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# SEVERABILITY

JOHN COPELAND NAGLE\*

*When a court holds a provision of a statute unconstitutional, a question remains regarding the validity of the remainder of the statute. The court may find that the unconstitutional provision may be severed from the statute and leave the remainder of the statute in effect. Alternatively, the court may hold that the unconstitutional provision cannot be severed and invalidate the entire statute.*

*In this Article, attorney John Nagle argues that the jurisprudence surrounding the issue of severability is confusing and inconsistent. After explaining the concept of severability and its ramifications for statutes, Mr. Nagle traces the development of the current judicial test for determining when a statute should be found severable. The effect of severability clauses—statutory provisions directing courts to leave the remainder of the statute in effect in the event a provision is found unconstitutional—is also discussed; Mr. Nagle finds that such clauses do not necessarily cause a court to reach a particular result. Mr. Nagle then examines the question of legislative intent in the context of severability. He concludes that courts have departed from established methods of determining legislative intent, opting instead to attempt to answer the hypothetical question whether the legislature would have chosen to enact the remaining parts of the statute without the unconstitutional provision.*

*Because the current jurisprudence of severability is unsettled, Mr. Nagle asserts that courts should follow several general principles regarding severability. First, courts should apply a plain meaning rule to severability clauses, so that a statute containing such a clause will automatically be considered severable. Second, when a statute does not contain a severability clause, the courts should look to the history, purpose, and structure of the statute to ascertain legislative intent. Finally, to assist in this inquiry Mr. Nagle advocates the creation of a legislatively-enacted clear statement rule requiring that courts consider a statute severable when a statute is silent on the issue of severability.*

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## I. INTRODUCTION

Severability is usually an afterthought, a sifting through the statutory rubble to salvage whatever survives a ruling that part of a law is unconstitutional. The question that severability poses is easily stated: If part of a statute is unconstitutional, does the rest of the statute remain in effect? The question is also ubiquitous. It can arise any time part of a statute or a particular application of a statute is held unconstitutional. Moreover, the answer can have profound consequences. Concluding that statutory provisions are severable presents the danger of leaving in effect statutory provisions that the legislature would have never enacted alone. Alternatively, a holding of nonseverability can mean, for example, that an entire appropriations statute or sweeping reform legislation falls because of a single unconstitutional provision.<sup>1</sup>

Yet severability is often overlooked. The severability test currently used by the Supreme Court was first stated in 1932,<sup>2</sup> and the seminal article on severability was written in 1937.<sup>3</sup> Fifty-one years after the test was first

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1. "[T]he entire continuing resolution appropriating funds for the federal government for fiscal year 1988 would have fallen" if an unconstitutional rider had not been severed by the court in *News Am. Publishing, Inc. v. FCC*, 844 F.2d 800, 815 (D.C. Cir. 1988). J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 Nw. U. L. Rev. 437, 477 (1990); see also *FCC v. League of Women Voters*, 468 U.S. 364, 411 n.3 (Stevens, J., dissenting) (questioning the propriety of invalidating the entire public broadcasting funding scheme because of an unconstitutional condition), *appeal dismissed*, 468 U.S. 1205 (1984). Decisions holding broad reform legislation unconstitutional and nonseverable include *Carter v. Carter Coal Co.*, 298 U.S. 238, 316 (1936) (invalidating New Deal legislation) and *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 524 (Tex. 1992) (invalidating school finance reform statute); see also *Buckley v. Valeo*, 424 U.S. 1, 255 (1976) (Burger, C.J., concurring in part and dissenting in part) (arguing that campaign contributions provisions of the Federal Election Campaign Act should have fallen with unconstitutional expenditure provisions).

2. *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932) (declining to consider the constitutionality of a provision in an Oklahoma statute authorizing price regulation of crude oil because it was severable from the provisions applied to the plaintiff), *overruled by Phillips Petroleum Co. v. Oklahoma*, 340 U.S. 190 (1950).

3. Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937). Stern continues to be acknowledged as the authority on severability. See *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1559 n.6 (D.C. Cir. 1985), *aff'd*, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987); *Atkins v. United States*, 556 F.2d 1028, 1083-84 (Ct. Cl. 1977) (Skelton, J., concurring in part and dissenting in part), *cert. denied*, 434 U.S. 1009 (1978). Commentators who analyzed severability before Stern include THOMAS M. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 246-50 (Victor H. Lane ed., 7th ed. 1903); 1 J. G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* 576-77 (John Lewis ed., 2d ed. 1904); Noel T. Dowling, *Dissection of Statutes*, 18 A.B.A. J. 298 (1932); Alfred Hayes, Jr., *Partial Unconstitutionality with Special Reference to the Corporation Tax*, 11 COLUM. L. REV. 120 (1911); see also *infra* notes 96 & 98 and accompanying text (discussing early academic commentary on severability clauses).

enunciated, *Immigration and Naturalization Service v. Chadha*<sup>4</sup> revived interest in severability when the Court held that an unconstitutional legislative veto over executive branch deportation decisions was severable from the deportation power delegated to the executive branch.<sup>5</sup> That decision provoked a number of critical discussions of the test for determining severability and its application to the nearly two hundred other statutes that contained legislative vetoes.<sup>6</sup> Four years later, the Court had an opportunity to answer its critics in *Alaska Airlines v. Brock*,<sup>7</sup> in which the severability of the legislative veto in the Airline Deregulation Act of 1978 was the only issue before the Court.<sup>8</sup> A unanimous Court responded by keeping the same basic test and holding another legislative veto severable.

Criticism of the Court's approach persists.<sup>9</sup> The problem, as one court recently put it, is that "[t]he test for severability has been stated often but rarely explained."<sup>10</sup> Thus, while severability is noncontroversial in many cases because almost any test—including the *Alaska Airlines* test—would produce the same result, hard cases illuminate the doctrinal inadequacy of *Alaska Airlines*. Would unconstitutional restrictions on public funding of art be severable from the funding itself? Is the unconstitutional legislative veto severable from the rest of the War Powers Act? Would unconstitu-

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4. 462 U.S. 919 (1983).

5. *Id.* at 959.

6. For academic commentary on the severability of legislative vetoes, see, e.g., Robert L. Glicksman, *Severability and the Realignment of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1 (1984); Glenn C. Smith, *From Unnecessary Surgery to Plastic Surgery: A New Approach to the Legislative Veto Severability Cases*, 24 HARV. J. ON LEGIS. 397 (1987); Laurence H. Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984); Angelo G. Garubo, Note, *Severing the Legislative Veto Provision: The Aftermath of Chadha*, 21 CAL. W. L. REV. 174 (1984); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 95 HARV. L. REV. 1182 (1984) [hereinafter Note, *Severability*]; Note, *The Aftermath of Chadha: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations*, 71 VA. L. REV. 1211 (1985) [hereinafter Note, *The Aftermath of Chadha*]. In addition severability received considerable attention in congressional hearings after *Chadha*. See *The Supreme Court Decision in INS v. Chadha and its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. *passim* (1983) [hereinafter *House Chadha Hearings*]; *Legislative Veto and the "Chadha" Decision: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. *passim* (1983) [hereinafter *Senate Chadha Hearings*].

7. 480 U.S. 678 (1987).

8. *Id.* at 678.

9. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992) (criticizing the *Alaska Airlines* test as "unrealistic").

10. Board of Natural Resources v. Brown, 992 F.2d 937, 947 (9th Cir. 1993); see also A. Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071, 1092 (1988) (book review) ("To this day, the Court has never offered a constitutionally satisfactory explanation of its severability decisions.").

tional conditions on a District of Columbia or Puerto Rico statehood act invalidate the creation of a new state? The *Alaska Airlines* test does not yield certain answers to these questions.

*Alaska Airlines* and other severability decisions properly focus on legislative intent but search for that intent in the wrong way. *Alaska Airlines* employs a decidedly non-textualist approach to deciding severability, even as the Supreme Court in recent terms has usually adhered to a textualist approach to statutory construction that emphasizes the plain meaning of the statutory text. The goal of the severability analysis embodied by *Alaska Airlines* has been to determine whether the legislature would have enacted the statutory provisions that survive after another part of the statute is held unconstitutional. By speculating about what the legislature would have intended if it had considered the question of severability, rather than seeking to determine what the legislature did intend as evidenced by the statute itself, *Alaska Airlines* substitutes an unanswerable question for one applied by the Court in most other statutory construction cases. Moreover, the Court treats severability clauses as merely creating a presumption of severability and thus ignores the plain meaning of the clauses themselves. And *Alaska Airlines* is unclear about what other presumptions inform severability decisions, or how those presumptions relate to one another.

This Article posits that the Court's general approach to statutory construction should also be applied to severability. If a statute contains a severability clause (or a nonseverability clause), such an explicit statement should be construed according to its plain meaning. If the statutory text is silent regarding severability, then the structure of the act, its purpose, and the legislative history should be consulted, although such sources are often inconclusive about severability. In addition, there should be a general rule favoring severability. The best solution would be a legislatively enacted clear statement rule providing that all statutes shall be construed as severable absent a specific nonseverability clause.

This Article shows how applying this approach can produce principled, predictable decisions about severability. Part II briefly explains the concept of severability and introduces an illustrative case demonstrating how severability works now and how it would work under the approach presented in this Article. Next, Part III reviews the current test for severability and the haphazard manner in which it has developed. After examining why severability is a question of legislative intent in Part IV, Part V argues that severability should be determined in accordance with the Court's general approach to statutory construction.

## II. THE NATURE OF SEVERABILITY

The severability question asks whether a court's holding that part of a statute is invalid causes the remainder of the statute to be invalidated as well.<sup>11</sup> Before considering *how* severability has been decided, it is helpful to examine briefly when severability must be determined and what kinds of severability questions arise. *In re Blainey & Ontario Hockey Association*,<sup>12</sup> a decision of the Ontario Court of Appeals, provides a good illustration of these issues.

The facts are uniquely Canadian. A twelve-year old girl was prohibited from playing on a boys' hockey team. She sued, claiming a violation of section 1 of the Ontario Human Rights Code of 1981, which provided that "[e]very person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, . . . [or] sex."<sup>13</sup> Section 19(2) of the Code provided, however, that section 1 is not violated "where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex."<sup>14</sup> The Ontario Court of Appeals held 2-1 that section 19(2) was unconstitutional under the equal protection clause of the Canadian Charter of Rights and Freedoms.<sup>15</sup>

The hockey association objected that "the Legislature would not have passed section 1 of the *Human Rights Code* in its present language in the absence of section 19(2)."<sup>16</sup> Rather than claiming that section 1 should fall with section 19(2), the hockey association argued that because those provisions could not be severed, both should be allowed to stand.<sup>17</sup> The majority rejected that argument, yet it failed to consider whether section 1 could remain in effect after section 19(2) was invalidated.<sup>18</sup> The dissent doubted that section 19(2) was severable because "[t]here are too many qualifica-

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11. The terms "severable," "separable," "divisible," and "elision" are used interchangeably. As discussed *infra* at notes 129-30 and accompanying text, the metaphor suggested by the term "severable" is probably misleading. "Separable" is a better choice, but the Article uses the term severability because almost all courts and commentators now do so.

12. 26 D.L.R.4th 728 (1986).

13. *Id.* at 734 (quoting Ontario Human Rights Code of 1981). The Code also prohibited discrimination based on "'place of origin, colour, ethnic origin, citizenship, creed[,] . . . age, marital status, family status or handicap.'" *Id.*

14. *Id.* at 735, 738 (quoting Ontario Human Rights Code of 1981).

15. *Id.* at 748. Section 15(1) of the Canadian Charter of Rights and Freedoms provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Id.* at 735 (quoting the Canadian Charter of Rights and Freedoms).

16. *Id.* at 747.

17. *Id.* at 746.

18. *Id.* at 747.

tions in the *Code* to the anti-discrimination provision in s. 1 for any court to assume that the legislature would have enacted the rest of the *Code* without this and other limitations."<sup>19</sup>

*Ontario Hockey Association* is a good example of a case addressing the issue of severability, but it is not the only example.<sup>20</sup> Severability becomes an issue in different ways in different cases. For instance, severability does not always involve the unconstitutionality of a statute. The issue of severability also arises when legal texts other than statutes are held unconstitutional<sup>21</sup> and when statutes are invalid for reasons other than their unconstitutionality.<sup>22</sup> In addition, severability can be implicated in the interpretation of commercial documents such as contracts and leases.<sup>23</sup> Also, in contrast to *Ontario Hockey Association*, in which section 19(2) was held invalid in all cases, a statutory provision may be invalid only in some applications. The two situations can be viewed as involving severable *language* (a specific provision of a statute is facially invalid) and severable *applications* (part of a statute is invalid only when applied in certain circumstances).<sup>24</sup>

Severability issues can arise in many contexts. For example, severability becomes an issue when: (1) a party challenges an entire statute, arguing that if any provision of the statute is unconstitutional and nonseverable, the rest of the statute is ineffective;<sup>25</sup> (2) a party argues that a statutory provision is invalid because it is nonseverable from another, purportedly

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19. *Id.* at 753 (Finlayson, J., dissenting).

20. For a comprehensive, general discussion of the various types of severability cases, see 2 NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 44 (C. Dallas Sands ed., 4th ed. 1986).

21. See, e.g., *In re Reyes*, 910 F.2d 611, 613-14 (9th Cir. 1990) (executive order); see also Michael S. Paulsen, *The Constitutional Lessons of the 27th Amendment*, 103 YALE L.J. (forthcoming December 1993) (discussing severability of state applications for a constitutional convention).

22. See Carolyn McNiven, Comment, *Using Severability Clauses to Solve the Attainment Deadline Dilemma in Environmental Statutes*, 80 CAL. L. REV. 1255, 1257 (1992) (advocating reliance on severability principles when reviewing missed statutory deadlines for administrative actions).

23. See, e.g., *5801 Assocs., Ltd. v. Continental Ins. Co.*, 983 F.2d 662 (5th Cir. 1993) (addressing severability of maritime insurance contract).

24. See Stern, *supra* note 3, at 106. For an overview of the difference between the two situations, see SUTHERLAND, *supra* note 3, at 519-23, 527-28, 533-34. Most courts apply the same test in both situations, although some would treat "severable applications" differently from "severable language." See *id.* at 482, 533; Stern, *supra* note 3 at 100-01, 114-15. This Article focuses on the problem of severable language, although it views each situation as posing the same question and therefore would apply the same test for determining severability in each case.

25. See, e.g., *Regan v. Time, Inc.*, 468 U.S. 641, 652-55 (1984); *Planned Parenthood v. Danforth*, 428 U.S. 52, 81-84 (1976); *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369-70 (9th Cir.), *modified*, 1992 U.S. App. LEXIS 13490 (9th Cir. June 16, 1992), *cert. denied*, 113 S. Ct. 633 (1992).

unconstitutional provision of the statute;<sup>26</sup> (3) a party contends that an application of a statutory provision is invalid because it is nonseverable from other, unconstitutional applications of the statute;<sup>27</sup> (4) a party argues that a statute is nonseverable, and therefore, another party's constitutional challenge to a provision of the statute would preclude that party from receiving any relief from other provisions of the statute;<sup>28</sup> and (5) a party challenges a statute as being either constitutionally underinclusive or overinclusive.<sup>29</sup> This list is not exclusive, but it depicts some of the situations in which severability becomes an issue in a case.<sup>30</sup>

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26. See, e.g., *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 682-83 (1987) (involving petitioner who argued that statutory duty was invalidated because it could not be severed from an unconstitutional legislative veto). By contrast, the hockey association's argument in *Ontario Hockey Ass'n* that the nonseverability of the two contested provisions should cause them both to remain in effect was plainly wrong: a holding of nonseverability should have invalidated both provisions.

27. See, e.g., *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802-04 (1992) (setting out Oklahoma's argument that legislation unconstitutionally favoring utilities in the state could be applied only to state-run utilities); see also Robert A. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308, 1323 (1982) ("[A] nonseverable law which is unconstitutional as to some cannot ever be validly applied.").

28. In *Chadha*, for example, the government denied Chadha's standing to challenge the legislative veto on the theory that the legislative veto was nonseverable from the provision authorizing him to stay in the country, and therefore invalidation of the legislative veto would not provide him any relief from his deportation order. *Chadha v. INS*, 634 F.2d 408, 415 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983); see also *Consumer Energy Council v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 441 & n.48 (D.C. Cir. 1982) (holding that nonseverability would deny plaintiffs relief), *aff'd mem. sub nom.*, *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983); *House Chadha Hearings*, *supra* note 6, at 161-62 (testimony of Alan Morrison) (describing standing problem for someone challenging an arms sale under a statute with an unconstitutional legislative veto provision).

29. As Judge Newman has explained:

A provision may be found to be underinclusive, thereby requiring a court to determine whether the legislature, had it known it could not legislate in a limited fashion, would have preferred to have no statute extended to apply to the impermissibly excluded class. . . . Or, less frequently, a provision may be found to be overinclusive, thereby requiring a court to determine whether the legislature, had it known it could not legislate broadly, would have preferred to have no statute or to have the statute limited to apply to all those except the impermissibly included class.

*Doyle v. Suffolk County*, 786 F.2d 523, 527 (2d Cir.), *cert. denied*, 479 U.S. 825 (1986); see also Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301 (1979) (discussing considerations in deciding whether to extend or invalidate a benefit); Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1208 n.87 (1986) (discussing severability clauses as "post-invalidations enactments of the prior legislative intent").

30. The question of when a party may raise a question of a statute's severability, along with the related question of when a court should examine a statute's severability, implicates broader concepts of standing, overbreadth, and the timing of judicial decisionmaking. For general discussions of the relationship between severability, overbreadth, and the timing of judicial review, see, e.g., PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 184-96 (3d ed. 1988); Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 14-23



## III. THE CURRENT TEST FOR SEVERABILITY AND ITS ORIGINS

*Alaska Airlines v. Brock* represents the Supreme Court's most recent attempt to fashion a definitive test for severability. In *Alaska Airlines*, several airlines challenged section 43 of the Airline Deregulation Act of 1978, which imposed a "duty to hire" certain protected employees who have a "first right of hire" by any airline hiring employees with their qualifications.<sup>31</sup> Section 43 authorized the Secretary of Labor to promulgate regulations to implement the program, but section 43 also contained a legislative veto authorizing either house of Congress to disapprove such regulations.<sup>32</sup> The airlines argued that section 43 should fall in its entirety because the legislative veto was nonseverable from the other parts of that section.<sup>33</sup>

A unanimous Court disagreed. The Court first described its general test for determining severability. It began by stating that "[a] court should refrain from invalidating more of the statute than is necessary."<sup>34</sup> Next the Court reaffirmed the *Champlin* test. Under this test, a statute is severable if: (1) the legislature would have enacted the remaining provisions of the statute without the invalid provisions, and (2) the remaining provisions of the statute can function independently of the invalid provision.<sup>35</sup> Faced with a legislative veto, "which by its very nature is separate from the operation of

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(1982). The interplay between these concepts is demonstrated in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-04 (1985); *New York v. Ferber*, 458 U.S. 747, 768-73 (1982); *Gannett Satellite Info. Network Inc. v. Berger*, 894 F.2d 61, 65 (3d Cir. 1990); *Trade Waste Management Ass'n, Inc. v. Hughey*, 780 F.2d 221, 231-32 (3rd Cir. 1985). A related issue concerns whether a court considers severability before or after deciding the constitutional question. Severability is usually examined after a court has held that part of a statute is unconstitutional. See, e.g., *New York v. United States*, 112 S. Ct. 2408, 2434 (1992); *Wyoming v. Oklahoma*, 112 S. Ct. at 802; *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990). Courts sometimes examine severability first. See, e.g., *INS v. Chadha*, 462 U.S. 919, 931 n.7 (1983); *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369 (9th Cir.), cert. denied, 113 S.Ct. 633 (1992); *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978). The latter course is supported by the principle of avoiding constitutional questions whenever possible, see Note, *Severability*, *supra* note 6, at 1193 & n.67, except that deciding severability first does not always eliminate the need to decide the constitutional question. All of these issues merit separate treatment. I simply note here that a determination of severability must be necessary to a case or controversy before the issue should be decided.

31. *Alaska Airlines v. Brock*, 480 U.S. 678, 680-81 (1987). Section 43 of the Airline Deregulation Act is codified at 49 U.S.C. App. § 1552 (1988).

32. *Alaska Airlines*, 480 U.S. at 682.

33. *Id.* at 685 n.7.

34. *Id.* at 684 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). Although this language suggests that there is a general presumption of severability, see *infra* text accompanying note 88, the Court disavowed any "need to resort to a presumption." *Alaska Airlines*, 480 U.S. at 687. The Court did clarify that the absence of a severability clause does not raise a presumption of nonseverability. *Id.* at 686.

35. *Id.* at 684-85 (citing *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932), overruled by *Phillips Petroleum Co. v. Oklahoma*, 340 U.S. 190 (1950)).

the substantive provisions of a statute," the Court refined the *Champlin* test to inquire "whether the statute will function in a manner consistent with the intent of Congress."<sup>36</sup> Finally, the Court said that a severability clause creates a presumption that a statute is severable, but the absence of such a clause does not create a presumption of nonseverability.<sup>37</sup>

Applying this test, the Court held the legislative veto severable from the rest of section 43. The Court examined the relationship of the legislative veto to the rest of section 43 and concluded that the statutory hiring duties could stand separately from the regulations authorized by that section.<sup>38</sup> The Court also reviewed the legislative history of section 43 and concluded that Congress would have enacted the duty-to-hire provisions without the legislative veto.<sup>39</sup> Based on this analysis, the Court rejected the airlines' argument and held that the hiring provisions remained in effect because the legislative veto was severable from those provisions.<sup>40</sup>

The failure of the *Alaska Airlines* Court's efforts to create a satisfactory test leaves one to question whether this decision will be the Court's final word on the subject.<sup>41</sup> The present test for severability suffers from three general shortcomings. First, in asking what the legislature would have done if it had known that part of a law would be invalidated, the test calls for an "answer" that is often little more than speculation. Second, the test downplays the only clear statutory text regarding severability—a severability clause—to a presumption of uncertain weight. Finally, the test employs general presumptions that have developed haphazardly and with little explanation. It is little wonder that severability remains "a vast and troubling terrain."<sup>42</sup>

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36. *Id.* at 684-85.

37. *Id.* at 686. The Court found it unnecessary to decide whether the severability clause in the Federal Aviation Act of 1958, the statute amended by the Airline Deregulation Act of 1978, applied to the case. *Id.* at 686-87 & n.8.

38. *Id.* at 687-91.

39. *Id.* at 691-96.

40. *Id.* at 697.

41. There is no indication that the changes in the Court since 1987 will affect the test for severability. Justices Kennedy and Ginsburg are familiar with the issue: Judge Kennedy wrote the lower court decision affirmed by the Court in *Chadha*. See *Chadha v. INS*, 634 F.2d 408, 415-18 (9th Cir. 1980). Judge Ginsburg wrote a concurring opinion in the lower court in *Alaska Airlines*. See *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1565 (D.C. Cir. 1985) (Ginsburg, J., concurring in the judgment); see also *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 306-08 (D.C. Cir. 1982) (per curiam opinion of Ginsburg, Bork & Bazelon, JJ.) (holding that legislative veto was nonseverable from remainder of provision in appropriations act prohibiting reorganization by the Department of Housing and Urban Development). Justices Souter and Thomas have not written any opinions discussing severability.

42. *Sidak & Smith*, *supra* note 1 at 456.

### A. *The Champlin Test: Legislative Intent and Function*

The *Champlin* test has its origins in Chief Justice Lemuel Shaw's 1854 opinion for the Supreme Judicial Court of Massachusetts in *Warren v. Mayor & Aldermen of Charlestown*,<sup>43</sup> the first case holding that an unconstitutional statutory provision rendered an entire statute invalid.<sup>44</sup> Prior to *Warren*, the severability of statutory provisions was usually assumed. In the earliest cases questioning the constitutionality of a federal statute, the United States Supreme Court gave no indication that the unconstitutionality of one provision—or its application—would render an entire statute invalid. In *Marbury v. Madison*,<sup>45</sup> for example, the unconstitutionality of section 13 of the Judiciary Act of 1789 did not render the entire Act invalid.<sup>46</sup> As Chief Justice Marshall later wrote, "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 . . ."<sup>47</sup> As a result of this lack of guidance, some courts invalidated statutes "so far as" they were unconstitutional,<sup>48</sup> while a few courts suggested

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43. 68 Mass. (2 Gray) 84 (1854).

44. *Id.* at 99-100 ("Before proceeding to consider the objections separately, we are all of opinion that if this act be unconstitutional at all it is not in any separate and independent enactments, but in the entire scope and purpose of the act.").

45. 5 U.S. (1 Cranch) 137 (1803).

46. Earlier, in *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792), Chief Justice Jay, Justice Cushing, and District Judge Duane, sitting as the Circuit Court for the District of New York, indicated that a provision of a 1793 statute that required circuit courts to review certain settlement claims was unconstitutional because it assigned nonjudicial duties to the circuit courts. The court assumed without discussion that another provision of the statute requiring circuit courts to sit for a terms of five days to receive applications remained in force. One early commentator suggested that the statute considered in *Hayburn's Case* should have been held nonseverable. Hayes, *supra* note 3, at 121-22.

47. *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. (2 Pet.) 492, 526 (1829). Some argued that "an act may be constitutional in part, and unconstitutional in part" as early as 1803. *See Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 307 (1803) (argument of counsel). This argument was accepted soon afterward. *See Ogden v. Sanders*, 25 U.S. (12 Wheat.) 213, 316 (1827) (Trimble, J., dissenting); *Milne v. Huber*, 17 F. Cas. 403, 404 (C.C.D. Ohio 1843) (No. 9617).

48. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 201 (1819); *United States v. The William*, 28 F. Cas. 614, 618 n.1 (D. Mass. 1808) (No. 16,700) (noting that *Marbury* invalidated the statute so far as it was unconstitutional). Other early decisions holding only part of a law invalid include *Mayor & Aldermen of Savannah v. State*, 4 Ga. 26, 38 (1848) (holding that state constitutional provision requiring subject of statute to be stated in title invalidates only that part of statute outside of title); *Armstrong v. Jackson*, 1 Blackf. 374, 376 (Ind. 1825) (holding that unconstitutional provision providing "mode of ascertaining the value of the improvements [of land] . . . does not affect rights of the occupant" under statute); *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 73 (1820) (holding that provision repealing statute remains effective even if replacement provisions are unconstitutional); and *Glenn v. Humphreys*, 10 F. Cas. 471, 472 (C.C.E.D. Pa. 1823) (No. 5480) (holding that unconstitutionality of state law authorizing qualified discharge from debts does not invalidate part of law discharging debtor from imprisonment).

that severability depended on the ability of the remaining provisions to function absent the unconstitutional provision.<sup>49</sup>

Then came *Warren*. The statute at issue in *Warren* provided for the annexation of Charlestown to Boston. The court held that one provision of the act was unconstitutional because it denied the citizens of Charlestown any state or federal representatives.<sup>50</sup> The court then considered whether the rest of the act should remain in effect. Chief Justice Shaw agreed with those courts that had found that a statute could be constitutional in part and unconstitutional in part.<sup>51</sup> But he quickly added:

[T]his must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as 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.<sup>52</sup>

Applying this test, the state supreme court held the statute nonseverable because all of its provisions described the consequences of the annexation and were thus dependent on each other.<sup>53</sup>

*Warren* was the first case to consider legislative intent—along with the ability of the remaining provisions of the statute to function—in deciding severability. This approach to severability gained immediate acceptance among state courts and has remained virtually unchallenged to this day.<sup>54</sup>

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49. See *Clark v. Ellis*, 2 Blackf. 8, 10 (Ind. 1826) (suggesting that an unconstitutional provision could be stricken and the rest of the statute would remain in effect “if enough remains to be intelligibly acted upon”); *Campbell v. Mississippi Union Bank*, 7 Miss. (6 How.) 625, 677 (1842) (stating that the matter “depend[s] on the connection or dependence of the several provisions,” so that “[i]f part of the act can be carried out, and that part be constitutional, it must stand, and the portion which is unconstitutional must be rejected”); *Exchange Bank v. Hines*, 3 Ohio St. 1, 34 (1853) (holding that the provision that is “essential to the law” is not severable, while “an independent provision, not in its nature and connection essential to the other parts of the statute” is severable).

50. *Warren v. Mayor & Alderman of Charlestown*, 68 Mass. (2 Gray) 84, 98 (1854).

51. *Id.*

52. *Id.* at 99.

53. *Id.* at 99-100.

54. See *Lathrop v. Mills*, 19 Cal. 513, 530 (1861); *Gordon v. Cornes*, 47 N.Y. 608, 616-17 (1872); *State ex rel. Huston v. Commissioners of Perry County*, 5 Ohio St. 497, 506-07 (1856); *Slauson v. City of Racine*, 13 Wis. 398, 404 (1861); see also *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 339 (1857) (citing *Warren* and finding statute nonseverable); *State v. Sinks*, 42 Ohio St. 345, 350-52 (1884) (describing *Warren* as “the leading case” and citing cases following it). As a result of this approach, many statutes were held nonseverable. See *Campau v. City of Detroit*, 14 Mich.

Thomas Cooley, the preeminent constitutional theorist of his day, also endorsed Shaw's approach, causing more courts to adopt the *Warren* approach.<sup>55</sup>

At that point, the Supreme Court jumped on the bandwagon. In the 1880 case of *Allen v. Louisiana*, the Court quoted *Warren* and then asked "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."<sup>56</sup> By 1902, the Court found the general test for severability "well settled."<sup>57</sup> The Court stated the test in its current form in *Champlin Refining Company v. Corporation Commission*,<sup>58</sup> where Justice Butler wrote: "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."<sup>59</sup>

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276, 285 (1866) (finding that an unconstitutional provision authorizing a six-member jury was not severable from provision requiring summoning of 24 people for jury duty); *State ex rel. Huston*, 5 Ohio St. at 506-07 (holding that statutory provision penalizing a county for the placement of its county seat was unconstitutional and could not be severed from the remainder of the statute); *Slauson*, 13 Wis. at 403-05 (holding that an unconstitutional provision authorizing differential taxation of agricultural lands not severable from remainder of annexation statute).

55. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 177-81 (1868). Later editions of Cooley's treatise expanded on the analysis in the first edition and collected additional cases. See COOLEY, *supra* note 3. The decisions that relied on Cooley include *Moir v. The Du-buque*, 17 F. Cas. 569, 572-73 (E.D. Mich. 1871) (No. 9696); *Doe, ex dem. Davis v. Minge*, 56 Ala. 121, 124-25 (1876); *People ex rel. Tucker v. Rucker*, 5 Colo. 455, 465-66 (1880); *Hinze v. People*, 92 Ill. 406, 424-25 (1879); *People ex rel. Miller v. Cooper*, 83 Ill. 585, 595 (1876); *People ex rel. City of Rochester v. Briggs*, 50 N.Y. 553, 566-67 (1872); *Ex Parte Towles*, 48 Tex. 413, 442 (1877); *Eckhart v. State*, 5 W. Va. 515, 518-19 (1872).

56. 103 U.S. 80, 84 (1881). The Court had begun to articulate rules regarding severability in two decisions holding that the unconstitutional applications of a statute could not be severed from the constitutional applications. See *Trade-Mark Cases*, 100 U.S. 82, 98 (1879); *United States v. Reese*, 92 U.S. 214, 221 (1876). In *Packet Co. v. Keokuk*, 95 U.S. 80, 89 (1877), the Court held an overbroad statute severable. Although there is no evidence that the Supreme Court gave any independent thought to the matter, the suggestion of one writer that the Supreme Court was "content to follow the lead of a few enterprising state courts that had already emphasized the importance of legislative intent," Note, *Severability*, *supra* note 6, at 1184 n.12 (emphasis added), understates the widespread acceptance of that approach by the time the Supreme Court adopted it.

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

58. 286 U.S. 210, 234 (1932), *overruled by Phillips Petroleum Co. v. Okla.*, 340 U.S. 190 (1950).

59. *Id.* This test has been quoted in all of the most recent Supreme Court severability decisions. See *New York v. United States*, 112 S. Ct. 2408, 2434 (1992); *Alaska Airlines Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976). Most state courts examine the same factors. See, e.g., *State Compensation Fund v. Symington*, 848 P.2d 273, 280 (Ariz. 1993); *Thayer v. S.C. Tax Comm'n*, 413 S.E.2d 810, 814-15 (S.C. 1992). So, too, do Canadian courts. See *In re Blaney and Ontario Hockey Ass'n*, 26 D.L.R.4th 728, 747 (1986) (quoting *In re Alberta Bill of Rights Act*, 4 D.L.R. 1, 11 (1947)).

Under *Champlin*, a statute's severability depends upon two factors: (1) legislative intent, and (2) the ability of the statute to function without the offending provision. Both factors must be satisfied before a court will sever the unconstitutional provision and give effect to the remainder of the statute.<sup>60</sup> The first inquiry asks whether "it is evident that the Legislature would not have enacted those provisions which are within its power."<sup>61</sup> A court is thus required to predict what the legislature would have done if it had known that part of the law it passed would be invalidated. For example, if the Ontario legislature would not have enacted the general prohibition on sex discrimination without the exception for amateur sports, then the two sections at issue in *Ontario Hockey Association* would not have been severable. To assist in this determination, many courts question the importance of the invalidated provision to the legislature's decision to enact the statute.<sup>62</sup>

The other prong of the *Champlin* test adds an objective question to the hypothetical inquiry about whether the legislature would have enacted the statute without the invalidated provision. It provides that "the invalid part may be dropped if what is left is fully operative as a law." While the term

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60. See SINGER, *supra* note 20, at 483 ("The problem is twofold: the legislature must have intended that the act be separable, and the act must be capable of separation in fact."); see also *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1256 (Cal. 1989) (stating that an invalid provision must be grammatically, functionally, and volitionally severable).

61. *Champlin Ref.*, 286 U.S. at 234; *accord Alaska Airlines*, 480 U.S. at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."); *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir.) ("The critical issue is whether the legislation would have been enacted if it had not included the unconstitutional provisions."), *cert. denied*, 498 U.S. 852 (1990); *House Chadha Hearings*, *supra* note 6, at 157 (asking "would Congress have thrown out the baby with the bathwater?") (testimony of Alan Morrison).

62. Chief Justice Shaw asked if the provisions were "conditions, considerations, or compensations for each other." *Warren v. Mayor and Alderman of Charlestown*, 68 Mass. (2 Gray) 84, 99 (1854). This language continues to be used today. See *Eubanks v. Wilkinson*, 937 F.2d 1118, 1128 (6th Cir. 1991). There are several other ways of asking this question. Specifically, an unimportant provision is severable, e.g., *Alaska Airlines*, 480 U.S. at 685 (stating that the legislative veto is not important to the original legislative bargain); an important provision is not severable, e.g. *City of New Haven v. United States*, 809 F.2d 900, 907 (D.C. Cir. 1987) (finding unconstitutional a legislative veto of crucial importance in statute governing presidential impoundments). Also, a provision is not severable if it was an essential part of the legislative compromise, see *Atkins v. United States*, 556 F.2d 1028, 1086 (1977) (Skelton, J., dissenting), *cert. denied*, 434 U.S. 1009 (1978); or an inducement to passage of the act, see *Thiokol Chem. Corp. v. Morris County Bd. of Taxation*, 184 A.2d 75, 81 (N.J. Super. Ct. Law Div. 1962), *aff'd*, 197 A.2d 176 (N.J. 1964).

The question of whether the legislature intended to enact *this* law is clearly inappropriate, because the answer is always "no"; the legislature enacted the law with the provision now held unconstitutional, not without it. See *Alaska Airlines*, 766 F.2d at 1560; *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984). "The moment any statute is declared invalid it is impossible to carry out the legislative intent in full . . ." Hayes, *supra* note 3, at 141.

"fully operative" "has received scant attention,"<sup>63</sup> the usual understanding of this part of the test is that it focuses on the dependence or independence of the unconstitutional provision and the rest of the statute.<sup>64</sup> If the provisions of the statute that would remain once the invalidated provision is excised can function in a coherent fashion, then the statute is severable.

But the ability of a statute to function without an invalidated provision does not always mean that the legislature intended it to do so. For instance, the remainder of a statute can always function independently of a legislative veto provision, and Ontario's general prohibition on sex discrimination could operate without the exception for amateur sports—yet the legislature may not have anticipated either result. Faced with this problem in *Alaska Airlines*, the Court refined the *Champlin* test to inquire "whether the statute will function in a manner consistent with the intent of Congress."<sup>65</sup>

Alas, that question is no easier to answer than the two parts of the *Champlin* test it incorporates. The first disagreements about severability occurred soon after Chief Justice Shaw first posed the test in *Warren*.<sup>66</sup> Severability also divided the Supreme Court in *Immigration and Naturalization Service v. Chadha*,<sup>67</sup> *Planned Parenthood v. Danforth*,<sup>68</sup> and *Buckley v. Valeo*.<sup>69</sup> And since *Alaska Airlines*, the lower federal courts have struggled with the severability of various provisions of the Sentencing Reform

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63. *Board of Natural Resources v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993).

64. Or, as it is sometimes put, the unconstitutional provision will be severed if it is functionally independent from the other provisions of the statute, but it will not be severed if it is interdependent with the other provisions of the statute. Compare *Buckley v. Valeo*, 424 U.S. 106, 109 (1976) (stating that public financing provisions are not dependent on unconstitutional expenditure limits) and *United States v. Jackson*, 390 U.S. 570, 585-86 (1968) (finding that capital punishment provision is independent of rest of Federal Kidnapping Act) with *Planned Parenthood v. Danforth*, 428 U.S. 52, 83 (1976) (finding that the requirement that physicians take measures to sustain life is inextricably tied to duty to preserve life of fetus).

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

66. 68 Mass. (2 Gray) at 99. In three early cases, courts held statutes nonseverable based on their evaluation of legislative intent. See *People ex rel. Miller v. Cooper*, 83 Ill. 585, 595 (1876); *State v. Sinks*, 42 Ohio St. 345, 350-55 (1884); *Slauson v. City of Racine*, 13 Wis. 444, 450-51 (1861). The dissent in each case would have held the statute severable because the remaining provisions could continue to operate. See *Cooper*, 83 Ill. at 596 (Sheldon, C.J., dissenting); *Sinks*, 42 Ohio St. at 363-71 (Johnson, C.J., dissenting); *Slauson*, 13 Wis. at 463 (Cole, J., concurring).

67. Compare *INS v. Chadha*, 462 U.S. 919, 931-35 (1983) (finding the legislative veto severable from the grant of power over deportations) with *id.* at 1013 (Rehnquist, J., dissenting) (finding the same provision nonseverable).

68. Compare *Planned Parenthood*, 428 U.S. at 83 (finding unconstitutional a provision requiring a physician to preserve the life and health of a fetus nonseverable from similar requirement relating to children) with *id.* at 100-01 (White, J., concurring in part and dissenting in part) (finding same provisions severable).

69. Compare *Buckley*, 424 U.S. at 109 (finding the unconstitutional expenditure provisions severable from contribution provisions) with *id.* at 255 (Burger, C.J., concurring in part and dissenting in part) (finding same provisions nonseverable).

Act after they had held that the Sentencing Commission established by the Act to promulgate sentencing guidelines violated the constitutional separation of powers. Courts first disputed whether the provisions placing the Commission in the judicial branch<sup>70</sup> and authorizing the removal of Commission members were severable.<sup>71</sup> The courts which decided that the Sentencing Commission and the Sentencing Guidelines could not be saved then disagreed about the severability of the Commission's enabling provision and the Guidelines from the rest of the Act.<sup>72</sup> Courts also struggled with severability questions concerning the supervised release provision,<sup>73</sup> the provision for good time credits,<sup>74</sup> and the parole

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70. Compare *United States v. Brown*, 690 F. Supp. 1423, 1428 (E.D. Pa. 1988) (finding the placement of the commission in the judicial branch not severable), *aff'd mem.*, 869 F.2d 587 (3d Cir.), *cert. denied*, 490 U.S. 1101 (1989) and *United States v. Horton*, 685 F. Supp. 1479, 1485 (D. Minn. 1988) (same), *aff'd mem.*, 902 F.2d 1575 (8th Cir. 1990) and *United States v. Russell*, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988) (same), *rev'd in part and vacated in part*, 880 F.2d 419 (11th Cir. 1989) with *United States v. Landers*, 690 F. Supp. 615, 622 (W.D. Tenn. 1988) (finding provision placing the commission in the judicial branch severable) and *United States v. Brittan*, 687 F. Supp. 1329, 1342 (E.D. Ark.) (same), *aff'd*, 871 F.2d 1093 (8th Cir. 1988), *vacated in part*, 872 F.2d 827 (8th Cir.), *cert. denied*, 493 U.S. 865 (1989).

71. Compare *United States v. Lopez-Barron*, 685 F. Supp. 725, 729 (S.D. Cal. 1988) (not severable) with *United States v. Myers*, 687 F. Supp. 1403, 1417-19 (N.D. Cal. 1988) (severable) and *United States v. Sparks*, 687 F. Supp. 1145, 1155-56 (E.D. Mich. 1988) (severable).

72. Compare *United States v. Cortes*, 697 F. Supp. 1305, 1314 (S.D.N.Y. 1988) (not severable) and *United States v. Kane*, 691 F. Supp. 341, 347 (N.D. Ga. 1988) (not severable) and *United States v. Swapp*, 695 F. Supp. 1140, 1150 (D. Utah. 1988) (en banc) (not severable), *rev'd*, *United States v. Singer*, 868 F.2d 1201 (10th Cir. 1989) and *United States v. Allen*, 685 F. Supp. 827, 830-31 (N.D. Ala. 1988) (not severable with one exception) and *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1515 n.11 (C.D. Cal. 1988) (en banc) (nonseverable) and *United States v. Arnold*, 678 F. Supp. 1463, 1472 (S.D. Cal. 1988) (nonseverable) with *United States v. Serpa*, 688 F. Supp. 1398, 1401-02 (D. Neb. 1988) (en banc) (severable), *aff'd in part, rev'd in part*, 873 F.2d 1447 (8th Cir. 1989) and *United States v. Williams*, 691 F. Supp. 36, 53-54 (M.D. Tenn. 1988) (severable), *aff'd mem.*, *United States v. Hayes*, 884 F.2d 1393 (6th Cir. 1989) and *United States v. Molina*, 688 F. Supp. 819, 825 (D. Conn. 1988) (severable) and *United States v. Velez-Naranjo*, 691 F. Supp. 584, 588 (D. Conn. 1988) (severable) and *United States v. Diaz*, 685 F. Supp. 1213, 1219-20 (S.D. Ala. 1988) (severable), *aff'd in part, rev'd in part*, *United States v. Zubiaga*, 876 F.2d 900 (11th Cir. 1989) and *United States v. Perez*, 685 F. Supp. 990, 1003-04 (W.D. Tex. 1988) (severable), *aff'd mem.*, *United States v. Carrales*, 888 F.2d 1389 (5th Cir. 1989) and *United States v. Estrada*, 680 F. Supp. 1312, 1336 (D. Minn. 1988) (severable), *rev'd mem.*, 873 F.2d 1449 (8th Cir. 1989).

73. See *United States v. Jackson*, 857 F.2d 1285, 1286 (9th Cir. 1988) (finding provision nonseverable from the rest of the Act).

74. Compare *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1267-68 (9th Cir. 1988) (finding the provision nonseverable from Sentencing Guidelines), *vacated*, *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989) with *id.* at 1283-84 (Wiggins, J., dissenting) (severable) and *United States v. Bogle*, 693 F. Supp. 1102, 1110-12 (S.D. Fla. 1988) (en banc) (severable).



provisions.<sup>75</sup> Mercifully, the Supreme Court pretermitted the question by holding the Act constitutional in *Mistretta v. United States*.<sup>76</sup>

### B. Presumptions

Perhaps because of the difficulty in applying the *Champlin* test, other aids to deciding severability developed—specifically, presumptions and severability clauses. The jurisprudence about presumptions of severability is especially confused because the Court has offered little explanation of why certain presumptions are warranted, how they operate, or how they relate to each other.

#### 1. General Presumption of Severability

The Court has vacillated over whether there is a general presumption that statutes are presumed severable, a general presumption that statutes are presumed nonseverable, or no general presumption about severability at all. As discussed above, prior to *Warren* severability was simply assumed.<sup>77</sup> The burden of establishing severability became confused after Chief Justice Shaw's decision in *Warren*. Some state courts required the proponent of severability to make the necessary showing; other state courts placed the burden on the proponent of nonseverability.<sup>78</sup> The Supreme Court never announced any presumptions concerning the severability of statutory provisions at that time, but dicta in some of its opinions supported a presumption of nonseverability.<sup>79</sup> The large number of Supreme Court decisions holding statutes nonseverable during the last quarter of the nineteenth century and

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75. See *United States v. Bogle*, 693 F. Supp. at 1110-11 (holding that parole provision is not severable from Guidelines).

76. 488 U.S. 361, 411-12 (1989).

77. See *supra* notes 45-49 and accompanying text.

78. Compare *Lathrop v. Mills*, 19 Cal. 515, 530 (1861) (stating that severability is "a matter of legislative intent," and that the legislature is presumed to intend severability of statutory provisions) with *Iowa Life Ins. Co. v. Mutual Life Ins. Co.*, 45 A. 762, 764 (N.J. 1900) (finding that the burden is on the proponent of severability to show clear probability that legislature would be satisfied with what is left) and *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 339 (1857) (holding a statute nonseverable because "the one [provision] may have been the motive, inducement, or consideration on which the other was founded") (emphasis added) and *State ex rel Cornell v. Poynter*, 81 N.W. 431, 435 (Neb. 1899) (stating that statute is nonseverable "if the void part to any extent influenced the legislature in passing the statute") and *State ex rel. Huston v. Commissioners*, 5 Ohio St. 497, 506-07 (1856) (stating as a "general rule" that statutory provisions are not severable "unless the respective parts are independent of each other").

79. See *El Paso & Northeastern Ry. v. Gutierrez*, 215 U.S. 87, 97 (1909) (stating that if "the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall"); *Employers' Liability Cases*, 207 U.S. 463, 501 (1908) (stating that severability is appropriate "only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated"); see also *Skagit County v. Stiles*, 39 P. 116, 116 (Wash. 1894) (finding a general presumption of nonseverability).

the first decades of the twentieth century gave further credence to that view.<sup>80</sup>

The preference for severability versus nonseverability became more confused in the 1930s. Writing in 1931 while on the New York Court of Appeals, Chief Judge Cardozo asserted that "[t]he whole tendency during recent years, at least on this court, has been to apply the principle of severance with increasing liberality."<sup>81</sup> At the same time, however, the Supreme Court propounded a "shifting presumptions" idea: statutes are generally presumed nonseverable, but they are presumed severable if they contain a severability clause.<sup>82</sup> There was little basis for this newly found general presumption of nonseverability absent a severability clause.<sup>83</sup> Moreover, the Court announced the *Champlin* decision during this period, and it made no mention of shifting presumptions depending on the presence or absence of a severability clause.<sup>84</sup> The Court never actually relied on this presumption of nonseverability, but it was cited for years until *Alaska Airlines* fi-

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Professor Cooley also suggested that statutes were presumed nonseverable. See COOLEY, *supra* note 3, at 248 n.1.

80. See *Guinn v. United States*, 238 U.S. 347, 366 (1915); *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 135 (1913); *Weems v. United States*, 217 U.S. 349, 381-82 (1910); *Employers' Liability Cases*, 207 U.S. at 501; *Illinois Cent. R.R. v. McKendree*, 203 U.S. 514, 529 (1906); *James v. Bowman*, 190 U.S. 127, 140-42 (1903); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 564-65 (1902); *Baldwin v. Franks*, 120 U.S. 678, 688 (1887); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 636-36 (1895); *Sprague v. Thompson*, 113 U.S. 90, 94-95 (1886); *Poindexter v. Greenhow* (Virginia Coupon Cases), 114 U.S. 270, 304 (1884). For tables of nineteenth and early twentieth century cases in which the Supreme Court held all or part of a federal statute unconstitutional and the Court's conclusion regarding severability, see Hayes, *supra* note 2, at 124-25 n.8; Stern, *supra* note 3, at 107-08 nn.138-40.

81. *People v. Mancuso*, 175 N.E. 177, 180 (N.Y. 1931); see also *Roberts v. Atlantic Oil Producing Co.*, 295 F. 16, 18 (6th Cir.) (stating that severance is preferred, though adding words of limitation is not), *cert. denied*, 265 U.S. 582 (1924).

82. See *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-13 (1936); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 362 (1935), *overruled by* *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-85 (1932); *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929).

83. Robert Stern immediately noted the lack of precedent for the Court's new presumption of nonseverability. Stern, *supra* note 3, at 118-20 & n.192. The Court relied on a single state court decision (albeit an opinion written by Judge Pitney, who later served on the Supreme Court) as evidence of a general presumption of nonseverability. *Riccio v. Mayor of Hoboken*, 55 A. 1109, 1113 (N.J. 1903) (cited in *Williams v. Standard Oil Co.*, 278 U.S. 235, 241 (1928)). *Riccio* itself cited *Iowa Life Ins. Co. v. Eastern Mut. Life Ins. Co.*, 45 A. 762 (1900), which announced a presumption of nonseverability after quoting at length from Cooley's treatise. *Id.* at 764.

84. 286 U.S. 210 (1932), *overruled by* *Phillips Petroleum Co. v. Oklahoma*, 340 U.S. 190 (1950).

nally put it to rest.<sup>85</sup> Several state courts continue to follow the rule that statutes are presumed nonseverable in the absence of a severability clause.<sup>86</sup>

Recent years have witnessed a trend toward finding statutes severable. The Supreme Court has not invalidated an entire federal law as nonseverable since the 1930s.<sup>87</sup> Moreover, a plurality of four members of the Court recognized a general presumption of severability in *Regan v. Time, Inc.*,<sup>88</sup> which has since been relied upon by several lower courts.<sup>89</sup> Several state courts apply such a presumption.<sup>90</sup> But a majority of the Supreme Court

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85. In *Alaska Airlines*, the Court wrote that "[i]n the absence of a severability clause . . . Congress' silence is just that—silence—and does not raise a presumption against severability." 480 U.S. 676, 686 (1987). But courts had cited the presumption of nonseverability first articulated in the 1930s before *Alaska Airlines*, see, e.g., *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216, 1217 n.1 (1983) (White, J., dissenting); *INS v. Chadha*, 634 F.2d 408, 415 & 417 n.5 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983), and they continued to do so afterward, see *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir.), *cert. denied*, 498 U.S. 852 (1990); *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 76 (1st Cir. 1990) (en banc), *vacated*, *Sullivan v. Massachusetts*, 111 S. Ct. 2252 (1991); see also *Gubien-sio-Ortiz v. Kanahale*, 857 F.2d 1245, 1267 (1988) ("Although the absence of such a clause does not raise a presumption of nonseverability, it does suggest that Congress intended to have the various components of the sentencing reform package operate together or not at all." (citation omitted)), *vacated*, *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989); *United States v. Allen*, 685 F. Supp. 827, 830 (1988) (stating that the absence of a severability clause in Sentencing Reform Act may be significant because there is a severability clause in another title of the Crime Control Act).

86. See, e.g., *State v. Aldrich*, 231 N.W.2d 890, 895 (Iowa 1975); *South Carolina Tax Comm'n v. United Oil Marketers, Inc.*, 412 S.E.2d 402, 405 (S.C. 1991).

87. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-17 (1936). The Supreme Court's 1992 decision in *Wyoming v. Oklahoma*, 112 S. Ct. 789, 803-04 (1992), held a state law nonseverable for the first time since *Planned Parenthood v. Danforth*, 428 U.S. 52, 83 (1976), was decided. Recent lower federal court holdings of nonseverability include *Board of Natural Resources v. Brown*, 992 F.2d 937, 947-49 (9th Cir. 1993) (holding that parts of § 620c of the Forest Resources Conservation and Shortage Relief Act that violate the Tenth Amendment are nonseverable from the other parts of that section); *In re Reyes*, 910 F.2d 611, 613-14 (9th Cir. 1990) (finding executive order regarding Grenada nonseverable); *Ragsdale v. Turnock*, 841 F.2d 1358, 1375 (7th Cir. 1988) (finding Illinois abortion law nonseverable), *appeal dismissed*, 493 U.S. 987 (1989); *City of New Haven v. United States*, 809 F.2d 900, 905-09 (D.C. Cir. 1987) (finding legislative veto in federal impoundment act nonseverable); *West Virginia Pride, Inc. v. Wood County*, 811 F. Supp. 1142, 1150-51 (S.D. W. Va. 1993) (finding county obscenity ordinance nonseverable).

88. 468 U.S. 641, 652-53 (1984). Justice Brennan cited a different principle in dissent: "[L]ike the general rule of construing statutes to avoid constitutional questions from which it derives, the doctrine of severability 'does not . . . license a court to usurp the policymaking and legislative functions of duly elected representatives.'" *Id.* at 664-65 n.2 (Brennan, J., concurring in part and dissenting in part) (citing *Heckler v. Mathews*, 465 U.S. 728, 739 (1984)).

89. See, e.g., *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1278 (D.C. Cir. 1993); *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990); *News Am. Publishing, Inc. v. FCC*, 844 F.2d. 800, 802 n.1 (D.C. Cir. 1988); *Doyle v. Suffolk County*, 786 F.2d 523, 528 (2d Cir. 1986); *United States v. Costleton*, 694 F. Supp. 786, 790 (Colo. 1988); *United States v. Williams*, 691 F. Supp. 36, 53-54 (M.D. Tenn. 1988).

90. See, e.g., *Muller v. Curran*, 889 F.2d 54, 57 (4th Cir. 1989) (applying Maryland law), *cert. denied*, 493 U.S. 1074 (1990); *Payne v. Fairfield Hills Hosp.*, 578 A.2d 1025, 1030 (Conn. 1990); *State v. Monastero*, 424 N.W.2d 837, 851 (Neb.), *appeal dismissed*, 488 U.S. 936 (1988).

has not acknowledged a general presumption of severability, despite opportunities to endorse the *Regan* plurality's view in *Alaska Airlines* and other recent cases.

## 2. Presumption of Severability Created by the Ability of the Remaining Provisions of the Statute to Function

Statutes are also presumed severable if they can function independently of the unconstitutional provision. As the Court explained the *Champlin* test in *Chadha*, "[a] provision is further presumed severable if what remains after severance 'is fully operative as a law.'"<sup>91</sup> Essentially, if the remaining provisions can function independent of the stricken provision (the second part of the *Champlin* test), then it is presumed that the legislature intended the statute to be severable (the first part of the *Champlin* test).

The significance of this presumption is unclear. *Alaska Airlines* did not refer to this presumption at all.<sup>92</sup> Few courts have described what it takes to overcome such a presumption.<sup>93</sup> Nor has it been explained what a presumption created by the ability of the remaining parts of the statute to function without the invalidated provision adds to the general presumption of severability. Indeed, perhaps the correct answer is that it adds nothing at all. If the Court had more plainly announced a general presumption of severability, then the need to resort to a distinct presumption that independent statutory provisions are severable would largely disappear because the same kind of evidence that the legislature actually intended nonseverability would be necessary to overcome either presumption.

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Tennessee has long been an exception. See *Vollmer v. City of Memphis*, 730 S.W.2d 619, 621 (Tenn. 1987) (finding a general presumption of nonseverability). A recent Arizona Supreme Court decision suggests that the burden is on the proponent of severability in that court as well. See *State Compensation Fund v. Symington*, 848 P.2d 273, 280-81 (Ariz. 1993) (en banc) (holding federal equivalency tax nonseverable from unconstitutional alternative minimum tax because court could not determine whether the legislature would have enacted the federal equivalency tax alone).

91. 462 U.S. 919, 934 (1983) (quoting *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)). Likewise, one writer characterized the Court in *Chadha* as seeking "to expand the use of severability through two presumptions: one based on the presence of a severability clause and the other on the statute's viability without the severed provision." Note, *The Aftermath of Chadha*, *supra* note 6, at 1215 (footnote omitted).

92. In fact, the airlines argued in *Alaska Airlines* that "[t]he *Chadha* 'operability' presumption is applicable only after legislative intent favoring severability is determined." Brief for Petitioner at 22-23, *Alaska Airlines v. Brock*, 480 U.S. 678 (1987) (No. 85-920).

93. But see *City of New Haven v. United States*, 809 F.2d 900, 905 (D.C.Cir. 1987) (stating that the presumption can be overcome "by strong evidence indicating that Congress would not have enacted the statute had it known it could not include the unconstitutional provision"); *American Fed'n of Gov't Employees v. Reagan*, 806 F.2d 1034, 1039 (Fed. Cir. 1986) (finding that the presumption can be overcome "by showing that it is evident from the legislative history that Congress would not have passed the [statute] without the [unconstitutional] provision"), *cert. denied*, 481 U.S. 1068 (1987).

### 3. Presumption of Severability Created by a Severability Clause

*Alaska Airlines* holds that statutes are further presumed severable if they contain a severability clause.<sup>94</sup> Rather than being dispositive of severability, a severability clause only creates a presumption of severability. Thus, a statute that contains a provision stating "if any provision is held invalid, the remainder of the statute shall remain effective" will not necessarily be held severable.<sup>95</sup>

It has not always been so. The first severability clauses appeared late in the nineteenth century, and they became much more common around 1910. These clauses were a reaction to those courts that were aggressively holding statutes nonseverable.<sup>96</sup> The earliest legislative statements that statutory provisions should be construed as being severable were taken at face value by the courts.<sup>97</sup> But courts soon soured on express legislative statements concerning severability. State courts and commentators refused to accept the proposition that legislatures had authority to dictate to the courts the appropriate decision regarding severability.<sup>98</sup> In 1922, the

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94. 480 U.S. 678, 686 (1987). Similarly, many state courts treat a severability clause as creating a presumption of severability. See, e.g., *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 371 (Colo. 1985) (en banc); *Ingraham v. Champion Int'l*, 793 P.2d 769, 773 (Mont. 1990).

95. For examples of statutes held nonseverable despite the presence of a severability clause, see *infra* note 97.

96. The first academic commentary on severability clauses described their arrival in dramatic terms: "Expressive of the present sweeping demand of the public for unrestricted democracy, this provision stands as a defiance to the courts and their apparent judicial supremacy." Note, *Constitutional Law: Partial Invalidity of Statutes: Power of Legislature to Alter General Rules of Construction*, 2 CAL. L. REV. 319, 320 (1914). The trend toward nonseverability in the last decades of the nineteenth century and the beginning of the twentieth century is described *supra* notes 68-69 and accompanying text.

97. See *Ohio Tax Cases*, 232 U.S. 576, 594 (1914); *Yee Gee v. City & County of San Francisco*, 235 F. 757, 768-69 (N.D. Cal. 1916); *Standard Home Co. v. Davis*, 217 F. 904, 916 (E.D. Ark. 1914); *State ex rel. Clarke v. Carter*, 56 So. 974, 977 (Ala. 1911); *In re Opinion of Justices*, 123 P. 660, 662 (Colo. 1912) (en banc); *Michigan Cent. R.R. v. Murphy*, 120 N.W. 1073, 1078 (Mich. 1909); *Saari v. Gleason*, 148 N.W. 293, 295-96 (Minn. 1914); *United N.J. R.R. & Canal Co. v. Parker*, 69 A. 239, 245 (N.J. 1908); *State v. Clausen*, 117 P. 1101, 1114 (Wash. 1911); *Borgnis v. Falk Co.*, 133 N.W. 209, 218 (Wis. 1911).

98. The speed with which the change took place is best demonstrated by the Wisconsin Supreme Court: one year it opined that "it would take a very extreme case of palpable absurdity or falsity in such a provision to justify any court in declaring such a declaration of legislative intent ineffective, if indeed a court could make such a declaration at all," *Borgnis*, 133 N.W. at 218, the next year the court said that a severability clause "may be some indication of legislative intention; but we regard it as merely declaratory of the rules heretofore laid down by this court on the same subject." *State ex rel. Wausau St. Ry. v. Bancroft*, 134 N.W. 330, 340 (Wis. 1912); see also 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 severability clauses to deny judicial power to determine severability). But see Note, *Effect of Separability Clauses in Statutes*, 40 HARV. L. REV. 626 (1927) (stating that the criticisms of severability clauses are unwarranted).

Supreme Court first limited the reach of a severability clause in *Hill v. Wallace*, in which the Court held the Futures Trading Act was nonseverable because the unconstitutional provisions were so interwoven with the other provisions.<sup>99</sup> The Court refused to employ the statute's severability clause to add words of limitation to the statute to make it constitutional, explaining that

[S]ection 11 [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. . . . [U]ndoubtedly [a saving provision] 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. But it does not give the court power to amend the act.<sup>100</sup>

Two years later, in dicta that developed into a maxim, Justice Brandeis stated 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."<sup>101</sup> Soon afterward, Justice Brandeis referred to "[t]he limited purpose and narrow effect" of a severability clause.<sup>102</sup>

The "shifting presumptions" announced by the Supreme Court in the 1930s relegated severability clauses to creating a mere presumption of severability. Under that rubric, a severability clause reversed a general presumption of nonseverability and replaced it with a presumption of severability. The presumption of severability that a severability clause created could be easily overcome, either "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,"<sup>103</sup> or if "the legislature would not have been satisfied

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99. 259 U.S. 44, 70-71 (1922).

100. *Id.*

101. *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (declining to decide severability of Kansas statute and instead leaving issue for the state courts); *accord Buckley v. Valeo*, 424 U.S. 1, 255 (1976) (Burger, C.J., concurring in part and dissenting in part); *Combs v. Glen Falls Ins. Co.*, 375 S.W.2d 809, 810 (Ark. 1964); *Commercial Nat'l Bank v. City of Chicago*, 432 N.E.2d 227, 240-41 (Ill. 1982); *Sanza v. Maryland Bd. of Censors*, 226 A.2d 317, 327 (Md. 1967). Apparently Justice Brandeis was uncomfortable with "inexorable commands." See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) (stating that stare decisis is not an inexorable command), *overruled by Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

102. *National Life Ins. Co. v. United States*, 277 U.S. 508, 534 (1928) (Brandeis, J., dissenting) (disagreeing with application of severability clause to enlarge scope of tax deduction).

103. *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1928), *overruled by Olsen v. Nebraska*, 313 U.S. 236 (1941).

with the statute unless it had included the invalid part."<sup>104</sup> The weakness of the presumption created by a severability clause is best demonstrated by three Supreme Court cases, decided within a seven year period, holding statutes nonseverable despite the presence of a severability clause.<sup>105</sup> Robert Stern captured the idea perfectly when he wrote: "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."<sup>106</sup>

In the decades after the 1930s, the courts gave mixed attention to severability clauses, sometimes treating them as dispositive,<sup>107</sup> sometimes suggesting that they were essentially irrelevant,<sup>108</sup> and sometimes saying that they create a presumption of severability.<sup>109</sup> Finally, the Supreme Court reaffirmed in *Chadha* that a severability clause creates a presumption of severability,<sup>110</sup> and it did so again in *Alaska Airlines*.<sup>111</sup>

How such a presumption works is still unclear. Some courts consider a severability clause when examining legislative intent pursuant to the first part of the *Champlin* test, but do not consider the clause when examining the function of the statute pursuant to the second part of the *Champlin* test.<sup>112</sup> Other courts examine both parts of the *Champlin* test regardless of the presence of a severability clause.<sup>113</sup> Moreover, several different views have been expressed about what it takes to overcome the presumption of

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104. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184-85 (1932).

105. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-16 (1936); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 362 (1935), *overruled by* *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Williams*, 278 U.S. at 241-44.

106. Stern, *supra* note 3, at 122.

107. See *Oregon v. Mitchell*, 400 U.S. 112, 130-31 (1970); *McElroy v. United States ex rel Guagliardo*, 361 U.S. 281, 283 (1960); *Marsh v. Buck*, 313 U.S. 406, 408 (1941); *Watson v. Buck*, 313 U.S. 387, 395-96 (1941).

108. The Court's statement in *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968), that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause" has been repeatedly quoted. See *INS v. Chadha*, 462 U.S. 919, 1014 (1983) (Rehnquist, J., dissenting); *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984); *Consumer Energy Council v. FERC*, 673 F.2d 425, 442 (1982), *cert. denied*, 463 U.S. 1216 (1983).

109. See *Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring in the result).

110. *Chadha*, 462 U.S. at 932; see also *id.* at 1013 (Rehnquist, J., dissenting) ("A severability clause creates a presumption that Congress intended the valid portion of the statute to remain in force when one part is found to be invalid.").

111. 480 U.S. 678, 686 (1987).

112. See, e.g., *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 142-43 (3d Cir. 1986).

113. See *infra* note 156 (citing cases in which courts applied the *Champlin* test notwithstanding the presence of a severability clause).

severability that a severability clause creates.<sup>114</sup> Finally, no court has explained what the presumption created by a severability clause adds to the general presumption of severability, or the presumption created by the ability of the other provisions to function independently.<sup>115</sup> It is certain, however, that the presumption created by a severability clause is not conclusive—courts frequently hold statutes nonseverable despite the presence of a severability clause.

The confusion surrounding presumptions and the absence of a consistent effort to explain how severability fits within broader theories of judicial review and statutory construction has left all of the various tests used over the years unanchored by a principled approach. The next two sections explain why legislative intent is the key to determining severability, and why the existing test for deciding severability often fails to ascertain that intent.

#### IV. SEVERABILITY AND LEGISLATIVE INTENT

“The lodestar of severability is legislative intent.”<sup>116</sup> That axiom has been followed by every court to decide severability since *Warren*. It has not, however, gone unchallenged. Justices White and Brennan disagreed over whether severability is “largely” or “exclusively” a matter of legislative intent.<sup>117</sup> Professor Laurence Tribe has criticized “heavily intent-based approaches to severability.”<sup>118</sup> Another commentator has criticized the “routine and often evasive reliance on malleable analyses of legislative in-

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114. See *Alaska Airlines*, 480 U.S. at 686 (stating that the presumption can be overcome by “strong evidence that Congress intended otherwise”); *American Fed’n of Gov’t Employees v. Reagan*, 806 F.2d 1034, 1039 (Fed. Cir. 1986) (explaining that presumption can be overcome “by showing that it is evident from the legislative history that Congress would not have passed” the legislation without the invalidated provision), *cert. denied*, *National Treasury Employees Union v. Reagan*, 481 U.S. 1068 (1987); *Chadha v. INS*, 634 F.2d 408, 416 (9th Cir. 1980) (stating that the presumption can be overcome by a “demonstrat[ion] that ‘it is evident’ that Congress ‘would not have enacted’” the permissible provisions without the unconstitutional provisions) (quoting *Champlin Refining Co. v. Corporation Comm’n*, 286 U.S. 210, 234 (1932)); *Senate Chadha Hearings*, *supra* note 6, at 100 (testimony of Stanley Brand) (explaining that the presumption created by a severability clause “may be overcome by examination of Congressional intent which demonstrates clearly the opposite, namely that Congress would not have enacted” the law absent the stricken provision).

115. Cf. *Doyle v. Suffolk County*, 786 F.2d 523, 528 (2d Cir.) (suggesting that a severability clause reinforces general presumption of severability), *cert. denied*, 479 U.S. 825 (1986).

116. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1267 (9th Cir. 1988), *vacated*, *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989).

117. *Compare* *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (stating that severability “is largely a question of legislative intent”) (plurality opinion of White, J.) *with id.* at 664 n.2 (“[C]ontrary to Justice White’s implication, severability is exclusively a question of legislative intent.”) (Brennan, J., concurring in part and dissenting in part).

118. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-3, 215 n.8 (2d ed. 1988).



tent,"<sup>119</sup> and warned that "the courts will only confuse analysis if they persist in invoking standard conceptions of legislative intent and statutory construction."<sup>120</sup> This Article maintains that severability is properly considered a question of statutory construction, and that concerns about the role of legislative intent in deciding severability are better directed toward the means of ascertaining that intent.

### A. *The Relationship Between Severability and Legislative Intent*

Deciding severability without looking to legislative intent presents several dangers. Striking down an entire statute as nonseverable when the legislature intended otherwise expands judicial power. The invalidation of statutory provisions that the legislature wanted to enact, that are within the legislature's power to enact, and that the legislature could unquestionably enact standing alone correspondingly decreases the power of the legislature. On the other hand, if a court construes a statute as severable contrary to the legislature's intent, the statutory provisions that remain in effect are akin to a new statute of the court's design, not the legislature's.<sup>121</sup> In addition, holding a statute severable despite a contrary legislative intent can separate the quid from the quo. For example, *Chadha* and other legislative veto cases provoked an outcry because severing legislative vetoes from many statutes preserved the delegation of power to the President while simultaneously eliminating the statutory condition on the exercise of that power. Lawmakers complained that they would not have delegated that power without an accompanying legislative veto, but many courts were convinced otherwise.<sup>122</sup>

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119. Note, *Severability*, *supra* note 6, at 1183.

120. *Id.* at 1195.

121. This is not to say that a "new statute" results every time that severance occurs. As discussed *infra* at notes 126-30 and accompanying text, the description of the provisions surviving severance as a "new statute" mischaracterizes what a court actually does when it holds a statutory provision unconstitutional but severable. The "new statute" criticism is justified only if the statutory provisions surviving severance remain in effect despite the legislature's intent that those provisions not stand alone. In other words, a "new statute" is one that exists despite the legislature's intent that the statute as enacted be nonseverable.

122. Besides *Alaska Airlines* and *Chadha*, legislative vetoes were held severable in *United States v. Romero-Fernandez*, No. 91-3720, 1993 LEXIS 1898 (11th Cir. Feb. 8, 1993) (International Economic Powers Act); *American Fed'n of Gov't Employees v. Reagan*, 806 F.2d 1034, 1039-41 (Fed. Cir. 1986) (Pay Act); *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 802-05 (temp. emer. ct. app. 1984) (Emergency Petroleum Allocation Act and Energy Policy and Conservation Act), *cert. denied*, 469 U.S. 852 (1984); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190-92 (5th Cir. 1984) (Reorganization Act); *Consumer Energy Council v. FERC*, 673 F.2d 425, 440-45 (D.C. Cir. 1982) (National Gas Policy Act); *see also* 15 Op. Off. Legal Counsel 61 (1991) (preliminary print) (Selective Service Act of 1948). By contrast, legislative vetoes were held nonseverable in *City of New Haven v. United States*, 809 F.2d 900, 905-09 (D.C. Cir. 1987) (section 1013 of the Anti-Deficiency Act); *EEOC v. CBS, Inc.*, 743 F.2d 969, 971-74 (2d Cir. 1984) (Reorganization

Whenever a court misconstrues legislative intent regarding severability, the legislature is forced to revisit the matter to reinstate its original plan. This comes with an institutional cost; Congress does not easily amend statutes after they have been construed by the Supreme Court.<sup>123</sup> The abandonment of legislative intent as the criteria for severability decisions would necessitate further legislative action if courts refused to make any attempt to discern whether the legislature wanted the remaining statutory provisions to stand.

Despite these dangers, there are two arguments against reliance on legislative intent in deciding severability. The first argument presumes that every statute must be treated as an inviolable whole. This is an argument against the principle of severability itself, and not just how severability is determined because it would require that all statutes be held nonseverable. The argument draws some support from the President's apparent lack of inherent power to line item veto specific provisions of a statute.<sup>124</sup> If a "bill" within the meaning Article I of the Constitution is the entire bill considered by Congress and presented to the President, then perhaps a court has no more power than the President to separate different parts of the enactment. But the argument that statutory provisions are never severable because each statute is a complete, indivisible whole proves too much. It fails to explain overbreadth and other doctrines limiting judicial challenges to the specific provision under attack, all of which assume that the unconstitutionality of one part or one application of a statute does not automatically result in the invalidation of the whole statute. Nor is it consistent with the actions of recent presidents who have employed a severability analysis

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Act); *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 306-08 (D.C. Cir. 1982) (HUD Appropriation Act); *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977) (Federal Salary Act).

123. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) (presenting "a revised view of the legislative process and the interaction between the Court, Congress and the President"). State legislatures face another problem if they are not scheduled to meet for a significant period after a court has ruled. See Stern, *supra* note 3, at 115.

124. See, e.g., 12 Op. Off. Legal Counsel 159 (1988) (preliminary print) (advising that the president does not have inherent line-item veto power). But see Sidak & Smith, *supra* note 1, at 439-41 (suggesting that the president has inherent line-item veto power); 137 CONG. REC. H3029-04 (daily ed. May 14, 1991) (statement of Rep. Campbell) (same). Of course, the argument can be turned around. See Sidak & Smith, *supra* note 1, at 456 ("If the excision of unconstitutional provisions is sometimes inherent in the judicial power, it is not immediately obvious why it is not equally inherent in the executive power."). The analogy does not work, however, in states that provide line-item veto power to the executive. In fact, many state courts have struggled with severability issues raised by a state governor's line-item veto of part of a bill. See generally 138 CONG. REC. S2287-01, S2290-92 (daily ed. Feb. 26, 1992) (remarks of Sen. Byrd) (describing history of severability issues raised by state line-item vetoes).

when announcing which parts of a bill they would enforce, notwithstanding their belief that they lacked the power to line-item veto a bill.<sup>125</sup>

Professor Laurence Tribe makes a related argument. He suggests that the provisions of a statute may not be separated because the result would be a statute that has not been enacted in conformity with the Constitution's bicameralism and presentment requirements.<sup>126</sup> Under the Constitution, the exclusive process by which a law may be enacted includes approval by both houses of Congress and presentment to the President.<sup>127</sup> The key to this argument is the assumption that a statute from which a court has severed an unconstitutional provision is a new statute, an assumption the Court has shared on occasion.<sup>128</sup>

But this argument ignores the fact that the statute *did* become effective after enactment by both the House and the Senate and approval by the President. Why, then, must the enactment procedure be repeated after a provision of a statute is found to be unconstitutional? It need not be repeated, and Tribe himself explains why.<sup>129</sup> A court deciding a constitutional attack on a statute gives effect to all of the law before it—both the statute itself and the Constitution. When part of the statute and the Constitution conflict, the Constitution trumps the contrary statutory provision. That does not mean, however, that the unconstitutional statutory provision is physically removed, i.e., “severed,” from the statute. Rather, the statute still exists as

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125. *E.g.*, Statement by President George Bush Upon Signing S. 1630, 16 WEEKLY COMP. PRES. DOC. 1824 (Nov. 19, 1990) (stating that provisions establishing a Chemical Safety Investigation Board violate the appointments clause but are severable), *reprinted in* 1990 U.S.C.C.A.N. 3887-1; Statement by President George Bush Upon Signing H.R. 3611, 25 WEEKLY COMP. PRES. DOC. 1947 (Dec. 13, 1989) (explaining that the provision conditioning authority to provide foreign assistance on approval by a single House of Congress is unconstitutional under *Chadha* but severable), *reprinted in* 1989 U.S.C.C.A.N. 1436-1.

126. Tribe, *supra* note 6, at 21-23. Tribe views it as ironic that *Chadha*, the very decision holding that legislative vetoes violate the bicameralism and presentment clauses, did not consider the relevance of those same clauses in holding that the legislative veto was severable from the remainder of the statute. *Id.* Nonetheless, the conclusion he eventually reaches is similar to the conclusion reached in this Article. He writes:

Invalidation of the entire law would result only if one could show that the meaning of the entire law Congress enacted was so thoroughly and radically compromised by the invalidation of the law's veto device that, as a matter of ordinary statutory construction, the stump that remains after the veto branch has been cut off ought to be given no legal effect at all.

*Id.* at 25. This statement seems to imply that severability should be favored, and it endorses the use of general principles of statutory construction in deciding severability, *see infra* notes 142-49 and accompanying text.

127. U.S. CONST. art. I, § 7.

128. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1985) (referring to the statute created in the absence of the unconstitutional provision).

129. Tribe first floated this explanation in 1985, *see* Tribe, *supra* note 6, at 25-26, and repeated it in the most recent edition of his treatise. *See* TRIBE, *supra* note 118, at 215 n.8.

it was enacted, although the unconstitutional provision will never be given effect. Accordingly, the statute that is given effect in subsequent cases is the same statute enacted by Congress and presented to the President, except that the unconstitutional provision is never applied. The bicameralism and presentment problems disappear absent the misleading metaphor of "severance."<sup>130</sup>

### B. Which Legislative Intent?

Simply saying that severability is a matter of legislative intent is inadequate. That general assertion could lead to at least four different inquiries, including an examination of: (1) the meaning of the statute itself (a textualist approach); (2) the purpose of the statute (a purposive approach); (3) the legislature's intent when it enacted the statute (an intentionalist approach); or (4) what the legislature would have done had it considered the issue (an imaginative reconstruction approach).<sup>131</sup> All severability tests since *Warren* have examined the last question.

The *Champlin* test asks whether "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not."<sup>132</sup> It is thus representative of the "imaginative reconstruction" theory of statutory construction advocated by Judge Posner, and before him by Judge Learned Hand.<sup>133</sup> Judge Posner analo-

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130. Legislation that is contingent on future events presents an analogous situation. See, e.g., Paulsen, *supra* note 21 (describing contingent nature of state applications for a constitutional convention). Severability and nonseverability clauses operate in much the same way. See Caminker, *supra* note 29, at 1208 n.87 (suggesting that severability clauses could be viewed as "contingency legislation"). But see Sidak & Smith, *supra* note 1, at 462-63 (suggesting due process problems with contingent legislation).

131. For a general discussion of each theory, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES & MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 569-639 (1988); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324-45 (1990) [hereinafter Eskridge & Frickey, *Statutory Interpretation*]. For arguments in support of completely different models, see T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 *passim* (1988); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 *passim* (1989).

132. *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932), *overruled by Phillips Petroleum Co. v. Oklahoma*, 340 U.S. 190 (1950).

133. Judge Posner describes his theory in RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985) [hereinafter POSNER, *THE FEDERAL COURTS*]; and Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986) [hereinafter Posner, *Legal Formalism*]. For examples of Judge Hand's approach to statutory construction, see *Fishgold v. Sullivan Drydock & Repair Co.*, 154 F.2d 785, 789-93 (2d Cir.), *aff'd*, 328 U.S. 275 (1946); *Borella v. Borden Co.*, 145 F.2d 63, 64-65 (2d Cir. 1944), *aff'd*, 325 U.S. 679 (1945). Recent cases following this approach are listed in ESKRIDGE & FRICKEY, *supra* note 131, at 608. For general criticisms of the theory, see Eskridge & Frickey, *Statutory Interpretation*, *supra* note 131, at 329-32.

gizes statutory construction to the giving of orders within the military.<sup>134</sup> Just as an inferior military officer must follow the orders of a superior officer, so too a judge must follow the "orders" of the legislature as embodied in a statute. When the orders are "garbled," Judge Posner posits that a judge, like an inferior military officer, should ask "what would the framers have wanted us to do in this case of failed communication?"<sup>135</sup> *Champlin* asks the same question.

There is some intuitive appeal to a severability test sustaining statutory provisions that the legislature would have enacted anyway and invalidating those provisions the legislature would not have enacted independently. But the question posed by *Champlin* is purely speculative, as many frustrated courts have acknowledged.<sup>136</sup> The hypothetical question about what the legislature would have done yields a certain answer only if the legislature anticipated that severability may be an issue and included a provision addressing that contingency in the statute. In that case, however, the orders from the legislature to the court were not garbled at all. By contrast, deciding severability without a severability clause is analogous to an inferior officer proceeding with no orders whatsoever. If there is no provision in the statute addressing severability, the inquiry into what the legislature would have intended can probably never be answered with certainty.<sup>137</sup>

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134. Posner, *Legal Formalism*, *supra* note 133, at 189-90.

135. *Id.*

136. See *Doyle v. Suffolk County*, 786 F.2d 523, 527 (2d Cir.) ("We can do no more than make an educated guess . . ."), *cert. denied*, 479 U.S. 825 (1986); *Scheinberg v. Smith*, 659 F.2d 476, 482 (5th Cir. 1981) (declining to sever a provision "on the authority of a wholly speculative, and insupportable, interpretation of legislative intent"); *Roberts v. Atlantic Oil Producing Co.*, 295 F. 16, 17-18 (6th Cir.) ("The difficulty is in determining what the Legislature would have done, if it had not done what it did do."), *cert. denied*, 265 U.S. 582 (1924); *State v. Dickerson*, 298 A.2d 761, 766 (Del. 1972) ("All we have to go on, in pursuit of ethereal legislative intent regarding severability, is the chronological history of the two statutes and speculation."); *Indiana Educ. Employment Relations Bd. v. Benton Community Sch. Corp.*, 365 N.E.2d 752, 760 (Ind. 1977) ("To say that [the legislature] would have passed the Act without the invalid portions, had it known of their invalidity, would be to indulge in sheer speculation."). Other observers have voiced the same complaint. See *House Chadha Hearings*, *supra* note 6, at 221 (testimony of Harold Bruff) ("Because the severability issue calls for a hypothetical inquiry about legislative intent, it is, as the Supreme Court admitted in *Chadha*, 'elusive.'"); *id.* at 157 (testimony of Alan Morrison) (characterizing what legislature would have done as "necessarily a hypothetical question"); 1 WESTEL W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 37 (2d ed. 1929) ("[T]he courts speculate freely as to what would probably have been the desires of the enactors of the law had they known that effect would not be given to those provisions of the law which the courts find to be unconstitutional."); *Smith*, *supra* note 6, at 402 ("[S]everability is a question of hypothetical legislative intent").

137. Again, the frustration experienced by the courts is palpable. See *Penn v. Attorney General*, 930 F.2d 838, 845 (11th Cir. 1991) (Clark, J., dissenting) ("[W]here the legislature has not indicated its intent through a severability clause, it is almost impossible to determine the contingent intent of the legislature."); *Muller Optical Co. v. EEOC*, 743 F.2d 380, 388 (6th Cir. 1984) (stating that "severance in the absence of a clearly expressed legislative intent is a murky en-

Would the Ontario legislature have generally prohibited sex discrimination if it could not have limited the reach of that prohibition to girls playing hockey? Persuasive arguments can be offered for either conclusion based on the structure, purpose, and history of the Ontario *Human Rights Code*, but we will never know the answer for sure.

Public choice theory highlights the difficulty of searching for legislative intent absent a severability clause. "The basic behavioral postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximizer."<sup>138</sup> This perspective reveals the futility in asking what a group of legislators, each acting in their own self-interest, would have done if they had known that their preferred outcome would be denied them. The inability to determine how each legislator would have voted makes it impossible to determine what the legislature would have done.

Moreover, Judge Posner aside, the question asked by *Champlin* does not represent the usual approach to statutory construction. Textualism and intentionalism are far more common. Thus, courts have noted the difference between statutory construction generally and the test for determining severability.<sup>139</sup> As Professor Tribe has written:

To be sure, legislative history and intent may shed light on this issue of meaning just as on other issues of statutory construction. But there is a major, even if subtle, difference, both in principle and as a practical matter, between (a) treating evidence of what Congress would have done, or would have wanted courts to do, in the event of partial invalidation as shaping our understanding of what Congress's law *means*; and (b) treating Congress's

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deavor"); *ABCD, Inc. v. Commissioner of Pub. Welfare*, 391 N.E.2d 1217, 1224 (Mass. 1979) (considering the absence of a severability clause, court "would be engaging in the sheerest speculation as to the Legislature's intent if we were to assume that the legislature would have adopted" the statute in a revised form). By contrast, a severability clause "leaves no room for speculation as to the intention of the . . . legislature with respect to severability." *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130, 135 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987); *see also Zobel v. Williams*, 457 U.S. 55, 65 (1982) ("[W]e 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."); *Oceanographic Comm'n v. O'Brien*, 447 P.2d 707, 715 n.2 (Wash. 1968) (Finley, C.J., dissenting) ("As the enactment contains a severability clause, speculation . . . is unnecessary.").

138. DENNIS C. MUELLER, *PUBLIC CHOICE* 1 (1979). For a survey of public choice and related literature, see Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873 (1987); *Symposium on the Theory of Public Choice*, 74 *VA. L. REV.* 167 (1988).

139. For example, Judge Newman has written that severability "is always said to require a determination of legislative intent, but it is not the traditional inquiry as to what the legislatures intended their broad statutory language to mean when applied to a specific set of facts." *Doyle*, 786 F.2d at 527 (citations omitted).

unenacted wishes or inclinations as the very *objects* of the court's search.<sup>140</sup>

Tribe added that he views the first perspective "as the only defensible one."<sup>141</sup> This perspective also adheres more closely to the Supreme Court's general approach to statutory construction. Indeed, this approach offers an alternative way in which to decide severability that adheres to legislative intent yet avoids the speculation about what the legislature would have done if it had only known that part of its work would be invalidated.

In short, Chief Justice Shaw was right: severability is a question of legislative intent. But Shaw and his successors needlessly confused severability analysis by insisting on a hypothetical inquiry into what the legislature would have done. That misstep has been compounded by dismissing the legislature's clear statements about severability. The test proposed in this Article eliminates the need to speculate about what the legislature would have done. It accomplishes this by tracking the approach to statutory construction used by the Supreme Court when the interpretation of other statutory provisions is at issue.

## V. SEVERABILITY AS STATUTORY CONSTRUCTION

The severability of a statute should be determined according to general principles of statutory construction. In recent years, the Supreme Court has usually followed a textualist approach to statutory construction. The Court begins with the text of the statute. If the meaning of the text is plain, then the text is controlling.<sup>142</sup> The only exceptions to this rule occur in "the most extraordinary circumstances."<sup>143</sup> If the statutory text is ambiguous, then the Court will consult other "traditional tools of statutory construction," including the structure of the statute, its purpose, and the legislative history.<sup>144</sup> In addition, the Court has used presumptions and clear statement rules with increasing frequency as aids in construing a statute.<sup>145</sup>

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140. Tribe, *supra* note 6, at 26-27 n.118.

141. *Id.* at 27 n.118.

142. See, e.g., *Good Samaritan Hosp. v. Shalala*, 113 S. Ct. 2151, 2157 (1993); *Estate of Cowart v. Nickols Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992); *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989).

143. *Estate of Cowart*, 112 S. Ct. at 2594; see also *Freytag v. Commissioner of IRS*, 111 S. Ct. 2631, 2636 (1991) ("rare and exceptional circumstances").

144. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446-49 (1987).

145. See, e.g., *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2169-70 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). For a thorough discussion of the Court's recent use of presumptions and clear statement rules, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 *passim* (1992).

This Article maintains that this framework should be applied to severability. This idea is developed in three parts. First, when the legislature includes a severability clause or a nonseverability clause in a statute, such an explicit statement should be construed according to its plain meaning. Second, when the statutory text fails to refer to severability, the structure of the act, its purpose, and the legislative history should be consulted, even though such sources are not as helpful in determining severability as they are in generally construing the meaning of a statute. Finally, the approach advocates a general rule favoring severability. This could be a presumption of severability; or, better yet, a judicially created requirement that the legislature's intent concerning the severability of a statute be clearly stated in the statute; or, best of all, a legislatively enacted clear statement rule providing that all statutes should be construed as severable absent a specific nonseverability clause.

I recognize, of course, that it could be the Court's approach to statutory construction that is wrong, not its approach to severability. Statutory construction has received a great deal of attention in the last few years, much of it critical of the Court's approach.<sup>146</sup> Moreover, the Court has not been uniform in deciding questions of statutory construction.<sup>147</sup> I nonetheless submit that the approach to statutory construction usually followed by the Court would produce a better test for severability than the test set forth in *Alaska Airlines*. Moreover, the most frequent objection to a textualist approach cannot be made in the context of severability. Many of the Court's recent cases evidence a disagreement about whether the meaning of

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146. The literature on this topic is extensive. Recent symposia devoted to statutory construction include Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992); Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992); Symposium on *Statutory Interpretation*, 66 CHI.-KENT L. REV. 321 (1990). For a list of academic works just between 1988 and 1991, especially Professor Eskridge's voluminous writing, see Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 767-68 n.1 (1991). And, of course, see ESKRIDGE & FRICKEY, *supra* note 131, at 569-635.

147. See *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1153-54 (1991) (Marshall, J., dissenting) ("In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation."); *INS v. Cardoza-Fonseca*, 480 U.S. at 452 (acknowledging that the Court has sometimes strayed from the plain meaning rule); see also Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 256 (1992) ("The Supreme Court remains up for grabs. For every case that seems to be a victory for textualism, another can be found that reflects more conventional intentionalist methodologies, and the purpose approach is not dead, either." (footnotes omitted)). But the Court's fluctuations should not be exaggerated. I agree with those commentators who have detected a decided preference for a textualist approach in the Court's most recent statutory construction decisions. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 *passim* (1990); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Alienikoff and Shaw*, 45 VAND. L. REV. 715, 716 (1992).



the statutory language is plain.<sup>148</sup> By contrast, if the statutory text refers to severability, there is rarely a dispute about the meaning of the text itself.<sup>149</sup> With this understanding, this Article spells out how the Court's approach to statutory construction can be used to decide severability.

### A. *The Plain Meaning of Severability Clauses*

The gulf between the Court's approach to statutory construction and the Court's test for determining severability is widest with respect to the treatment of severability clauses. In most statutory construction cases, the Court begins with the plain meaning of the statutory text. The only circumstances in which the Court will depart from the plain meaning of a statutory provision are where the plain meaning produces an absurd result,<sup>150</sup> or in some instances, where the plain meaning produces a result "demonstrably at odds with the intentions of its drafters"<sup>151</sup> or a result that would defeat the purpose of the statute.<sup>152</sup> By contrast, in severability cases the statutory text (a severability clause) is usually treated as merely establishing a presump-

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148. The examples include *Good Samaritan Hosp. v. Shalala*, 113 S. Ct. 2151, 2157 (1993) (statute ambiguous); *id.* at 2167 (Souter, J., dissenting) (statute unambiguous); and *West Virginia Univ. Hosps., Inc.*, 111 S. Ct. at 1146-48 (statute unambiguous); *id.* at 1149 (Stevens, J., dissenting) (statute ambiguous). As Eskridge and Frickey observe, "the 'plain meaning' of the statute is not a reliable way to determine its meaning in *hard cases*. Almost all scholars of legislation agree that the meaning of a statute in cases where the language does not provide a completely determinate answer ought to be found by looking at the larger 'context' of the statute." *ESKRIDGE & FRICKEY*, *supra* note 131, at 571 (emphasis added).

149. Take this example: "If any provision of this statute is held unconstitutional, all other provisions shall remain in effect." Considered in a case where one provision of a statute contains a constitutional defect that is not shared by any other provision of the statute, the plain meaning of the severability clause is obvious.

150. "An interpretation that would produce an absurd result is to be avoided because it is unreasonable to believe that a legislature intended such a result." John P. Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1372, 1383 (1992) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)). The Court is divided, though, about how unusual a reading must be before other materials may be consulted. Compare *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 453-54 n.9 (1989) (holding that reading need not be absurd) with *id.* at 473 (Kennedy, J., concurring in the judgment) (arguing that reading must be absurd).

151. *Demarest v. Manspeaker*, 111 S. Ct. 599, 604 (1991) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); see also *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993) (insisting that statutory text is controlling unless there is a "clearly expressed legislative intent to the contrary" (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981))).

152. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); *Lewis v. Grinker*, 965 F.2d 1206, 1215, 1221-24 (2d Cir. 1992).

tion of severability.<sup>153</sup> Sometimes a severability clause does not even fare that well.<sup>154</sup>

The justifications for not reading a severability clause according to its plain meaning are unconvincing. Generally, three reasons are offered: (1) the statutory provisions remaining after severance would be unworkable standing by themselves, (2) the court perceives a severability clause as an illegitimate legislative threat to its judicial power, or (3) the court does not believe that a severability clause means what it says. Although the first reason is consistent with a recognized exception to the plain meaning rule in some cases, the second reason is misguided, and the third is simply wrong.

First, courts ignore a severability clause when the resulting "statute" cannot operate.<sup>155</sup> The plain meaning rule does not prohibit a court from invalidating an entire statute if the remaining provisions produce an absurd result. But a lower standard for departing from the statutory text is presently employed in deciding severability. Under the present severability test, a statute containing a severability clause will nonetheless be held nonseverable if it fails the *Champlin* test, i.e., if the court believes that the legislature

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153. To be sure, in some statutory construction cases the statutory text is described as creating a presumption concerning the meaning of the statute. See *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (referring to "[t]he 'strong presumption' that the plain language of the statute expresses congressional intent"); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 427 (1987) (referring to "the strong presumption that Congress expresses its intent through the language it chooses"); see also Schauer, *supra* note 147, at 721-23 (describing plain meaning rule, like other formalist arguments, as presumptive rather than conclusive). This "presumption" is much different from the presumption of severability afforded a severability clause. In *Connecticut Nat'l Bank*, for instance, the "presumption" created by the statutory text was conclusive, for the Court added that "[w]hen the words of a statute are unambiguous . . . 'judicial inquiry is complete.'" 112 S. Ct. at 1149 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981) (citations omitted)).

154. See Caminker, *supra* note 29, at 1208 n.87 (noting that severability clauses are usually viewed as nonbinding instructions like preambles and enactment clauses); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543, 604 n.266 (1988) (stating that "the judicial disregard of the plain meaning of a severability clause" is an "example of treating statutory language as dictum").

155. Robert Stern's example was *Mazurek v. Farmers' Mut. Fire Ins. Co.*, 181 A. 570 (Pa. 1935), in which "the only valid provision of a statute (apart from the separability clause itself) was the section repealing the earlier law which the unconstitutional provisions were to replace." Stern, *supra* note 3, at 124. For cases in which the courts held statutes nonseverable despite a severability clause because the remaining provisions of the statute were so interconnected with the unconstitutional provision as to preclude their separate operation, see *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148-51 (2d Cir. 1991) (describing anomalies that would result if municipal sign ordinance severable); *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110, 1117-18 (N.D. Ga. 1990) (holding statute nonseverable because only definition and costs sections remained after provision requiring drug testing invalidated); *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861, 868 (Cal. App. 2d Dist. 1993) (finding insurance and departmental service charge provisions dependent on unconstitutional parade permit requirement).

would not have enacted the statute without the invalidated provision or if the remaining provision would not function in a manner consistent with legislative intent absent the invalidated provision. This is the same test that applies if there is no severability clause.<sup>156</sup> By contrast, the plain meaning rule would treat a severability clause as dispositive of severability in all but those instances in which severance would produce an absurd result.

*Carter v. Carter Coal Co.*<sup>157</sup> illustrates this difference. *Carter* involved a constitutional challenge to the Bituminous Coal Conservation Act of 1935, which imposed a heightened excise tax on coal producers that failed to submit to the Act's price fixing and labor provisions.<sup>158</sup> The Court held that the labor provisions, which sought to regulate wages, hours, and working conditions, were unconstitutional.<sup>159</sup> Although the Act had a severability clause, the Court held that the labor provisions were nonseverable from the price-fixing provisions because "[t]he interdependence of wages and prices is manifest."<sup>160</sup> This result is wrong under the higher standard of the absurd results test. Notwithstanding the connection between wages and prices, the severability clause plainly said that the provisions could stand alone, and it is in no way absurd to enforce price fixing controls independently.<sup>161</sup>

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156. After all, a severability clause was present in *Champlin* itself. *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234-35 (1932). Sometimes the courts explicitly state that the same test applies. See *Rhode Island Fed'n of Teachers, AFL-CIO v. Nordberg*, 630 F.2d 855, 863 (1st Cir. 1980); *Atkins v. United States*, 556 F.2d 1028, 1085 (Fed. Cir.) (Skelton, J., dissenting), cert. denied, 434 U.S. 1009 (1978). There are also some decisions suggesting that the *Champlin* test need not be applied if there is a severability clause. See *INS v. Chadha*, 462 U.S. 919, 932 (1983) ("[W]e need not embark on that elusive inquiry since Congress itself has provided the answer to the questions of severability."); *National Treasury Employees Union v. United States*, 788 F. Supp. 4, 12 (D.D.C. 1992) (holding that *Champlin* test applies only in absence of severability clause). *Alaska Airlines* is ambiguous on this point: after stating the *Champlin* test, the Court said that "[t]he inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute." *Alaska Airlines v. Brock*, 480 U.S. 678, 686 (1987) (emphasis added).

157. 298 U.S. 238 (1936).

158. *Id.* at 281.

159. *Id.* at 297-312.

160. *Id.* at 315.

161. *Id.* at 312. As Justice Cardozo wrote:

Undoubtedly the rules as to labor relations are important provisions of the statute. Undoubtedly the lawmakers were anxious that provisions so important should have the force of law. But they announced with all the directness possible for words that they would keep what they could have if they could not have the whole.

*Id.* at 336 (Cardozo, J., dissenting); see also *id.* at 317-24 (Hughes, C.J., separate opinion) ("The purpose of Congress, plainly expressed, was that if a part of that aid [provided by the Act] were lost, the whole should not be lost.").

Second, courts resist severability clauses because they perceive such provisions as a legislative usurpation of judicial power.<sup>162</sup> Of course, if reading a severability clause according to its plain meaning would usurp judicial power, then severability clauses themselves are unconstitutional, a result only one court has reached.<sup>163</sup> If severability is a matter of statutory construction, then it is appropriate—indeed, preferable—for the legislature to address severability in the text of a statute. The legislature often directs the courts how to construe statutes.<sup>164</sup>

Two other related arguments rest on the claim that a severability clause intrudes on the role of the courts. One argument contends that a severability clause is evidence of legislative intent (the first part of the *Champlin* test) but not of the ability of the remaining statute to function absent the invalidated provision (the second part of the *Champlin* test).<sup>165</sup> Some sev-

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162. See *supra* notes 98-102 and accompanying text. Professor Singer is especially adamant 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," and thus severability clauses should be given a limited reading. SUTHERLAND, *supra* note 3, at 507-08.

163. *Mathews v. Schweiker*, No. 79-G-5251-NE (N.D. Ala. Aug. 24, 1982) (LEXIS, Genfed library, Dist file), *rev'd*, *Heckler v. Mathews*, 465 U.S. 728 (1984). In *Mathews*, a retired postal worker claimed that he was unconstitutionally denied spousal benefits that a similarly situated woman would have been eligible to receive. The challenged statute contained a severability clause which provided that the benefits would be denied to everyone if the gender classification was invalidated. The district court concluded that the classification violated the Equal Protection Clause. The court then held that the severability clause itself was unconstitutional as "an unconstitutional usurpation of judicial power by the legislative branch. . . . By enacting a severability clause to accompany the unconstitutional requirement of the pension offset exception, Congress attempted to mandate the outcome of any challenge to the validity of the exception by making such a challenge fruitless." *Id.* at \*10. The Supreme Court found it unnecessary to reach the issue of the constitutionality of the severability clause because the Court concluded that the plaintiff would have had standing to challenge the classification in any event. 465 U.S. at 739-40. For discussions of the severability issue in *Mathews*, see *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1178-79 n.3 (5th Cir. 1993) (en banc); *id.* at 1184-85 (Goldberg, J., dissenting); *Kurtz v. Baker*, 829 F.2d 1133, 1151-52 (D.C. Cir. 1987) (Ginsburg, J., dissenting), *cert. denied*, 486 U.S. 1059 (1988).

164. Congress has specified general rules of statutory construction in 1 U.S.C. § 1 (1988). See *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 113 S. Ct. 716, 719 (1993) (construing definition of "person" in 1 U.S.C. § 1). For a recommendation that Congress enact more instructions concerning statutory construction, see Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 VAND. L. REV. 561, 566-72 (1992). Remember, too, that severability clauses first developed in response to concerns about judicial manipulation of severability doctrine. See Note, *Severability*, *supra* note 6, at 1184-85.

165. See *State ex rel. Crumpton v. Montgomery*, 59 So. 294, 303 (Ala. 1912); *Talley v. Succession of James Merkel Stuckey*, 614 So.2d 55, 59 La. 1993 (stating that severability clause demonstrates "the intention that all valid provisions be retained in full effect . . . and hence creates a presumption of severability in fact"); see also Stern, *supra* note 2, at 118 (stating that the Supreme Court's early case law viewed severability clauses as "conclusive as to the legislative intention").

erability clauses say exactly that,<sup>166</sup> and they should be read according to their terms. Most severability clauses, however, contain no such limitation. It is improper to imply such a limitation on the effect of a severability clause because the ability of a statute to continue to function absent an unconstitutional provision is itself really a question of legislative intent.<sup>167</sup> Rather, a severability clause's instruction of severability should be disregarded only if it would produce an absurd result.

The third argument of this type contends that a severability clause may not be used to rewrite a statute. "Courts generally do not add words of limitation to statutes because they are aware of the dangers of intruding on the legislative function."<sup>168</sup> Thus, if a statute is invalid in certain *applications*, courts are properly leery of *sua sponte* adding any language to the statute that would prohibit such applications. If a severability clause specifically provides that the invalid applications are severable, however, then the fear of usurping the legislative function is misplaced because the statutory text itself authorizes the action. *National Treasury Employees Union v. United States*<sup>169</sup> provides a good illustration of this issue. The court held that a provision in the Ethics in Government Act<sup>170</sup> prohibiting federal employees from receiving honoraria was unconstitutional as applied to employees of the executive branch.<sup>171</sup> Judge Williams, joined by Judge Randolph, held that the unconstitutional application of the statutory ban to executive branch employees could be severed from the permissible applica-

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166. See, e.g., D.C. CODE ANN. § 32-804 (1992) ("The invalidity of any part of this chapter shall not be construed to affect the validity of any other part capable of having practical operation and effect without the invalid part."); ILL. REV. STAT. ch. 48, para. 31.21 (1992) ("If any part of this Act is decided to be unconstitutional and void, such decision shall not affect the validity of the remaining parts of this Act unless the part held void is indispensable to the operation of the remaining parts.").

167. As Robert Stern explained:

In theory, a legislative body has power to enact laws or parts of laws which are incapable of being given legal effect. Accordingly, if a legislative body should for some or no reason desire that an ineffectual or meaningless part of a law stand alone, the legislative intention should prevail. But the fact that valid provisions of a statute are incapable of having legal effect by themselves is ordinarily conclusive proof that the legislature did not intend them to stand by themselves.

Stern, *supra* note 3, at 76 n.1.

168. *Eubanks v. Wilkinson*, 937 F.2d 1118, 1125 (6th Cir. 1991); see also *Regan v. Time, Inc.*, 468 U.S. 641, 644-45 (1984) (Brennan, J., concurring in part and dissenting in part) (stating that severability clause is not a license to usurp policy and legislative functions); *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (holding that severability clause is not a license to amend an act); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985) ("[E]ven the broadest severability clause does not permit a federal court to rewrite as opposed to excise."), *aff'd*, 475 U.S. 1001 (1986).

169. 990 F.2d 1271 (D.C. Cir. 1993).

170. See 5 U.S.C.A. App. 7, § 501(b) (as amended) (1993).

171. *National Treasury Employees Union*, 990 F.2d at 1273.

tions of the statute to legislative and judicial branch employees.<sup>172</sup> Judge Sentelle argued in dissent that severance was improper because federal courts cannot add language to a statute.<sup>173</sup> The statute did not have a severability clause, so Judge Sentelle's point is well taken. On the other hand, if the statute contained a severability clause providing that unconstitutional applications were severable, then Judge Williams would have been correct.

The final, most common, and most troubling reason given for ignoring the plain meaning of a severability clause is that the clause itself is meaningless. Courts and commentators often dismiss severability clauses as "boilerplate" that the legislature unthinkingly inserts into a statute without considering whether it really wants each provision of its handiwork to stand independently.<sup>174</sup> Consider the remarkable decision of *Nixon v. Allen*,<sup>175</sup> in which the Arkansas Supreme Court held that a statute was nonseverable notwithstanding the presence of a severability clause. Section 28 of the statute, the severability clause, provided: "The Legislature hereby declares that it would have passed the remainder of said act, and each and every part thereof, irrespective of such unconstitutional part."<sup>176</sup> The court declared, "We do not believe that the Legislature intended by the language of the twenty-eighth section to declare that it would have passed each and every part of the act even though several of its outstanding provisions were unconstitutional and stricken out."<sup>177</sup> *Nixon v. Allen* is an extreme case, but it

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172. *Id.* at 1279-81.

173. *Id.* at 1296-98 (Sentelle, J., dissenting).

174. Professor Tribe, for example, refers to "a boiler-plate severability clause (of the sort most laws contain)." Tribe, *supra* note 6, at 22; *see also* Trainor v. Hernandez, 431 U.S. 434, 463 (1977) (Stevens, J., dissenting) (referring to "a legitimate severability clause, or some other equally innocuous provision"); Lindenberg v. First Fed. Sav. & Loan Ass'n, 90 F.R.D. 255, 258 (N.D. Ga. 1981) (describing severability clause as "merely boilerplate"); SUTHERLAND, *supra* note 2, at 507 ("Because of the very frequency with which it is used, the separability clause is regarded as little more than a mere formality."); McNiven, *supra* note 22, at 1295 (suggesting that "the severability clause is so commonplace in federal legislation that it did not capture the attention of the courts and the Agency"); John F. Bodle & E. A. Steffen, Jr., Note, *Delegation and Separability Aspects of the Housing and Rent Act of 1949*, 25 NOTRE DAME L. REV. 79, 96 (1949) ("[I]ndiscriminate use of the separability clause has weakened its evidentiary effect."). Early warnings that the frequent inclusion of severability clauses in legislation would dilute their effectiveness were prophetic. *See* Note, *Effect of Separability Clauses in Statutes*, *supra* note 98, at 629 ("[I]t is to be feared that, as the clauses become more common and assume the appearance of mere formality, less and less weight will be given to them.").

175. 234 S.W. 45, 50 (Ark. 1921).

176. *Id.* at 47.

177. *Id.* at 48. The court thus struck down an entire act establishing a county government because of an unconstitutional provision creating two county judges. The court claimed that the unconstitutional provision was "to this act as is the hub to a wheel or the foundation pillars to a building," *id.* at 50, but the court's description of the provisions of the statute indicates that at least some of the provisions were not completely dependent on the invalid provision, *id.* at 45-47. The court simply disbelieved the severability clause. *Id.* at 47 ("[W]e are convinced that, if the Legis-

does not stand alone in holding that the legislature would not have enacted the remaining provisions of a statute, no matter what the severability clause says.<sup>178</sup> Conversely, at least one court has held that the legislature intended a statute to be severable despite the presence of a nonseverability clause.<sup>179</sup> In addition, other courts have held that a statute is nonseverable without even acknowledging the existence of a severability clause.<sup>180</sup>

Although there is some truth to the charge that severability clauses often receive little attention in legislative drafting,<sup>181</sup> or that legislatures enacting such clauses know that the courts have not read such clauses for what they say,<sup>182</sup> the "boilerplate" claim fails in two respects. First, the claim that a severability clause is entitled to less force than other statutory

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lature had known in advance that several of the more important sections would be eliminated because of their unconstitutionality, it would not have enacted the remaining portions of the act.").

178. See *Fumaro v. Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1303 (Ill. 1990) (finding statute nonseverable despite severability clause because "the legislature would not have enacted this statute"); *Ingram v. Borough of Fort Lee*, 330 A.2d 640, 645 (N.J. Super. Ct. Ch. Div. 1974) (holding statute nonseverable despite severability clause because invalid provision must have been an inducement); *Lynden Transp., Inc. v. State*, 768 P.2d 475, 480 (Wash. 1989) (en banc) (finding statute nonseverable because "a severability clause will not save other portions of the act if the court nonetheless decides that the Legislature probably would not have passed the remaining portion of the act without the invalid part or if we believe the remaining valid enactment would not reasonably accomplish the legislative purpose"); see also *Brown v. Alexander*, 516 F. Supp. 607, 620-21 (M.D. Tenn. 1981) ("In applying the severability clause, the duty of this Court is to determine whether the legislature would have passed the act without its obnoxious provisions."), *aff'd in part*, 718 F.2d 1417 (6th Cir. 1983).

179. *Stiens v. Fire & Police Pension Ass'n*, 684 P.2d 180, 184-85 (Colo. 1984) (en banc) (holding that the legislature intended the prospective benefit provisions of a state pension act to be severable from the act's unconstitutional minimum funding provisions, notwithstanding the act's nonseverability clause).

180. See, e.g., *Ragsdale v. Turnock*, 841 F.2d 1358, 1377 (7th Cir. 1988) (Coffey, J., dissenting) (criticizing the majority for "completely disregard[ing] the statute's severability clauses as if they didn't exist"); cf. *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (holding statute severable but not citing severability clause); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1128-29 (6th Cir. 1991) (discussing severability without noting severability clause).

181. Members of the legislature themselves sometimes refer to "usual" or "boilerplate" severability clauses. See 134 CONG. REC. 12,280 (1988) (statement of Rep. Frank) (describing clause as "just boilerplate severability"); H.R. REP. NO. 988, 91st Cong., 2d Sess. 49 (1970) (describing section as "the usual separability provision in legislation"); see also *Senate Chadha Hearings*, *supra* note 6, at 41 (testimony of Michael Davidson, Legal Counsel to the U.S. Senate) ("[S]everability clauses, which are added, possibly without a great deal of reflection at the end of statutes, [may] provide a greater license than the Congress truly intended for the judicial branch to restructure statutes."); *id.* at 103 (testimony of Stanley M. Brand, General Counsel to the House Clerk) (testifying that severability clauses "were in the files of the legislative counsel like boilerplate in wills"); *id.* at 123 (testimony of Louis Fisher, Congressional Research Service) (describing "severability clauses as boilerplate language in public laws").

182. The legislature is presumed to be familiar with judicial rules of construction. See, e.g., *Department of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992); see also *Esckridge & Ferejohn*, *supra* note 9, at 555 n.96 (citing cases on congressional acquiescence in executive constructions of a statute).

provisions is exaggerated. Second, the claim does not justify reading the statutory language in a manner contrary to its plain meaning.

That severability clauses are common does not necessarily indicate that they are meaningless. It more likely evidences that the legislature usually wants provisions of its acts to be severable. This explanation is consistent with the presumption that a legislature generally intends its acts to be severable. Moreover, the fact that a particular kind of provision is common in statutes does not mean that it is meaningless.

Severability clauses are not always added to a statute unthinkingly. Legislatures have debated the desirability of including a severability clause, and in doing so, they have evidenced a keen awareness of the consequences of severability *vel non*. For example, during the Senate debate over a child care bill in 1989, Senator Helms introduced an amendment to remove the bill's severability clause and to attach a nonseverability clause instead.<sup>183</sup> He did so because if a provision authorizing parents to use federally-funded child care certificates for religious day care was invalidated, he wanted the entire title to fall so Congress could "go back to the drawing board."<sup>184</sup> Senator Hatch responded that a severability clause was necessary "so that all of the legislation is not wiped out in a single swoop of the Supreme Court's pen."<sup>185</sup> Other opponents of a nonseverability clause characterized it as "a back-door attempt to kill the bill."<sup>186</sup> Undeterred, Senator Domenici claimed that the nonseverability clause was necessary because "the whole bill would fail but for the religious section."<sup>187</sup> The amendment failed (as did the entire bill, eventually), but the debate itself revealed a congressional awareness of the choice between severability and nonseverability.<sup>188</sup>

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183. 135 CONG. REC. S7439-42 (daily ed. June 23, 1989).

184. *Id.* at S7440.

185. *Id.* at S7441. Other senators noted that severability clauses were a common mechanism for preventing entire statutes from being invalidated. *See id.* at S7441 (statement of Sen. Dodd); *id.* (statement of Sen. Mitchell); *id.* at S7442 (statement of Sen. Durenberger).

186. *Id.* at S7442 (statement of Sen. Ford); *see also id.* (statement of Sen. Durenberger) ("[I]ts actual intent is to bury a legal landmine in the bill before us, which he hopes will eventually destroy it.").

187. *Id.* at S7441.

188. The recent debate over campaign financing legislation offers another example. The bill reported by the Senate Rules Committee would have made its key provisions nonseverable. *See S. REP. NO. 41, 103d Cong., 1st Sess. 50 (1993)* (stating that § 101(c) of S.3 provides for nonseverability of certain provisions); *id.* at 66 (stating that § 903 provides that other provisions are severable). Several senators objected to the nonseverability provision. *See 139 CONG. REC. S7140* (daily ed. June 10, 1993) (amendment introduced by Sen. Chafee to replace the nonseverability clause with a severability clause). Indeed, severability was one of the key principles insisted upon by a group of senators seeking to break the gridlock on the bill. *See 139 CONG. REC. S6442* (daily ed. May 25, 1993) (statement of Sen. McCain) ("[S]everability should be part of this bill"); *139 CONG. REC. S6433* (daily ed. May 25, 1993) (statement of Sen. Cohen) (stating that the fifth point is severability and that "[c]ertainly we can supply no argument against that").



The testimony in the congressional hearings in the aftermath of *Chadha* further rebuts the argument that severability clauses are enacted unwittingly by the legislature. Many were hostile to severability clauses (which is not surprising because Congress was hostile to the holding of severability in *Chadha* generally), but that testimony reveals that Congress is aware that it has the ability to choose whether to include severability clauses, and that its choice is likely to have an effect. Representative Moakley stated that the inclusion of severability clauses "has not been an intelligent policy," and that such provisions "are a dangerously open invitation to the courts to assume th[e] legislative function" of deciding whether to reexamine the legislation.<sup>189</sup> He thus suggested a prohibition or limitation on the use of severability clauses and a requirement to consider non-severability clauses.<sup>190</sup> The House counsel testified that he "always believed . . . that severability clauses were against our interest, and consistently advised committees not to insert them," and therefore, he recommended that "severability clauses ought to be banned by legislative fiat" if Congress does not want to delegate power unconditionally to the President.<sup>191</sup> Others, including the Senate counsel, also expressed concerns about severability clauses.<sup>192</sup> Such complaints belie the suggestion that severability clauses—at least severability clauses enacted since *Chadha*—were enacted by the legislature unawares.

In addition, severability clauses are not automatically included in all legislation, or even all constitutionally problematic legislation. Congress did not include a severability clause in the Low-Level Radioactive Waste Policy Amendments Act of 1985,<sup>193</sup> the subject of the Supreme Court's most recent severability decision involving a federal statute,<sup>194</sup> even though Congress knew that part of the Act raised a constitutional question.<sup>195</sup> Nor did Congress include a severability clause in the Sentencing Reform Act.<sup>196</sup> The omission of a severability clause in such statutes shows that the legislature does not always include severability clauses as a matter of course, even when it knows that an act will be subject to constitutional attack.<sup>197</sup>

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189. *House Chadha Hearings*, *supra* note 6, at 275.

190. *Id.* at 276.

191. *Id.* at 41 (testimony of Stanley M. Brand, General Counsel to the House Clerk).

192. *Id.* (testimony of Michael Davidson); *id.* at 123 (testimony of Norman Ornstein, Visiting Scholar, American Enterprise Institute for Public Policy Research); *id.* (testimony of Louis Fisher, Congressional Research Service).

193. 42 U.S.C. § 2021b - 2021j (1988).

194. *New York v. United States*, 112 S. Ct. 2408, 2434 (1992).

195. See 131 CONG. REC. S18252 (daily ed. Dec. 19, 1985) (remarks of Sen. Simpson).

196. See *supra* notes 70-76 and accompanying text.

197. The Guam abortion law, Guam Pub. L. 20-134 (1990), see *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369-70 (9th Cir. 1992), and the Ethics in Government Act

The diversity of severability clauses further illustrates that they are not simply boilerplate. The general term "severability clause" encompasses a variety of provisions. Severability clauses include both specific provisions in a particular statute detailing which provisions of that statute are severable<sup>198</sup> and "general severability clauses" stating that all statutes are severable.<sup>199</sup> They provide that severability must always occur<sup>200</sup> or that severability occurs only in certain circumstances.<sup>201</sup> They speak in terms of legislative intent<sup>202</sup> or provide directions about which provisions or applications may survive a finding that another provision is unconstitutional. In-

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of 1989, *Ethics in Gov't Act of 1978*, 5 U.S.C.A. App. 7 § 501 (1993), *see* *National Treasury Employees Union v. United States*, 990 F.2d 1271 (D.C. Cir. 1993), are other recent, controversial statutes that did not include a severability clause.

198. *See, e.g., Charles v. Carey*, 627 F.2d 772, 778 n.7 (7th Cir. 1980) (quoting Illinois statute providing for severability of "any provision, word, phrase or clause of this Act or the application thereof to any person or circumstances").

199. Many states have general severability clauses that establish a general rule for the severability of all statutes. *See, e.g., ALASKA STAT. § 01.10.030* (1992) (stating that all statutes shall be construed as if they contained a specific severability clause); *COLO. REV. STAT. § 2-4-204* (1973) (stating that statutes are severable unless valid provisions are so dependent upon void provision that legislature would not have enacted alone "or valid provisions . . . are incomplete and incapable of being executed"); 1 N.J. STAT. ANN. 1:1-10 (1992) (stating that invalidation of part of a statute shall not invalidate other parts of the statute). In some cases, both a general provision and a statute-specific provision apply. *See, e.g., Muller v. Curran*, 889 F.2d 54, 57 (4th Cir. 1987), *cert. denied*, 493 U.S. 1074 (1990); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir. 1985), *aff'd*, 484 U.S. 171 (1987). There is no federal general severability clause.

200. *See Chadha v. INS*, 462 U.S. 919, 932 (1983) ("If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." (emphasis omitted)).

201. *See Shea v. North Butte Mining Co.*, 179 P. 499, 504 (Mont. 1919) (involving severability clause providing for severance only if the main purpose of the act can be effected without the invalid provision).

202. For provisions stating that the legislature intends the statute to be severable, *see, e.g., ARIZ. REV. STAT. ANN. § 15-1490* (1992) ("It is declared that the sections, clauses, sentences and parts of this article are severable . . ."); *Brown v. Alexander*, 718 F.2d 1417, 1428 (6th Cir. 1983) (quoting Tennessee statute). For provisions stating that the legislature would have passed the remaining provisions of the statute without the offending provision, *see, e.g., KAN. STAT. ANN. § 47-838* (1992) ("It is hereby declared to be the legislative intent that this act would have been enacted had such unconstitutional or invalid provisions not been included."); *WASH. REV. CODE § 66.98.020* (1992) ("[I]t is hereby declared that, had the invalidity of such [provision] been considered at the time of the enactment of this act, the remainder of the act would nevertheless have been enacted without such and any and all such invalid [provisions]."); *National Found. v. City of Fort Worth*, 415 F.2d 41, 47 n.3 (5th Cir. 1969) (quoting Fort Worth ordinance), *cert. denied*, 396 U.S. 1040 (1970); *Sage v. Baldwin*, 55 F.2d 968, 969 (N.D. Tex. 1932); *Yee Gee v. City & County of San Francisco*, 235 F. 757, 768-69 (D.C. Cal. 1916) (quoting San Francisco ordinance); *State v. Inland Empire Refineries, Inc.*, 101 P.2d 975, 981 (Wash.) (en banc) (quoting Washington statute), *cert. denied*, 311 U.S. 713 (1940).

deed, the legislature may include a nonseverability clause directing that statutory provisions are *not* severable.<sup>203</sup>

The variety of severability clauses demonstrates that their actual language should not be ignored. When the legislature wants a court to presume that the provisions of a statute are severable, it says so.<sup>204</sup> Thus, if the legislature says that the provisions of a statute *are* severable, that language should be respected. Moreover, the precise language of a severability clause can make a difference. In *Wyoming v. Oklahoma*,<sup>205</sup> an Oklahoma statute contained a severability clause providing that "[t]he provisions of this act are severable and if any part or provisions shall be held void, the decision of the court so holding shall not affect or impair any of the remaining provisions of this act."<sup>206</sup> The clause did not provide that unconstitutional *applications* of the statute were severable. As the Court noted, "[s]everability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes."<sup>207</sup> Thus, once the Court held that the statutory requirement that Oklahoma utilities use at least ten percent Oklahoma mined coal violated the Commerce Clause, the Court held that the application of the statute to state-owned utilities could not be severed from the application of the statute to other utilities.<sup>208</sup> This result honors the specific language of the severability clause and refuses to accept the myth that the language adopted by the legislature in a severability clause is irrelevant.<sup>209</sup>

The alternative sources of legislative intent are unlikely to equal the clarity of the statutory text itself. Even if there is no record of why the legislature included a severability clause in a statute, that is not an adequate

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203. For examples of nonseverability clauses, see *Zobel v. Williams*, 457 U.S. 55, 65 (1982); *Biszko v. RIHT Fin. Corp.*, 758 F.2d 769, 773 (1st Cir. 1985); *Scinto v. Kollman*, 667 F. Supp. 1106, 1109 (D. Md. 1987); *Brookins v. O'Bannon*, 550 F. Supp. 30, 31 (E.D. Pa. 1982), *aff'd*, 699 F.2d 648 (3d Cir. 1983).

204. See, e.g., OKLA. STAT. tit. 75, § 11a (1991) (providing that statutes are to be presumed severable unless affected provisions are interconnected or incapable of standing alone).

205. 112 S. Ct. 789 (1992).

206. *Id.* at 803 (quoting Oklahoma statute).

207. *Id.* (footnote omitted). By contrast, one court in *viewed* a clause similar to that construed in *Wyoming v. Oklahoma* as "evidenc[ing] a marked preference for maintaining any portion of the civil service law that remains after partial invalidation." *Doyle v. Suffolk County*, 786 F.2d 523, 528 (2d Cir.), *cert. denied*, 479 U.S. 825 (1986).

208. *Wyoming v. Oklahoma*, 112 S. Ct. at 802-04.

209. The attention that courts pay to the precise words of a severability clause is further illustrated by the cases emphasizing the "unusually explicit" language of such a clause as justifying a holding of severability. See *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1023 (1st Cir. 1981). As a response to the dilution of the effect of severability clauses as their numbers increased, Robert Stern advocated specific severability clauses indicating precisely which statutory provisions are severable from other statutory provisions. See Stern, *supra* note 3, at 122-26.

basis for concluding that the legislature meant something less than it said. An equally plausible inference from the absence of any legislative history regarding a severability clause is that the provision was so noncontroversial that no debate was necessary. In any event, as Professor Daniel Farber has written, "this suspicion [that Congress did not really mean what it said,] although perhaps well-founded, should not carry much weight in statutory interpretation."<sup>210</sup>

The "boilerplate" argument, then, is unpersuasive. Yet that in itself does not justify a change in the test for severability. If construing a severability clause according to its plain meaning is unnecessary and possibly harmful,<sup>211</sup> why should the rule be changed now?

This question invites three responses. First, the current severability rule is internally inconsistent. It preaches the primacy of legislative intent, but rejects the normal means of ascertaining legislative intent. For example, a legislature may truly intend to make all parts of a statute severable and thus enact a severability clause, but a court may still hold the statutory provisions nonseverable. To avoid such a result and to effectuate its intent, the legislature would have to say: "This statute is severable—and we really mean it."

Second, the current severability rule produces unpredictable results. Even among those courts agreeing that a severability clause creates a presumption of severability, there is no agreement about what it takes to overcome that presumption. Finally, not surprisingly, legislators display conflicting understandings of what a severability clause means.<sup>212</sup> Applica-

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210. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 300 n.94 (1989). Thus, even though Justice Scalia—the Court's foremost advocate of the plain meaning rule—has referred to some statutory language as "boilerplate," he did so not because the language should be ignored, but because the language was not sufficiently clear to overcome an applicable contrary presumption. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2918 (1993).

211. See Stern, *supra* note 3, at 123. Stern would have found severability clauses controlling in cases of severable application but not in cases of severable language. *Id.* at 100-01; cf. Eskridge, *supra* note 147, at 683 (changing rules regarding the significance of legislative history would frustrate Congress' understanding when it passed laws).

212. Although some members of Congress recognize that the Court usually presumes that statutes are severable, see 133 CONG. REC. 28,595 (1987) (statement of Rep. Shaw); others believe that a severability clause is necessary to overcome a general presumption of nonseverability, see 123 CONG. REC. 9,352 (1977) (statement of Rep. Drinan). At least one member of Congress is not familiar with severability at all. See 139 CONG. REC. S7357 (daily ed. June 16, 1993) (statement of Sen. Wellstone) (asking if part of the bill "is ruled unconstitutional, then what happens to the rest of the legislation? Then what do we have by way of any legislation? What happens then?"). The confusion is not necessarily the fault of Congress. One severability clause was added to a bill precisely because of the unpredictability of the courts. See 134 CONG. REC. H3645 (daily ed. May 25, 1988) (statement of Rep. Frank).

tion of the plain meaning rule to a severability clause would place the determination of severability within a familiar interpretive framework.<sup>213</sup>

Furthermore, the current severability rule attributes to the legislature the intent to enact a superfluous provision. The legislature has no reason to include a severability clause if statutes are already presumed severable. Decisions treating a severability clause as merely codifying the general severability rule further treat the statute's provisions as irrelevant.<sup>214</sup>

Severability clauses, therefore, should be read according to their plain meaning.<sup>215</sup> In addition to the general advantages of bright-line rules for both the courts and the legislature, treating a severability clause as dispositive of severability avoids the need to speculate about what the legislature would have done if it had known that part of its work would be invalidated. When there is no severability clause, that prediction becomes unavoidable.

### B. *Statutory Construction Absent a Severability Clause*

If the plain meaning of a statute is unclear, i.e., if the statute does not contain a severability clause, then severability should be determined in the same manner that ambiguous statutes are construed. When the statutory text is unclear, the courts look at the statute's structure, purpose, and legislative history to determine what the statute means. These sources can shed some light on whether a statute was meant to be severable, but too often they are also inconclusive.

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213. See *Finley v. United States*, 109 S. Ct. 2003, 2010 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."). The trickiest question is whether evidence in the legislative history that the legislature enacted the severability clause believing that it only created a presumption precludes application of the rule advocated here. This situation reflects a broader disagreement about how to construe a statute when the plain meaning and the legislative history conflict. This Article sides with the proponents of adhering to the plain meaning. Legislators' statements concerning severability are suspect for the same reason that legislators' statements with respect to statutory meaning are generally suspect—there is no assurance that they reflect the understanding of the entire legislature (or even a majority).

214. See, e.g., *Sugarloaf Citizens Ass'n, Inc. v. Gudis*, 573 A.2d 1325, 1333-35 (Md. 1990).

215. A final issue concerns the timing of a change in the rule. For example, in *State v. Aldrich*, 231 N.W.2d 870, 895 (Iowa 1975), the court observed that a statute enacted in 1851 preceded the existing rule that the absence of severability clause creates a presumption of nonseverability. If a court has previously construed a severability clause in a particular statute, stare decisis counsels against overruling the construction of that statute. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 164 (1989) (stare decisis in statutory construction establishes a very strong presumption of correctness). Compare Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 MICH. L. REV. 177, 210 (1989) (arguing that the Court should never overrule statutory precedents) with Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388-91 (1988) (criticizing strict stare decisis rule). A decision announcing that severability clauses should be construed according to their plain meaning but applying that new rule prospectively offers one way to avoid this problem. See Note, *The Aftermath of Chadha*, *supra* note 6, at 1220 (describing the use of prospective overrulings).

Apart from a severability clause, examination of a statute's structure is the most promising source of insight into legislative intent concerning severability. In fact, under the second part of the *Champlin* test, courts already consider the structure of a statute when determining whether to invalidate the entire statute. Indeed, absent the textual indication of severability provided by a severability clause, the second part of the *Champlin* test offers a proper inquiry into legislative intent concerning severability. Moreover, the inability of the surviving statutory provisions to function without the invalidated provision is strong evidence of nonseverability, even if that inability to function does not rise to the level of an "absurd result" that would be necessary to overcome the contrary language of a severability clause.

This focus on structure attempts to ensure that a statute is construed in a way that harmonizes all of its provisions.<sup>216</sup> Often a statute's design provides evidence that the statute can operate if one provision is eliminated, or alternately, that the statute cannot operate if another provision is eliminated. In addition, it has long been recognized that certain types of statutory provisions are generally severable or nonseverable. Riders to appropriations bills, amendments to existing legislation, and penalties attached to underlying offenses are all generally viewed as severable.<sup>217</sup> By contrast, severability is less favored in criminal statutes because of the need for special clarity when criminal penalties may ensue.<sup>218</sup>

Yet the structure of a statute may not tell the whole story. To use the most common example, a grant of power to the executive branch can function independently of a legislative veto provision, but other evidence may show that severance would be inconsistent with legislative intent. Furthermore, some types of statutory provisions are susceptible to conflicting arguments regarding severability. Exceptions to general statutory commands are a good example. On the one hand, exception clauses are often held

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216. As Justice Stevens admonishes, "Read the *entire* statute." Stevens, *supra* note 150, at 1376; see also Sunstein, *supra* note 131, at 425 ("[A]n interpretation should be disfavored if it would make the disputed provision fit awkwardly with another provision or produce internal redundancy or confusion.").

217. For examples of subsequent amendments held severable, see *United States v. Jackson*, 390 U.S. 570, 588 n.33 (1968) (severing a capital punishment provision which was a later addition to the Federal Kidnapping Act); *Gentry v. United States*, 546 F.2d 343, 347 (Ct. Cl. 1976) (severing requirement that child must live with parent to receive benefits under Civil Service Retirement Act). But see SUTHERLAND, *supra* note 3, at 535. For examples of invalid penalty provisions held severable, see *New York v. United States*, 112 S. Ct. 2408, 2434 (1992); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 395-96 (1894).

218. See, e.g., *American Booksellers Ass'n Inc. v. Webb*, 654 F. Supp. 503, 505 (N.D. Ga. 1987) (involving unconstitutional exception for libraries from obscenity law that caused whole act to fall because presumption created by general severability clause was rebutted by rule that invalidity of exception to a criminal statute causes the whole statute to be invalid); SUTHERLAND, *supra* note 3, at 435.

severable because the other provisions can stand alone by definition.<sup>219</sup> It is equally plausible, though, that the exception is evidence that the legislature was not satisfied with an unqualified general command. *Ontario Hockey Association* illustrates this problem: did the legislature want the general bar against sex discrimination to stand without the exception for amateur hockey teams, or did it not?<sup>220</sup> The structure of that statute raises, rather than answers, the question of severability.

The purpose of a statute is another factor employed in determining the statute's meaning.<sup>221</sup> Courts have held statutes severable if the purpose would be achieved by the remaining statutory provisions and nonseverable if the purpose could not be achieved.<sup>222</sup> But reliance on a statute's purpose is not always so simple. There is the difficult matter of determining the "purpose" of a collective body. If, as is likely, the legislature had several purposes, which ones must be achieved for a statute to be held severable? Presumably, not all of the purposes can be achieved once part of the statute becomes ineffective.<sup>223</sup> And which purposes control? One commentator responding to *Chadha* opined that a court should ignore a legislative veto in ascertaining the relevant statutory purpose for deciding severability.<sup>224</sup>

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219. See, e.g., *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1398-99 (8th Cir. 1985); *Rhode Island Chapter of the Nat'l Women's Political Caucus, Inc. v. Rhode Island Lottery Comm'n*, 609 F. Supp. 1403, 1419-20 (D.R.I. 1985).

220. *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 817, 830-32 (Md. 1985), provides the closest analogy. A Maryland statute generally prohibited discrimination but provided an exception for single-sex clubs. The court held the exception nonseverable from the rest of the statute. *Id.*

221. For a general discussion of the role of purpose in statutory construction, see REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 87 (1975); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 *passim* (1984).

222. Compare *New York v. United States*, 112 S. Ct. 2408, 2434 (1992) (finding penalty provision severable because it was only one incentive to achieve the overall purpose of a radioactive waste statute) with *Ratcliff v. County of Buncombe, N.C.*, 663 F. Supp. 1003, 1010-11 (W.D.N.C. 1987) (finding statute nonseverable because it would fail to achieve purpose of establishing a particular form of government for a county); see also *Sparhawk v. Sparhawk*, 116 Mass. 315, 321 (1874) (finding divorce statute nonseverable because "[t]o hold otherwise would be to impute to the Legislature the purpose that a man who was still the husband of one wife might be authorized by this court to marry another").

223. In one case, congressional desire for "comprehensive reform" caused a court to hold the Sentencing Reform Act nonseverable, see *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1267-68 (9th Cir. 1988), but the same court held that Guam's desire to pass a comprehensive abortion statute did not demand severability, see *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369-70 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

224. Note, *Severability*, *supra* note 6 at 1196. *Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991), presents another example. The majority held a Kentucky abortion statute nonseverable because the dominant purpose of the act was stricken, *id.* at 1128-29, while the dissent argued that the legislature's goal of assuring parental consent would be honored by severance. *Id.* at 1131-32 (De Mascio, J., dissenting).

Thus, reliance on the purpose of a statute in deciding severability is far too often a speculative exercise.

Similarly, legislative history is often relied upon in determining severability, but the conclusions drawn from this examination prove no less speculative. Justice Jackson's quip that "[i]t is a poor cause that cannot find some plausible support in legislative history"<sup>225</sup> has been echoed in describing the relevance of legislative history to severability.<sup>226</sup> Perhaps the greatest difficulty in relying on legislative history when deciding severability is that such history infrequently discusses severability. Legislative history is more often cited in severability cases for evidence of the statute's purposes, from which an inference about severability may be gleaned. Obviously, such reliance suffers from all of the difficulties presented by depending on statutory purpose. And even when the legislative history contains a direct statement about severability, the significance of that statement is questionable. For example, the federal courts of appeals disagreed about the severability of a legislative veto from the Reorganization Act, and in particular, about the proper weight to be afforded Representative Drinan's statement during the congressional debate that the legislative veto was not severable from the remainder of the statute.<sup>227</sup> Similarly, in *United States v. Jackson*, the Supreme Court held that the death penalty provision was severable from a federal kidnapping statute despite one representative's statement that "the legislation would not be worth anything without the death penalty provision."<sup>228</sup>

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225. Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948). For a sampling of the recent commentary on legislative history, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375; 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); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992). This Article addresses the role of legislative history when it conflicts with the plain meaning of the statutory text. See *supra* note 202.

226. See *Senate Chadha Hearings*, *supra* note 6, at 123 (testimony of Louis Fisher). In *Consumer Energy v. FERC*, for example, the court observed that "the legislative history, as almost always is the case, contains contradictory comments about the importance" of the two relevant provisions, and the court acknowledged "two remarkably different interpretations of the legislative history and intent." 673 F.2d 425, 442-44 (D.C. Cir. 1982), *aff'd*, *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216, *reh'g denied*, 463 U.S. 1250 (1983).

227. Compare *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190-92 (5th Cir. 1984) (severable) with *EEOC v. CBS, Inc.*, 743 F.2d 969, 971-74 (2d Cir. 1984) (nonseverable). See also Note, *The Aftermath of Chadha*, *supra* note 6, at 1232 (arguing that Representative Drinan's statement was clear evidence of legislative intent); cf. *Muller Optical Co. v. EEOC*, 743 F.2d 380, 387-88 (6th Cir. 1984) (refusing to reach severability issue).

228. 390 U.S. 570, 587 n.31 (1968) (quoting statement of Rep. Dyer). As Judge Skelton wrote: "That such comments [supporting an invalidated provision] appear in the record is hardly



In short, a statute's structure, purpose, and history may offer some evidence of legislative intent regarding severability, but none of these sources can be expected to provide a definitive answer. Because severability is such a straightforward question, when the legislature has a specific intention, it expresses it via a severability or nonseverability clause. Yet many statutes lack such provisions. Accordingly, something more is needed—a default rule that can guide both courts and legislatures in deciding severability when there is little evidence of legislative intent.

### C. *A Rule Favoring Severability*

A general severability rule must be theoretically and empirically justified, clearly understood and consistently applied, and operate in a straightforward manner. In short, it must be different from the presumptions that courts have used in deciding severability because the use of contradictory presumptions, their inconsistent application, and uncertainty about the force of any presumption has robbed them of any real force. The best rule, as I explain here, is a clear statutory statement favoring severability.

#### 1. Basis for a Rule Favoring Severability

There are two reasons for adopting a rule favoring severability, one theoretical and one empirical. The theoretical justification derives from several familiar principles guiding judicial review and construction of statutes, each of which courts have relied upon in deciding severability cases. These interrelated principles include: (1) statutes should be construed to avoid constitutional questions;<sup>229</sup> (2) statutes are presumed to be constitutional;<sup>230</sup> (3) a constitutional construction of a statute should be adopted

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surprising. . . . The issue, however, is *not* whether some Congressmen favored it, or even that it was voted for, but whether it was *essential* to secure passage of the Act." *Atkins v. United States*, 556 F.2d, 1028, 1086 (Cl. Ct. 1977) (Skelton, J., dissenting), *cert. denied*, 434 U.S. 1009 (1978).

229. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 677 (1984) (Brennan, J., concurring in part and dissenting in part); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991). *See generally* ESKRIDGE & FRICKEY, *supra* note 131, at 599-600 (describing application of rule in other contexts). For criticism of this approach, see Note, *Severability*, *supra* note 6, at 1194 ("Preserving the administrative infrastructure is an institutional concern as important as minimizing constitutional adjudication.").

230. *See, e.g.*, *Santa Barbara Sch. Dist. v. Superior Court*, 530 P.2d 605, 617 (Cal. 1975) (en banc) (quoting *In re Blaney*, 184 P.2d 892, 900 (Cal. 1947)); SUTHERLAND, *supra* note 3, at 480 & n.3; Stern, *supra* note 3, at 120. By contrast, Cooley and one early court asserted that the presumption of constitutionality attaches only to entire acts, not to parts of them. *See* *Skagit County v. Stiles*, 39 P. 116, 116 (Wash. 1894); COOLEY, *supra* note 3, at 248 n.1. This is little different, however, from the claim rejected above that all statutes must be treated as an inviolable whole. *See supra* notes 124-28 and accompanying text.

versus an unconstitutional construction of the statute whenever possible;<sup>231</sup> (4) a court should give effect to a statute to the maximum extent permitted by the Constitution;<sup>232</sup> and (5) a court should strike down only what is necessary.<sup>233</sup> Each of these general principles suggests that a court should invalidate as little of a statute as possible unless the statute indicates that the legislature intended a contrary result.<sup>234</sup>

The empirical realities of the legislative process also support a rule favoring severability. I submit that in most cases the legislature prefers to save as much of a statute as possible. The regularity with which legislatures include severability clauses in statutes, and the infrequency with which they include nonseverability clauses, bears witness to this preference.<sup>235</sup> For example, there has long been a reluctance to hold tax statutes nonseverable.<sup>236</sup> Likewise, in areas where the legislature chafes at constitu-

231. See, e.g., *El Paso & Northeastern R.R. v. Gutierrez*, 215 U.S. 87, 96 (1909); see also Stern, *supra* note 3, at 120 (stating that in later severability cases "the court did not appear to be bound by any presumption" of severability).

232. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 684, *reh'g denied*, 464 U.S. 874 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 131 (1970); *Celebrity Club Inc. v. Utah Liquor Control Comm'n*, 657 P.2d 1293, 1299 (Utah 1982); *Senate Chadha Hearings*, *supra* note 6, at 123 (testimony of Louis Fisher); SUTHERLAND, *supra* note 3, at 480 & n.5.

233. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Regan v. Time, Inc.*, 468 U.S. at 652; *Ackerley Communications v. City of Somerville*, 878 F.2d 513, 522 (1st Cir. 1989); *McAlpine v. University of Alaska*, 762 P.2d 81, 94 (Alaska 1988); *Ewing v. Scotts Bluff County Bd. of Equalization*, 420 N.W.2d 685, 691 (Neb. 1988). As Judge Cardozo wrote, "Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 N.E. 202, 208 (N.Y. 1920), *cert. denied*, 256 U.S. 702 (1921). This is quoted as "the general rule" in *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991).

234. Justice White's opinion in *Regan v. Time, Inc.* contains the fullest expression of these principles in a severability case:

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."

468 U.S. at 652 (plurality opinion of White, J.) (quoting *El Paso & Northeastern R.R. v. Gutierrez*, 215 U.S. at 96). See generally SUTHERLAND, *supra* note 3, at 480 (describing rules of statutory construction from which principle of severability derives).

235. In contrast to the innumerable federal cases involving severability clauses, there have been very few cases in which a nonseverability clause was present. See *supra* note 203 and accompanying text. Presumably, one could argue that the legislature includes a severability clause when it wants a statute to be severable, but I am not aware of any instance in which the failure to include a severability clause was purposeful. The Court was right when it said in *Alaska Airlines* that "[i]n the absence of a severability clause . . . Congress' silence is just that—silence—and does not raise a presumption against severability." 480 U.S. at 686.

236. See *Field v. Clark*, 143 U.S. 649, 696-97 (1892) ("Unless it be impossible to avoid it, a general revenue statute should never be declared inoperable in all its parts because a particular

tional restrictions on its power, it is often apparent that the legislature intended a statute to remain operative to the extent constitutionally permissible.<sup>237</sup> Moreover, the way Congress writes legislation implies that it normally expects statutes to be severable. Congress' proclivity to enact multititle, omnibus acts covering a host of matters supports the presumption that Congress does not intend the invalidation of one part of a statute to invalidate the entire act.<sup>238</sup>

The contrary empirical argument for a rule favoring nonseverability is that most legislation is a bundle of compromises, so that the legislature generally prefers all or nothing in order to prevent the *quid* from being separated from the *quo*.<sup>239</sup> Certainly, there are instances in which severance of an unconstitutional statutory provision threatens the result achieved during the drafting of a statute. Legislative vetoes are the most prominent example. Many have argued that when Congress delegates power to the executive but establishes a legislative veto to allow further legislative review of the executive use of that power, the invalidation of the veto without also invalidating the delegation upsets the compromise.<sup>240</sup> Likewise, the

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part relating to a distinct subject may be invalid."); Hayes, *supra* note 3, at 142 ("[I]t is reasonable to suppose that the legislature meant [revenue] laws to operate as fully as might be possible."). Attorney General Mitchell expressed a contrary view in 37 Op. Att'y Gen. 56, 66 (1933), where he wrote that "[i]f the Congress makes an appropriation attaching to it an invalid condition, we would hardly be justified in rejecting the condition as void and treating the appropriation as available. The safe course is to treat the two as inseparable." *Id.* at 66.

237. For severability decisions holding capital punishment provisions severable, see *United States v. Jackson*, 390 U.S. 570, 585-91 (1968); *People v. District Court*, 834 P.2d 181, 190 (Colo. 1992). Similarly, with some exceptions, courts have held abortion statutes severable. See *Planned Parenthood v. Casey*, 978 F.2d 74, 76-78 (3d Cir. 1992); *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369-70 (9th Cir. 1992); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir. 1985), *aff'd*, 484 U.S. 171 (1987). But see *Planned Parenthood v. Danforth*, 428 U.S. 52, 83-84 (1976); *Ragsdale v. Turnock*, 841 F.2d 1358, 1375 (9th Cir. 1988), *appeal dismissed*, 112 S. Ct. 1309 (1992). For other decisions recognizing that the legislature wanted part of a statute to operate if the whole statute could not be given effect, see *New York v. United States*, 112 S. Ct. 2408, 2434 (1992); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 496, 506-07 (1985) ("It would be frivolous to suggest . . . that the Washington Legislature, if it could not proscribe materials that appealed to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute."); *General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1461 (2d Cir. 1991).

238. See *Senate Chadha Hearings*, *supra* note 6, at 41 (testimony of Michael Davidson).

239. Under this view, a fundamental purpose of severability analysis should be to preserve the bargains legislators made. See Note, *The Aftermath of Chadha*, *supra* note 6, at 1212-13, 1217, 1220, 1223. The argument thus draws on public choice theory, which sees the legislative process as a collection of individuals seeking to maximize their own interests. See Farber & Frickey, *supra* note 138, at 878.

240. This charge was leveled both against *Chadha*, see *House Chadha Hearings*, *supra* note 6, at 138 (statement of Rep. Berman) ("[I]t's hard for me to envision a statutory enactment that probably couldn't be viewed as fully operative, even though the legislative veto was struck down. It would just be a different kind of operation that Congress contemplated."); *Senate Chadha Hearings*, *supra* note 6, at 36 (testimony of Stanley Brand) ("[U]nder the judicial rubric of severabil-

dissent in *Ontario Hockey Association* argued that conditioning the general prohibition on sex discrimination by restricting its application to amateur hockey was an essential part of the legislative compromise.<sup>241</sup>

The furor provoked by *Chadha*, however, suggests that legislative vetoes and other provisions that are essential to the legislative bargain are the exception, not the rule. The courts have been holding statutes severable with increasing regularity for years, and no one has objected. Fashioning a severability rule to accommodate these exceptional cases would likely provoke a similar outcry as soon as the invalidity of an insignificant part of a continuing appropriations statute, or an agency's authorization statute, caused the whole to fall. The relationship of most statutory provisions points toward severability, rather than nonseverability.<sup>242</sup>

## 2. What Kind of Rule Favoring Severability?

The Court's recent statutory construction cases suggest two types of general rules in the severability context: a presumption of severability or a clear statement rule. A presumption of severability would impose either the burden of proof or the burden of persuasion on the advocates of nonseverability.<sup>243</sup> If the legislature's actual intent regarding severability should be

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ity, the congressional quid goes the way of all flesh, while the unreviewable executive quid remains intact."), and against *Alaska Airlines*; see Eskridge & Ferejohn, *supra* note 9, at 558-59 (arguing that Congress would not have enacted the statute absent the legislative veto and that the Court separated the *quid* from the *quo*); *id.* at 563 (arguing that *Chadha*, *Alaska Airlines* and *Chevron* reversed congressional expectations in striking statutory deals).

241. *In re Blainey & Ontario Mackey Ass'n*, 26 D.L.R.4th 728, 753 (1986).

242. Professors Benno Schmidt and Alexander Bickel offered several additional justifications for a rule favoring nonseverability. Defending the rule applied by the Court in *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 133-38 (1913), which held that a federal civil rights act could not be applied in territories because such an application was nonseverable from the unconstitutional application in states, they argued that the rule was "highly deferential, because it reduced the element of judgment to virtually nothing." ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921* 772 (1984). Schmidt and Bickel further endorsed the *Butts* rule as "promot[ing] fairness to those who might be caught in the tattered remains of a torn statutory web, predictability for the legal system, tidiness in the statute books, and continuing legislative assessment of the costs and benefits of particular legislative policies." *Id.* at 774. Of course, a rule that statutes are always severable would achieve similar results. For example, the legislature's ability to "correct" a court's severability decision has been used as a justification for a rule favoring severability. See Note, *Severability*, *supra* note 6, at 1196 (arguing for the general rule that favoring severability is appropriate because "[i]f Congress decides that the statute should not survive without its [legislative] veto provision, Congress is free to repeal the statute"); see also *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 685 (1895) (Harlan, J., dissenting) (observing that new legislation might be enacted to ameliorate any harsh effects of enforcing only a portion of a statute).

243. A burden of proof is "the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause." BLACK'S LAW DICTIONARY 196 (6th ed. 1990). A party has the burden of persuasion when "[t]he onus [is] on the party with the

decisive, then the amount of evidence required to demonstrate that the legislature intended nonseverability need not be great. Such evidence could be gleaned from the statute's structure, purpose, or history. Where there is no evidence of legislative intent regarding severability—as is often the case—then the statute would be held severable because of the failure to produce any evidence of nonseverability necessary to satisfy the burden the presumption of severability imposes. Thus, a general presumption of severability that imposed a burden of proof or persuasion would often be dispositive for a court.<sup>244</sup> It would also instruct the legislature about what to expect if it fails to include a severability or nonseverability clause in the statute.

But a presumption of severability constructed along these lines suffers from a critical weakness. A presumption may be overcome by evidence that the legislature actually intended a statute to be nonseverable, thus necessitating an examination of a statute's structure, purpose, and legislative history for evidence of the statute's severability. Because these sources are frequently subject to conflicting interpretations, and because in many instances the legislature probably never considered the issue, the undertaking remains somewhat speculative. Defining what kind of evidence, and how much of it, would be necessary to overcome a general presumption of severability is a difficult task. What would the court in *Ontario Hockey Association* need to know, for example, in order to overcome a presumption that the Ontario legislature intended the exception for amateur sports to be severable from the general prohibition on sex discrimination?<sup>245</sup> The proclivity of courts to read the same evidence in different ways suggests that a presumption may not eliminate the guesswork from deciding severability.

The creation of a clear statement rule for severability would avoid any need to speculate about legislative intent or to consult these frequently inconclusive sources.<sup>246</sup> A clear statement rule would treat all statutory pro-

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burden of proof to convince the trier of fact of all elements of his case." *Id.* As explained in the text, however, neither rule would achieve the results desired here.

244. As one writer observed, "[i]f any presumption is recognized, this may be of prime importance since there may be little to indicate legislative intent . . ." Hayes, *supra* note 2, at 140.

245. See *supra* notes 26, 216-23 and accompanying text.

246. Eskridge and Frickey contrast "presumptions" and "clear statement rules" as follows:

"Presumptions" of interpretation are general policies the Court will "presume" Congress intends to incorporate into statutes. Presumptions can be rebutted by persuasive arguments that the statutory text, legislative history, or purpose is inconsistent with the presumptions. "Clear statement rules" require a "clear statement" on the face of the statute to rebut a policy presumption the Court has created.

Eskridge & Frickey, *supra* note 145, at 595 n.4. They identify another category that they label "super-strong clear statement rules," which they say "seem to require very specifically targeted 'clear statements' on the face of the statute." *Id.* Because the distinction between "super-strong" clear statement rules and "ordinary" clear statement rules makes little difference in the context of

visions as severable unless the legislature clearly states in the text of the statute its intention that a statutory provision is nonseverable. Because a clear statement rule "foreclose[s] inquiry into extrinsic guides of interpretation,"<sup>247</sup> it would eliminate any need to glean evidence from the structure, purpose, or history of a statute to inform a prediction about the legislature's intent regarding severability. Any confusion about whether such evidence is sufficient to overcome an indefinite presumption is thus avoided.

The Court has increasingly relied upon judicially established clear statement rules as part of its approach to statutory construction.<sup>248</sup> The Court has declared this necessary for "the protection of weighty and constant values, be they constitutional, or otherwise."<sup>249</sup> Such values have included the immunity of states from suit under the Eleventh Amendment,<sup>250</sup> "protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord,"<sup>251</sup> and "constraining judicial discretion in the interpretation of the laws."<sup>252</sup> In addition, Professors Eskridge and Frickey have outlined a theory of how clear statement rules can operate to "articulate and protect underenforced constitutional norms."<sup>253</sup>

Severability fits within this framework. Requiring the legislature to state clearly its intention that a statute be treated as nonseverable would promote the general principles listed above, counseling caution in invalidating any part of a statute. These values are akin to those the Court has protected with other clear statement rules. Although it can be debated

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severability, in which a statute either contains a provision directly aimed at severability or it does not, this Article refers only to "clear statement rules."

247. *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1238 (1991) (Marshall, J., dissenting).

248. For a comprehensive description of the development of the Court's jurisprudence of clear statement rules, see Eskridge & Frickey, *supra* note 145, at 593. They observe that "consistent with its interest in textualism as its dominant interpretive methodology, the current Court emphasizes clear statement rules much more than presumptions." *Id.* at 597.

249. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2170 (1991) (citations omitted). Generally, "[i]n traditionally sensitive areas, . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). Examples of clear statement rules the Court has established include *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992) (requiring clear statement of waiver of sovereign immunity); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403 (1991) (requiring clear statement of congressional regulation of core state functions); *Arabian Am. Oil Co.*, 111 S. Ct. at 1230 (requiring clear statement of extraterritorial effect of a statute); and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (requiring clear statement of abrogation of state sovereign immunity).

250. See *Atascadero State Hosp.*, 473 U.S. at 243.

251. *Arabian Am. Oil Co.*, 111 S. Ct. at 1230.

252. *Astoria Federal Sav. & Loan Ass'n*, 111 S. Ct. at 2170 (describing basis for clear statement rule against repeals by implication established by *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

253. Eskridge & Frickey, *supra* note 145, at 631.

whether these values are "underenforced" by the Court today, the mixed judicial record in heeding the legislature's own attempts to assure severability counsels that the Court would be justified in adopting a clear statement rule for severability. Also, severability presents the same kind of "yes or no" question answered by other clear statement rules that ask whether sovereign immunity has been waived or whether a statute should apply extraterritorially.

Admittedly, the Court's creation of clear statement rules has been subject to criticism. Critics have questioned the Court's presumed authority to require an extraordinary expression of legislative intent in those areas that the Court finds special.<sup>254</sup> As Justice Marshall noted, "[c]lear statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them."<sup>255</sup> Although there is a strong argument that the values protected by a clear statement rule for severability justify such a rule, a still better way to decide severability remains.

The legislature can create a clear statement rule by enacting a general severability clause providing that all statutes should be treated as severable unless they contain a nonseverability clause specifically stating otherwise. Indeed, Maryland<sup>256</sup> and Minnesota<sup>257</sup> have provisions similar to this,

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254. For an account of the countermajoritarian concerns raised by the establishment of clear statement rules by the Court, see *id.* at 636-40. One of these concerns does not apply to severability: that a clear statement rule "make[s] it quite hard for Congress to express its expectations even when it is focusing on the issue." *Id.* at 638. It would be easy for Congress to draft a nonseverability clause that would overcome a clear statement rule for severability. Other concerns about clear statement rules are expressed in Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 545 (1983) ("[T]he 'clear statement' principle usually fails as a useful tool of construction because it cannot demonstrate why the legislature would have wanted the court to hesitate just because the subject matter of the law is 'sensitive.' Likely it thinks that making hard decisions in sensitive areas is what courts are for." (footnote omitted)) and Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 835 (1991) (considering the argument that clear statement rules "describe a dysfunctionally 'acontextual' view of the power of language").

255. *Arabian Am. Oil Co.*, 111 S. Ct. at 1238 (Marshall, J., dissenting).

256. Maryland's statute provides:

*The provisions of all statutes enacted after July 1, 1973, are severable unless the statute specifically provides that its provisions are not severable. The finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute, unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent.*

MD. ANN. CODE art. 1, § 23 (1992) (emphasis added). For a decision following this clause, see *State v. Prince Georgians for Glendening*, 617 A.2d 586, 589-90 (Md. 1993).

257. Minnesota's statute provides:

*Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be*

although both statutes are conditioned in a manner that undercuts their force.<sup>258</sup> Maryland's statute has the further virtue of explicitly stating that it applies only prospectively. Alas, general severability clauses have suffered from even greater neglect than severability clauses contained in specific statutes.<sup>259</sup> For example, in *Muller v. Curran*, the court refused to believe that the legislature intended severance despite Maryland's clear statement rule *and* a specific severability clause in the statute.<sup>260</sup> But if a general severability clause like Maryland's or Minnesota's were construed according to its plain meaning, as advocated here, such a provision would operate as a legislatively established clear statement rule in favor of severability. If the Ontario legislature had enacted such a provision, then section

unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining provisions without the valid one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and incapable of being executed in accordance with legislative intent.

MINN. STAT. ANN. § 645.20 (West 1992) (emphasis added). For decisions of the Minnesota courts applying this clause, see *New Creative Enters., Inc. v. Dick Hume & Assocs. Inc.*, 494 N.W.2d 508, 512 (Minn. Ct. App. 1993); *Schleck v. State*, 442 N.W.2d 359, 361-62 (Minn. Ct. App. 1989).

258. The general severability clause recommended by this Article would include only the first sentence of each provision. It would not include the language in the balance of each provision inviting a court to judge whether severance can be accomplished "in accordance with legislative intent." Rather, the only situation in which a plain statutory directive would not control would be if the application of the general severability clause would produce an absurd result. See *supra* note 150 and accompanying text.

259. Alaska's general severability clause, for example, creates only "a weak presumption in favor of severability." *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992); accord *People ex rel. Chicago Bar Ass'n v. Illinois State Bd. of Elections*, 558 N.E.2d 89, 97 (Ill. 1990) (noting that general severability statutes carry less weight than severability clauses attached to specific statutes). Other general severability clauses are treated as merely creating a presumption of severability. See *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130, 136 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987) (construing 1 PA. CONS. STAT. ANN. § 1925 (Supp. 1986)); *Trade Waste Management Ass'n v. Hughey*, 780 F.2d 221, 231 (3d Cir. 1985) (construing N.J. STAT. ANN. 1:10 (West 1992)); *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110, 1118 (N.D. Ga. 1990) (construing GA. CODE ANN. § 1-1-3 (1990)).

260. 889 F.2d 54, 57 (4th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990). Likewise, Frickey ignores Minnesota's general severability clause in discussing the severability of an arguably unconstitutional delegation of power. He writes that

the Minnesota scheme makes it impossible to sort out the severability puzzle. There is no meaningful way to ascertain whether any Minnesota statute delegating rule-making authority would have passed without the LCRAR suspension authority lurking in the background, particularly since the Minnesota Legislature, like many state legislatures, prepares no formal legislative history.

Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1261 (1986) (footnote omitted). Frickey does not mention Minnesota's general severability provision, which should easily govern the case he described.



19(2) of the Human Rights Code (the exception for amateur sports) would be severable from section 1 (the general prohibition against sex discrimination) because the Code does not contain a specific nonseverability clause. Ascertaining the legislature's intent regarding severability would be that simple with a legislatively enacted clear statement rule.

## VI. CONCLUSION

The prevailing view toward severability is that the question of the severability of unconstitutional statutory provisions merits a different analysis of legislative intent. The thesis of this Article is that the issue of severability is no different than other questions of statutory construction. The practical differences between these approaches are not always great. Many severability cases are easy because most statutes are obviously severable. Therefore, it may not make a difference whether one examines the plain meaning of the statutory text or speculates about what the legislature would have done if it had anticipated the severability problem. Courts are thus able to reach the correct result in many cases when they employ the current test. The inadequacy of *Alaska Airlines* is not apparent until a difficult severability case, such as *Ontario Hockey Association*, arises, in which it is difficult to know what the legislature would have done. When a severability clause is viewed with indifference and the effect of any presumptions is unknown, and when the remaining sources of insight into legislative intent regarding severability produce only a guess about what the legislature would have done, the weakness of the *Alaska Airlines* test becomes evident.

The rule favoring severability that this Article proposes would provide an understandable baseline from which the legislature and the courts can decide severability questions. As Professor Cynthia Farina has written, "[T]he choice of interpretive model is ultimately a choice about allocating power, the power that results from ambiguity. When Congress has failed to speak clearly or comprehensively, who gets to decide what the law is?"<sup>261</sup> The lack of clear standards in the current test effectively vests that power in the courts. The rule advocated here would make the consequences of ambiguity certain—the statute is severable. By establishing a rule pursuant to which statutory provisions are deemed severable absent a specific legislative statement to the contrary, this proposal substitutes a coherent theory for the existing intuitive assumption that most statutes are severable. This is not to say, however, that the legislature should be discouraged from indicating that certain statutes are not severable. Some statutory provisions are the product of compromises that would be disrupted if one part was allowed to

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261. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 464 (1989).

stand as another part fell; such statutes should be nonseverable. The best way of assuring that result is to include a nonseverability clause in the statute itself.

In many respects, Chief Justice Hughes modeled the approach advocated here. Writing in dissent from the Court's finding of nonseverability in *Carter v. Carter Coal Co.*, he first explained that "[t]his is admittedly a question of statutory construction; and hence we must search for the intent of Congress. And in seeking that intent we should not fail to give full weight to what Congress itself has said upon the very point."<sup>262</sup> He then rejected the guesswork inherent in the Court's approach:

I do not think that the question of separability should be determined by trying to imagine what Congress would have done if certain provisions found to be invalid were excised. That, if taken broadly, would lead us into a realm of pure speculation. Who can tell amid the host of divisive influences playing upon the legislative body what its reaction would have been to a particular excision required by a finding of invalidity? The question does not call for speculation of that sort but rather for an inquiry whether the provisions are inseparable by virtue of inherent character. That is, when Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.<sup>263</sup>

Thus, he concluded that "the express provisions of the Act preclude such a finding of inseparability."<sup>264</sup>

The approach proposed by this Article goes a step further than Chief Justice Hughes because of the difficulty in deciding severability when no severability clause is present. A rule favoring severability, especially a clear statement rule, would guide both the courts and the legislatures in making decisions about severability. With such clear guidance, severability would no longer be a matter of speculation.

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262. 298 U.S. 238, 321 (1936) (Hughes, C.J., concurring in part and dissenting in part).

263. *Id.* at 321-22.

264. *Id.* Hughes also wrote that a severability clause "is a declaration which reverses the presumption of indivisibility and creates an opposite presumption." *Id.* at 321; *see also* *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938) ("[W]hen validity is in question, divisibility and not integration is the guiding principal.") The balance of his opinion and his other opinions demonstrate that he viewed a severability clause as doing much more than establishing a burden of persuasion. *See Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 389 (1935) (Hughes, C.J., dissenting), *overruled by Olsen v. Nebraska*, 313 U.S. 236 (1941); *Crowell v. Benson*, 285 U.S. 22, 62-63 (1932), *overruled by, Director, Office of Workers' Compensation Programs v. Perini N. River Assoc.*, 459 U.S. 297 (1983).

