

Severability of Statutes

TOM CAMPBELL*

Courts legislate when they engage in “severability analysis,” allowing part of a law to continue in force after having struck down other parts as unconstitutional. This is flawed for the same reason that the legislative veto and the executive line-item veto are flawed. All involve creating a legislative outcome without the joint approval of both houses and the executive. The practice derives from an analogy to contract enforcement, where a court will try to preserve part of a contract when the rest is unenforceable. However, the analogy is imperfect because Congress or the state legislature remains in a position to pass a new law, unlike the parties to a contract who might not be in a position to create a new bargain. No appeal to convenience should allow severability practice to continue, any more than it would have allowed the legislative veto to continue after INS v. Chadha. It is more respectful of a co-equal branch to invalidate an entire act than to create a result that was not passed by the legislature or signed by the executive. Even in the presence of a severability clause, it is not reasonable to infer that the legislature considered all possible permutations of a bill and approved them all, accepting that a court might strike down some clauses while allowing others to stand. Severability analysis has created systems the legislature never intended. The examples of campaign finance in Buckley v. Valeo and Sarbanes-Oxley last term in Free Enterprise Fund v. Public Company Accounting Oversight Board, are used to illustrate. Accordingly, when holding a provision of an act unconstitutional a reviewing court should strike down the entire act and allow the legislative and executive branches to craft whatever alternative they wish to adopt. This Article is the first commentary to call for the entire abolition, rather than some modification, of the severability process.

* Dean and Donald P. Kennedy Chair in Law, and Professor of Economics, Chapman University. United States Congressman, 1989–93 and 1995–2001. California State Senator, 1993–95. Professor of Law, Stanford University, 1987–2002. Associate Professor of Law, Stanford University, 1983–87. Bank of America Dean and Professor of Business, Haas School of Business, University of California, Berkeley, 2002–08 (with leave of absence 2004–05 to serve as Director of Finance, State of California). Visiting Professor of Law, and Presidential Distinguished Fellow, Chapman University, 2009–10.

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INTRODUCTION

When a court finds part of a statute unconstitutional, it often severs the rest of the bill, and allows what is left to continue to have force.¹ This is inappropriate. When a provision of a law is struck down, a reviewing court creates something new, something that was not approved by Congress or the state legislature, or signed by the President or a governor. Considering traditional separation of powers principles, the role of the court is fulfilled when it holds the provision unconstitutional and thus renders void the entire bill of which that unconstitutional provision was a part. When a court does anything more than that, it is legislating.²

1. See, e.g., *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 789–90 (E.D. Va. 2010) (holding that the “individual mandate” portion of the Patient Protection and Affordable Care Act, President Obama’s health care law, is unconstitutional and must be severed from the rest of the Act).

2. A similar issue arises when a court narrows the reach of a statute in order to preserve its

Accordingly, I call for the complete abolition of the severability doctrine. Over many years, scholars have proposed limitations on or expansions of severability doctrine.³ None has proposed eliminating the entire doctrine.⁴

constitutionality. Cases “paring down” federal statutes to avoid constitutional shoals are legion. These cases recognize that the court does not legislate, but instead respects the legislature, by preserving a statute through a limiting interpretation. See *Skilling v. United States*, 130 S. Ct. 2896, 2931 & n.43 (2010); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997). The Court contends that when it “narrowly construe[s] a broadly worded Act of Congress,” it does not “create a common law crime.” *Id.* Justice Scalia’s separate opinion in *Skilling* disagrees with this contention, noting that such narrowing of a criminal statute is, indeed, legislating: “The Court strikes a pose of judicial humility in proclaiming that our task is ‘not to destroy the Act . . . but to construe it’ But in transforming the prohibition of ‘honest-services fraud’ into a prohibition of ‘bribery and kick-backs’ it is wielding a power we long ago abjured: the power to define new federal crimes.” *Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring in part and concurring in the judgment) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). However, a limiting construction is slightly more defensible against the charge that a court is legislating, than is severing a clause and letting the rest stand. The court can assert that it is, in fact, only interpreting a series of words, not striking them.

3. For authors proposing limitations on the doctrine, see, for example, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 293 (1994) (arguing that a default presumption of inseverability is preferable); Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 919–20 (1997) (arguing that inseverability clauses should be inviolably respected, though even with such a rule, severability clauses might occasionally be ignored); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 643–45 (2008) (arguing that severability should be limited not by an inquiry into legislative intent, but an analysis of whether the court would be engaged too much in lawmaking); Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 ALB. L. REV. 997, 1025–26 (2005) (arguing that inseverability clauses should not be honored when they are adopted in an attempt to influence a reviewing court); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 45–46 (1995) (arguing that severability should be decided purely on textualism, that a severability or inseverability clause should be followed literally, and that there should be a presumption of severability otherwise). For authors arguing for expansions of the doctrine, see, for example, John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 206 (1993) (arguing that in the absence of a clear statement of inseverability in the statute, severability should be assumed); Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 271–72 (2004) (making an argument similar to Movsesian’s); Glenn Chatmas Smith, *From Unnecessary Surgery to Plastic Surgery: A New Approach to the Legislative Veto Severability Cases*, 24 HARV. J. ON LEGIS. 397, 461–63 (1987) (arguing that courts should not stop with simply severing unconstitutional sections of a bill, but should reconstruct a law in order to vindicate legislative will, even when this means adding new language); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name*, 21 HARV. J. ON LEGIS. 1, 24–26 (1984) (arguing that severability should be understood as a reflection of standing jurisprudence, because the law itself continues in force, but a ruling that part of the law is unconstitutional denies standing to one seeking to enforce that provision to her or his benefit); C. Vered Jona, Note, *Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation*, 76 GEO. WASH. L. REV. 698, 713–14 (2008) (arguing that severability clauses should not be honored where there is reason to believe Congress or the legislature knew it was acting unconstitutionally); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1193–95 (1984) (arguing that in aftermath of *INS v. Chadha*, severability analysis should focus on preserving policy outcomes rather than legislative history). Professor Mark Movsesian offers a good compilation of the state of the legal commentary:

[E]stablished doctrine on the severability of unconstitutional statutory provisions has drawn criticism on almost every conceivable basis. Commentators have condemned severability analysis as too malleable and as too rigid; as encouraging judicial overreaching and as encouraging judicial abdication. They have criticized the doctrine’s reliance on legislative intent and its disregard of legislative intent; its excessive attention to political concerns and

I propose now is the time to take such action, and base such a proposal on fundamental separation of powers principles.

I. WHEN THE COURT SEVERES A PORTION OF A STATUTE, IT IS
EFFECTIVELY ACTING AS A LEGISLATURE⁵

The Supreme Court has held that it is impermissible for Congress, through the legislative veto, to create a legislative result other than one which passes both houses and is signed by the President: “There is no provision allowing Congress to . . . amend laws by other than legislative means pursuant to Art. I.”⁶ The Court has also held that it is impermissible for the President, through use of line-item veto legislation, to create a new legislative result other than one that passed both houses and was signed by the President: “If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature.”⁷ Yet making something into law that was not

its inattention to political concerns; its lack of any coherent explanation.

Movesian, *supra*, at 41–42 (footnotes omitted).

4. Lars Noah, *The Executive Line Item Veto and the Judicial Power to Sever: What's the Difference?*, 56 WASH. & LEE L. REV. 235, 241 (1999) (“Although commentators have criticized the Supreme Court’s approach to deciding the severability of particular provisions, apparently no one has suggested that the judiciary’s assertion of that power violates Article I’s ‘finely wrought’ procedures for legislating.”).

5. This Article deals with severability, but it suggests an application to equal protection analysis as well. When striking down a statute that affords benefits based on an impermissible classification, a court may choose to extend the benefit to all or deny it to all. *See Dorf, supra* note 3, at 251–52. The Supreme Court has arrogated to itself the right to choose which it will do. *See Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (“Although the choice between extension and nullification is within the constitutional competence of a federal district court, and ordinarily extension, rather than nullification, is the proper course, the court should not, of course, use its remedial powers to circumvent the intent of the legislature, and should therefore measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.” (internal quotation marks and citations omitted)). In extending a benefit to a class of persons to whom Congress or a state legislature did not, the court is acting legislatively. In striking down a benefit awarded to one class because it was not equally offered to another class, the court is acting judicially. Applying the principles of *Chadha* and *Clinton*, a different legislative outcome has resulted from what Congress or the legislature passed when a benefit is extended to a group the legislature excluded.

6. *INS v. Chadha*, 462 U.S. 919, 954 n.18 (1983).

7. *Clinton v. City of N. Y.*, 524 U.S. 417, 448 (1998). As the Court explained:

[O]ur decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Balanced Budget Act of 1997 is a 500-page document that became “Public Law 105-33” after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may “become a law.” Art. I, § 7. If one paragraph of that text had been omitted at any one of those three stages, Public Law 105-33 would not have been validly enacted. . . . Something that might be known as “Public Law 105-33 as modified by the President” may or may not be desirable, but it is surely not a document that

precisely the text that had been approved by Congress and signed by the President is exactly what a court does when it exercises its severability authority.⁸

Suppose Congress had, reflecting a desire to curb the federal deficit, cut all federal employees' salaries in an annual appropriation bill. Upon review, the Supreme Court would hold unconstitutional, according to Article III, Section 1,⁹ the line item in that appropriation bill paying federal judges less than the previous year. Using severability analysis, the Court would then allow the rest of the appropriations bill to go ahead. Suppose the President had, before the line-item veto law was held unconstitutional, done the same and vetoed out the line for federal judges because he thought it was unconstitutional. Applying the logic of the Court in *Clinton v. City of New York*, the President could not do so because to do so "would authorize the President to create a different law—one whose text was not voted on by either House of Congress."¹⁰ It is inconsistent to conclude that the President cannot create a different legislative outcome by a line-item veto, and that Congress cannot create a different legislative outcome by a one-house veto,¹¹ but that the Court can using severability analysis. All three processes amend in the same way the bill passed by Congress and signed by the President.¹²

may "become a law" pursuant to the procedures designed by the Framers of Article I, §7, of the Constitution.

Id. at 448–49.

8. I emphasize the structural flaw of severability: it is lawmaking because it leads to a legislative result. Others have observed the comparative disadvantage flaw, which is a different criticism, though one I also share: a court is institutionally less advantaged to write laws than is a legislature. *See, e.g., Gans, supra* note 3, at 663 ("When courts rewrite statutes via severance, they do so without the ability to investigate the problem and find facts in the ways legislatures can, without the power to consider the full range of policy choices that might be open to the legislature, and without any accountability to or understanding of the wishes of the electorate. All of this should come as little surprise. Judges, in our constitutional system, are not meant to write laws. Yet, severability doctrine gives them this role."). Professor Lars Noah has observed the logical consistency between the President's asserted line-item veto power, which is granted in statute, and the Court's use of severability; but he uses that identity to criticize the Court's opinion in *Clinton*, rather than the doctrine of severability. Noah, *supra* note 3, at 241.

9. U.S. CONST. art. III, § 1 ("The Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

10. *Clinton*, 524 U.S. at 448.

11. *Chadha*, 462 U.S. at 956–58.

12. A possible distinction between the line-item veto and a court engaged in severability analysis is that in the first instance, Congress was attempting to give policy-making authority to the President, and in the latter, a court was only doing what it had to do under the Constitution. That would be an important distinction if *Clinton* had been decided on the grounds of the nondelegation doctrine: namely, that Congress was attempting to delegate legislative authority without any reasonable guidelines. However, *Clinton* was not decided on the basis of the nondelegation doctrine. It was decided, rather, on the basis cited in the text of this Article: that a legislative result was caused by a process other than the one prescribed by the Constitution. *See id.* at 447–48. That rationale applies equally to a legislative result caused by a President or by a court in selecting only part of a statute to continue in force.

The proper outcome in the hypothetical I present is for the Supreme Court to strike down the appropriation bill for federal employees in its entirety. Congress would then be free to pass a new appropriation, without the line lowering pay for federal judges. Perhaps Congress would not wish to be frugal in the case of its own members' salaries if federal judges were not included in the sacrifice—a point that anticipates the next Part regarding whether severability is really respectful of legislative intent.¹³ Putting to one side what Congress might have done, what is plain is that creating an appropriation bill excluding the diminution in judicial salaries was not what Congress *did* do. To allow an appropriation bill to become law for federal employees without that provision is to amend that federal law. If Congress cannot amend a law except by new legislation,¹⁴ and the President cannot amend a law except by signing new legislation,¹⁵ neither can the courts.

A recent Supreme Court decision displays with great clarity the legislative nature of a severability decision. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,¹⁶ the Court struck down the portion of Sarbanes-Oxley¹⁷ that created the Public Company Accounting Oversight Board (“PCAOB”).¹⁸ Members of the PCAOB were to be chosen by the Securities and Exchange Commission (SEC), but were not removable except by the SEC, and even then removable only for cause.¹⁹ The Court saw a constitutional infirmity in that the PCAOB exercised executive authority, yet its members were not directly responsible to the President.²⁰ The combination of three parts of the bill caused the flaw: the PCAOB members were not direct Presidential appointees, they could only be removed for cause, and they exercised executive authority.²¹ It was thus up to the Court to decide which clause would be struck down to cure the defect. The Court reasoned:

It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be “Officers of the United States.” Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel.²²

13. See *infra* Part II.D.

14. See *Chadha*, 462 U.S. at 956–58.

15. See *Clinton*, 524 U.S. at 448.

16. 130 S. Ct. 3138 (2010).

17. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of U.S.C.).

18. *Free Enter. Fund*, 130 S. Ct. at 3154.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 3162.

Instead, the Court chose another alternative: to strike down the clause protecting PCAOB members from being removed except for cause.²³ It could just as well have struck down any provision giving the PCAOB authority to exercise an executive function, leaving it with only the legislative function that long-established precedent has found acceptable for Congress to delegate to an independent agency.²⁴ Either way, the constitutional problem would have been fixed. The Court claimed to be avoiding the use of legislative power: “[S]uch editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward.”²⁵

The Court thus admitted that alternative solutions would be too much for the judiciary, and belong instead with the legislative branch. What the Court missed is that there is no difference between what it says is reserved to the legislative branch and what it actually did in the case. Choosing to strike down one clause of a bill, here the specification of executive functions for the PCAOB, is as much of a legislative act by the Court as would be striking down another, such as the protection of PCAOB members from being dismissed except for cause. Whichever provision it struck down, the Court “amended” an act of Congress—to use the characterization the Court found condemnable in *INS v. Chadha*²⁶—and thereby “passed” a new law that Congress had never enacted.²⁷ The Court’s approach to curing unconstitutionality in the statute in *Free Enterprise* is illustrative of a problem that can recur whenever the unconstitutionality of a law results from the interplay of

23. *Id.* at 3151.

24. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935).

25. *Free Enter. Fund*, 130 S. Ct. at 3162. This statement immediately follows a fourth alternative, “Or the Board members could in future be made removable by the President, for good cause or at will.” *Id.* The Court stated that this hypothetical alternative would constitute more “editorial freedom” than “belongs to the Legislature” than what it did in striking down the provision limiting removal only to cause. *Id.* There is, indeed, a difference between the Court (1) striking down the protection of PCAOB members from being fired except for cause (which the Court did) and (2) striking out the executive powers of PCAOB members (which it mused it could have done), on the one hand; and (3) adding a provision that PCAOB members were to be appointed directly by the President, on the other hand. The first two require only striking out provisions of the bill that passed Congress; the third requires writing new words. My argument is fundamentally that in choosing between these approaches, the Court is legislating; and that remains true whichever option is followed.

26. 462 U.S. 919, 953 (1983).

27. It is immaterial for this part of my analysis to speculate whether Congress would have passed the PCAOB provisions of Sarbanes-Oxley without making the PCAOB members free from arbitrary dismissal. I deal with the task of trying to decide what Congress would have done had it known part of a bill would be struck down in the next Part of this Article. However, it’s useful to note this concern at this point. In the context of the Enron and other scandals, it was clear Congress was not pleased with the existing level of oversight exercised by the SEC, and wanted to create an independent board incapable of being influenced by political appointees. See *infra* note 131. The Court assumes much when it concludes that Congress would have gone ahead with a PCAOB knowing it would have to be a creature of, and its members dismissible at will by, the SEC.

several different clauses. The unconstitutionality can be cured by removing any of them, but it is up to the court to choose which one. Choosing between alternative versions of a statute is legislating. Striking down the law, and returning it to the Congress or state legislature, is not.

Professor Laurence Tribe recognized this problem a quarter century ago:

When a severability clause is regarded as an instruction to judges that they ought to act *as if* Congress has enacted a . . . law severed from a portion subsequently held to be unconstitutional . . . the clause seems nothing more than an invitation for courts to disregard the absence of any actual enactment of the severed law in accord with Article I's strictures. The constitutional safeguards of bicameralism and presentment are thereby abandoned, and a new law is created by judicial fiat.²⁸

Tribe found this argument initially persuasive. By severing some parts of a bill and allowing the rest to stand, a court has created a new law that was not passed by Congress or signed by the President: "If the debate is conducted in these terms, the anti-severability position seems the winner by a wide margin."²⁹ He offers an ingenious solution with which, nevertheless, I disagree. He proposes that severability analysis is really not striking down part of a law and leaving the rest. Rather, a court should uphold the Constitution and the entirety of the law, and, as to a party with proper standing, apply both together.³⁰ A party who is not affected by the unconstitutional part continues to receive the benefit or burden of the statute because that party lacks standing to raise the challenge to the unconstitutional part.³¹ This approach, Tribe maintains, allows the court to escape from the difficult and paradoxical quest of finding out what Congress had intended, when Congress passed a different law.³² Under Tribe's approach, it is immaterial what Congress might have intended.³³

Nevertheless, Tribe appeared uneasy with his result. He offered the following amendment to his rule: "[I]f a fair reading of the law is that it cannot have been meant to apply *at all* once certain parts or applications had been excised, then ordinary canons of interpretation would leave the law a nullity once such partial invalidity had been decreed."³⁴ Tribe opts for a strong presumption of severability: "[O]nly the clearest evidence that a majority of both Houses of Congress actually *meant to choose self-*

28. Tribe, *supra* note 3, at 22 (footnote omitted).

29. *Id.* at 23.

30. *Id.* at 25.

31. *Id.*

32. *Id.* at 26.

33. *Id.* at 26 ("Under the approach here proposed, inseverability would *never* follow from the mere prospect that the legislature might not have enacted the law at all if it had known that the offending aspects or applications of that law would not survive.")

34. *Id.* at 26.

destruction over severability should suffice to yield an interpretation of inseverability.”³⁵ This position, however, undoes Tribe’s entire argument about standing. If a party is not touched by the unconstitutional part of a statute,³⁶ then that party’s rights should not be affected by the existence of the unconstitutional part—even if there is the “clearest evidence that a majority of both Houses of Congress actually” would have preferred self-destruction of the statute. The party lacks standing; end of argument.

Assuming Tribe had not made this retreat, and maintained his position on pure standing, he would have had a more consistent argument, but one that would nonetheless fail. A violation of the requirement of bicameralism and presentment is not lessened by the absence of a party with standing to challenge it. Tribe would allow a law to work differently in practice than was intended, due to a legislative act not passed by both houses of Congress and presented to the President. That was the Court’s reasoning in *Chadha*.³⁷ That the *Chadha* Court nevertheless severed the legislative veto provision, and allowed the rest of the Immigration Act to apply, thus creating a law that was not passed by both houses nor signed by the President, created an irony not lost on Tribe.³⁸

Recently, Professor Luke Meier asked,

If the *Clinton* and *Chadha* decisions apply with equal force to the courts, does it follow that the courts must determine Congress’s power to pass the statute only as it was passed by Congress and signed by the President? . . . If *Clinton* and *Chadha* apply to the judiciary, was not the Court required to consider the bill wholly, as it was passed and signed into law?³⁹

Meier answers his question in the context of whether as-applied challenges, instead of facial challenges, to statutes should be allowed,⁴⁰ but his answer is entirely analogous to the severability discussion in this Article. Indeed, Meier explicitly invokes Professor Gillian Metzger’s treatment of “statutory severability” and “application severability”⁴¹ in arriving at his answer that facial challenges alone should apply.⁴² An entire statute should be struck down where the challenge is to the power of Congress to pass a law (as opposed to a possible violation of an individual right), or where the challenge is to certain applications of a

35. *Id.* at 27 n.118.

36. Tribe uses the example, drawn from *Chadha*, of a one-house legislative veto that is not actually exercised. *Id.* at 24.

37. *INS v. Chadha*, 462 U.S. 919, 956–58 (1983).

38. Tribe, *supra* note 3, at 22–23.

39. Luke Meier, *Facial Challenges and Separation of Powers*, 85 *IND. L.J.* 1557, 1591 (2010).

40. *Id.* at 1558.

41. Gillian E. Metzger, *Facial Challenges and Federalism*, 105 *COLUM. L. REV.* 873, 880, 887–88 (2005).

42. Meier, *supra*, note 39, at 1571.

law rather than a specific clause in the bill.⁴³ Meier attempts to rescue severability treatment in those instances where a specific clause in a bill is held to be unconstitutional and any instance where a law is not alleged to exceed congressional promulgation authority.⁴⁴ His effort at limiting the logical force of *Chadha* and *Clinton* in this way is not convincing, though his effort at extending the logic of those cases to the judicial branch is irrefutable. He appears motivated, at least in part, by the desire to claim that his thesis, “limited to the congressional power context, would actually necessitate the overruling of only a very few Supreme Court cases.”⁴⁵ I would rather see the Court consistently follow the logic of its opinions in *Chadha* and *Clinton*.

Considering the two distinctions made by Meier and Metzger, neither compel the continuance of severability in any context. If a statute reaches different kinds of behavior or groups of persons, and is unconstitutional insofar as it reaches one specific kind of behavior or group of persons, when a court allows the statute to continue in force it ignores the possible legislative bargain that might very well have led to the legislation being passed in the first place. Cutting judges salaries may have been an essential part of the bargain to get the votes to cut legislators’ and executive branch members’ salaries. As a matter of the legislative bargain, a statute saying “all federal employees’ salaries are cut by ten percent” is identical to one that says: “The following groups of federal employees shall have their salaries cut by ten percent: (a) legislative branch; (b) executive branch; and (c) judicial branch.” As above, I can put aside the legislative bargain argument, however, and present the *Chadha/Clinton* syllogism more succinctly: this is a legislative result but it (the final outcome after the court has ruled) did not pass both houses of Congress and receive the President’s signature.

As to the second distinction, whether a statute is unconstitutional because it exceeds congressional power or because it violates individual rights, it should be immediately clear that the *Chadha/Clinton* syllogism is agnostic as to the source of the unconstitutionality. Indeed, in the foregoing example, I confound the two possible sources of unconstitutionality: the law is unconstitutional because it applies to one group, judges, as to which the Congress lacks the authority to lower pay.

Lastly, consider Metzger’s distinction, once more in the context of an as-applied and facial constitutional challenge. She upholds the availability of as-applied challenges, or, as the context of this Article would say, severability, in both cases: where a law is unconstitutional in some applications, and where a law is unconstitutional in some specific

43. *Id.* at 1596.

44. *Id.* at 1597.

45. *Id.*

clause.⁴⁶ Yet, as Meier notes,⁴⁷ Metzger expresses strong reservations about severability in the former instance.⁴⁸ “Application severability” is no different from “statutory severability” when measured under the *Chadha/Clinton* lens. In both instances, a legislative result is reached that Congress did not pass.

II. TRADITIONAL DEFENSES OF SEVERABILITY FAIL TO JUSTIFY ITS CONTINUED USE

The various arguments for preserving severability practice are unavailing. They are: (1) that Congress (often) wants the rest of a bill to continue in force; (2) that severability analysis is no different from the traditional common law practice of reformation of a contract when a term is unenforceable; (3) that it would jeopardize the efficient operation of government to enjoin entire bills when only part is unconstitutional; and (4) that it is disrespectful to a co-equal branch for a court to stop the effectiveness of all of a bill when part is unconstitutional and the rest can be made to work.

A. ACQUIESCING TO CONGRESS’ SUPPOSED DESIRE TO RETAIN THE REMAINDER OF THE LAW WHEN A PORTION IS HELD UNCONSTITUTIONAL IS IMPROPER

The Supreme Court held in *Alaska Airlines, Inc. v. Brock* that “[t]he final test, for legislative veto[e]s as well as for other provisions, is the traditional one: the unconstitutional provision must be severed” and the rest of the bill allowed to stand, “unless the statute created in its absence is legislation that Congress would not have enacted.”⁴⁹

In deciding whether Congress would have passed the law without the unconstitutional part, the court considers the legislative bargain as well as the structure of the surviving law.⁵⁰ While a court might lay decent claim to being able to evaluate whether a statute is capable of functioning with or without a particular provision,⁵¹ the court can have no

46. Metzger, *supra* note 41, at 931–32.

47. Meier, *supra* note 39, at 1592.

48. Metzger, *supra* note 41, at 885 (“Intuitively, application severability may have been a judicial endeavor of more dubious legitimacy, as a court must draw lines not found in the statute’s language.”).

49. 480 U.S. 678, 685 (1987).

50. *See id.* (“Thus, it is not only appropriate to evaluate the importance of the veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a veto. Some delegations of power to the Executive or to an independent agency may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism.”).

51. A functional analysis of whether the remaining parts of a bill create a coherent scheme is often undertaken by a court in severability analysis. *See id.* at 684. “Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently.” *Id.* However, this analysis is only a way of getting at the fundamental question of whether Congress or the state legislature would have passed

real knowledge of which bargains were essential to arrive at a final legislative product. Yet that is what it must presume to know in order to make the severability determination.⁵² Even if the legislative history were pellucid regarding a particular bill,⁵³ it would not record the quid pro quo reached by leading legislators between bills.⁵⁴ Limiting consideration to the legislative history of a single bill, even supposing the court could actually find a quid pro quo, it could not evaluate for how many legislators the quid pro quo might have been essential, or even whether the seeming compromise was in response to a bluff or a real threat to withhold support. Legislative history is doubtful enough in attempting to resolve the meaning of ambiguous words.⁵⁵ To rely upon it to discern what was and was not essential to obtain passage of a bill is almost entirely speculation.

Congress and state legislatures will often include a severability clause in a bill, stating that it is their wish that, if part of the bill being passed is struck down as unconstitutional, the rest shall continue in force.⁵⁶ Even in the absence of such an explicit clause, some authors have advocated for a presumption of severability, absent a clear statement in the law to the contrary.⁵⁷ Others have distinguished inseverability clauses from severability clauses, holding that inseverability clauses should be strictly respected, while severability clauses might be overcome by a reviewing court.⁵⁸ However, the presence of a severability clause should

the bill without the unconstitutional part.

52. For a useful description of that task, from which one can readily infer the difficulty of undertaking it in a conscientious manner, see NORMAN J. SINGER & J.D. SHAMBLE SINGER, 2 STATUTES AND STATUTORY CONSTRUCTION § 44:6 (7th ed. 2010) (“Courts have developed supplementary tests to more precisely adduce legislative intent. Some courts uphold the valid portion of a statute when the invalid portion was not the inducement for passage of the act. Conversely, where the invalid portion was the principal inducement for the passage of the statute, the whole statute must fail. In ruling that the legislature would not have enacted separately the valid part of a statute, courts describe the valid and invalid parts of the act as having been conditions, considerations, or compensations for each other. To render an entire act void, the invalid part of the act need not be the sole inducement for passage of the act, but it must be an inducing cause in some important aspect.” (citations omitted)).

53. The inquiry, as the Court in *Alaska Airlines* put it, is whether there is evidence that Congress would *not* have wanted a statute with part excised. See 480 U.S. at 685. We know, however, that Congress did not want such a bill; it wanted what it passed. How do we count the votes for something that was not ever put to a vote?

54. For example, “Add this item in the relevant appropriation bill for my district, and I will vote for the comprehensive legislation my party is pushing on the floor at the same time.” Such a deal would not be discoverable in any legislative history search.

55. See, e.g., *Babbitt v. Sweet Home Chapter of Cmities. for a Great Or.*, 515 U.S. 687, 704–08 (1995); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

56. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 443 (4th ed. 2007) (providing examples) (“A . . . provision often found at the end of a bill is a *severability clause*, which seeks to preserve provisions of the proposed legislation if other provisions are invalidated.”).

57. See, e.g., Nagle, *supra* note 3, at 259.

58. See, e.g., Friedman, *supra* note 3, at 917–18.

not change the conclusion that it is perilous to assume Congress wanted the outcome of severability. There are two reasons for this. First, after *Chadha* it is unconstitutional for Congress to pass a law allowing several legislative results, leaving an agent other than the full Congress plus the President to pick which one will become law.⁵⁹ Second, it is often not believable that Congress, or a state legislature, had actually considered all the various permutations of a multiprovisioned bill and decided they would vote in favor of all of them.

I. A Severability Clause Violates Chadha's Prohibition of Legislating Outside of the Traditional Legislative Process

When Congress or a state legislature includes a severability clause, it is as though it enacted a preamble that read as follows:

The Legislative Branch, having considered all possible permutations of the clauses in this bill, realizes that any one of those clauses might be struck down by the courts as being unconstitutional. Having considered all possible outcomes, we hereby state that all of them are valid legislation, and that we are today passing all of those variations as well as the text that the public can actually see, with the final resolution of what law we actually passed to be decided by a court.

Chadha made it clear that it is unconstitutional to allow a body other than the full Congress to create law. In *Chadha*, Congress passed a law, but allowed a single house of Congress to alter an outcome.⁶⁰ The Supreme Court ruled that only both houses of Congress, followed by the President's signature, or two thirds of both houses of Congress, following the President's veto, could effectuate a legislative result.⁶¹ Even though Congress passed, by all appropriate legislative steps, a scheme that anticipated a legislative result caused by the action of a single house, it could not do so constitutionally. Passing the hypothetical preamble language I suggested is the same thing. Congress, by all appropriate legislative steps, would be adopting a scheme that anticipates a legislative result caused by the action of something different from both houses of Congress. That, *Chadha* teaches, it cannot do.

2. Severability Relies on the Improbable Assumption That Congress Has Considered and Approved All Possible Permutations

The unbelievable part of a severability clause is due to the fact that, if each part of a multiprovisioned bill is potentially severable, the permutations are so numerous that it defies reason to infer that Congress

59. See *INS v. Chadha*, 462 U.S. 919, 956–59 (1983). For discussion of an alternative criticism, based on the nondelegation doctrine, see Kameny, *supra* note 3, at 1018 (arguing that an inseverability clause is an unconstitutional delegation of authority by Congress to the judicial branch).

60. *Chadha*, 462 U.S. at 944.

61. *Id.* at 958.

had confronted all of them and found them all acceptable. Take the number of clauses that a statute contains, raise the number two to that power, and that is the number of possible outcomes from severability.⁶² It is unbelievable that Congress actually considered all such permutations of a multi-provisioned bill.⁶³

Severability has its genesis in the common law of contracts, where a court will, in equity, grant reformation to change the words of a contract when it is incapable of being applied as written.⁶⁴ In that common law tradition, however, reviewing courts put a heavy burden upon the party claiming that the parties' actual agreement differed from what was contained in the written agreement.⁶⁵ Respecting that common law origin, courts should be hesitant, at the least, to leap to the conclusion that Congress or a state legislature wished a result other than the one it actually passed.

62. A bill with ten substantive sections, for instance, would have 1024 possible permutations. Even in the presence of a severability clause, it is not realistic to take Congress at its word that, in passing one version, it had contemplated and approved 1023 other versions that would be acceptable as a back-up. Of course, I recognize that only some of the sections might be constitutionally in doubt. If, say, four of them are, we still have to believe Congress considered fifteen alternatives to the version it actually passed, and approved each one.

63. Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 419 (1942) ("Are we really to imagine that the legislature had, as it says it had, weighed each paragraph literally and come to the conclusion that it would have enacted that paragraph if all the rest of the statute were invalid? That contradicts the ordinary experience of which every citizen takes notice."). By contrast, some are seemingly willing to accept that assumption. See Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 371 (2007) ("[A] severability clause is general. In one fell swoop, the legislature can enact a fallback for every possible constitutional ruling invalidating the enactment in whole or in part . . ."); Shumsky, *supra* note 3, at 254 ("Given that Congress evaluates hundreds of statutory permutations during the lawmaking process, considering seven, twenty, or even fifty possible post-severance permutations is certainly within its institutional capacity."). What is missing in these arguments, of course, is that Congress actually voted on such alternatives, even granting the (to me incredible) assumption that somewhere in the legislative process, as many as fifty alternative postseverance permutations were considered. Shumsky offers another way out of the permutation problem, suggesting that Congress occasionally legislates in broad terms, intending the courts to develop "federal common law," as in antitrust. *Id.* at 253. However, leaving broad terms to court interpretation is not the same thing as passing terms in a law that Congress is then assumed to be willing to see excised.

64. See *infra* Part II.B.

65. See RESTATEMENT (SECOND) OF CONTRACTS § 155(c) (1981) ("Because experience teaches that mistakes are the exception and not the rule, the trier of the facts should examine the evidence with particular care when it relates to a party's assertion of mistake as the basis for his claim or defense. Care is all the more necessary when the asserted mistake relates to a writing, because the law of contracts, as is indicated by the parol evidence rule and the Statute of Frauds, attaches great weight to the written expression of an agreement. This is commonly summarized in a standard that requires the trier of the facts to be satisfied by 'clear and convincing evidence' before reformation is granted. Each case must, however, turn on its particular facts, and the evidentiary weight to be attached to a writing will depend, in part, on its inherent credibility in the light of those facts.").

3. *A Clear Statement Rule in Favor of Severability Is Distinguishable from Other Clear Statement Rules*

The rule in favor of severability has been defended by the Supreme Court as one of the “clear statement” rules; that is, a presumption that will be applied unless Congress makes it quite clear it wants the contrary result.⁶⁶ Under this rubric, Congress is assumed to want severability unless it speaks explicitly to the contrary. The foregoing arguments against according deference to a severability clause apply with even greater force to a clear statement rule, because in the case of such a rule Congress has not even spoken as it has with a severability clause. In addition, there is a special reason why a clear statement rule is inappropriate for severability.

Among the clear statement rules is the rule that a state does not waive its Eleventh Amendment immunity and Congress does not use its Fourteenth Amendment power to abrogate a state’s Eleventh Amendment immunity unless Congress says so explicitly.⁶⁷ Other such rules include: that a statute will be applied prospectively only,⁶⁸ that a private party shall not have the right to enforce a statute,⁶⁹ and that a federal statute does not reach extraterritorially.⁷⁰

There is a difference between severability and all other clear statement rules. The other clear statement rules add to a statute a provision about which the drafters chose to remain silent. It is arguable that Congress would have intended the result reached, had it chosen to address the question. Most likely, the legislative drafters in Congress really did not care about the issue, as they left it silent, and could live with either outcome. In that context, all we would want from a clear statement rule is consistency. Let the Court say that silence means prospective application of a law, for example; when Congress is silent, that is what we will get. It does not strain the legal fiction past breaking to infer that Congress was aware that such an outcome would follow from its silence.

None of this is true in the case of severability, however. With severability, the statute is not assumed to have an additional clause, such as “application of this law shall be prospective only,” or “this law shall

66. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). The presumption for severability is a strong one; even when Congress is explicit that inseverability is to be the rule, courts have on occasion felt free to ignore that direction. See Friedman, *supra* note 3, at 906; see also Nagle, *supra* note 3, at 259 (favoring a presumption of severability as a clear statement rule).

67. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 (1985).

68. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

69. *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001); see also TOM CAMPBELL, *SEPARATION OF POWERS IN PRACTICE* 56 (2004) (citing cases).

70. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

only apply to conduct within the United States.” The statute is not added to; rather, a part of the statute is removed. It is thereby organically changed. A provision that Congress explicitly wanted in the law, and which Congress put in the law, has now been removed. This is not a case of Congress being inattentive to a matter such as retroactivity or extraterritoriality. Rather, Congress has been very attentive: it has explicitly passed a bill with the specific language now to be excised. Assuming that Congress would be amenable to removing this language flies in the face of what Congress actually did. That is not true for any other clear statement rule.

In the other cases of clear statement rules, Congress chose to pass a law without that specific provision. The court is involved in making explicit what Congress can reasonably have been assumed to make implicit. Congress is on notice of what a court will do. If Congress stays silent, it knows that a provision such as “application of this law shall be prospective only” will be “added” should the matter come up in court. In the case of severability, however, the clear statement rule results in a product that we know with one hundred percent certainty was not what Congress thought it was passing. This is not a matter of implying what Congress’ silence meant; Congress was not silent.

The Court has actually changed its clear statement rule regarding severability. In 1932, in *Champlin Refining Co. v. Corporation Commission of Oklahoma*, the Court reaffirmed its nineteenth century cases holding that silence would imply severability: “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.”⁷¹ Four years later, in *Carter v. Carter Coal Co.*, the Court made inseverability the effect of silence, stating:

In the absence of [a severability] provision, the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it.⁷²

The presumption of inseverability was upheld two years later,⁷³ but then in 1968, the Court moved back to its 1932 formulation, declaring that the default would be severability.⁷⁴ Further, the Court felt free to ignore any explicit severability or inseverability clauses that Congress or a state

71. 286 U.S. 210, 234 (1932).

72. 298 U.S. 238, 312 (1936).

73. *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938) (holding that a severability provision “reverses the presumption of inseparability”).

74. *United States v. Jackson*, 390 U.S. 570, 585 & n.27 (1968); see Shumsky, *supra* note 3, 241 (dating the return to the presumption of severability not until *Alaska Airlines* in 1987).

legislature might have included.⁷⁵ “[W]hatever relevance such an explicit clause might have in creating a presumption of severability, the ultimate determination of severability will rarely turn on the presence or absence of such a clause.”⁷⁶

With this history, it is not much to ask the Court to revert to a previous position in favor of inseverability. Its language in *Carter Coal* about the “mutilation of a statute” caused by severability is quite accurate.⁷⁷ I do urge the Court to go beyond *Carter Coal*, however, and hold that inseverability should be the rule in all cases, even when Congress or a state legislature has inserted a severability clause. The severability context is inappropriate for a clear statement rule of any kind.⁷⁸

Professor Kevin Walsh has suggested a new clear statement rule for severability that would require Congress or a state legislature to adopt explicitly an alternative, fallback version of a law, or else the entire law would be invalidated when part was held unconstitutional.⁷⁹ There are many bases to criticize “fallback law,” principally that it is unlikely to occur. In practice, it is difficult to imagine Congress or a state legislature spending statutory resources preparing permutations of its bills, especially when it has no advance suspicion of which parts or applications of its law will be held unconstitutional. The sheer number of permutations also makes the suggestion unworkable. As even a short and simple piece of legislation could be held unconstitutional in application, Congress or the state legislature would have to imagine how a law might apply to any

75. SINGER & SINGER, *supra* note 52, § 44:8 (“Because of the frequency with which it is used, the separability clause is regarded as little more than a mere formality. Judicial attitudes towards such provisions have sometimes been disrespectful: ‘The act in question contains a “saving clause,” which it seems customary nowadays to insert in all legislation with the apparent hope that it may work some not quite understood magic.’ In the seminal case of *Dorchy v. State of Kansas*, Justice Brandeis set out the rule giving separability clauses their widest efficacy. By this authority the clause provides a rule of construction to aid in determining legislative intent, ‘but it is an aid merely; not an inexorable command.’ This doctrine has been followed by subsequent federal cases and approved in some state courts.” (footnotes omitted)).

76. *Jackson*, 390 U.S. at 585 n.27 (citing *Elec. Bond*, 303 U.S. at 434).

77. *See Carter Coal*, 298 U.S. at 312.

78. With a rule of never severing, it would become immaterial whether Congress or a state legislature has inserted an inseverability clause into a bill. As their having done so has not compelled reviewing courts to feel bound, in any event, a change at the level of the Supreme Court’s jurisprudence, rather than advice to Congress and state legislatures, is what is necessary to effectuate the recommendation of this Article. *See Friedman, supra* note 3, at 917–18 (suggesting that legislatures may choose not to include inseverability clauses because courts do not defer to them).

79. Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 784 (2010). Professor Dorf advances the criticism that Congress is unlikely to spend resources creating permutations of bills, as well as many other criticisms of “fallback law.” Dorf, *supra* note 63. Still, Dorf offers a “yellow light for fallback law, not a red one.” *Id.* at 370. It is unclear whether, were Walsh convinced that fallback law is an unworkable expedient, he would retreat to the existing law on severability, or abolish severability. The fact that he wanted to create an escape clause suggests hesitation on his part to embrace full abolition of severability.

group protected as a suspect class, or to any conduct potentially affecting interstate and intrastate commerce differently, or to any of a myriad of other potentially unconstitutional distinctions.

Further, Congress or the legislature may need to know why its previous effort was unconstitutional before fashioning a fallback alternative. The basis for the ruling might prevent a fallback from being constitutional as well, suggesting a different fallback if only Congress or the legislature knew. This makes fallback alternatives impossible to fashion in advance.

B. SEVERABILITY IS NOT THE SAME PRACTICE AS REFORMATION OF A CONTRACT AT COMMON LAW

The origin of the severability doctrine appears to be an extension of the common law contracts principle that a court will try to save as much of a contract as it can after having held part of the contract unenforceable.⁸⁰ “If the parties are mistaken with respect to the legal effect of the language that they have used, the writing may be reformed to reflect the intended effect.”⁸¹ However, if “the parties make a written agreement that they would not otherwise have made because of a mistake other than one as to expression, the court will not reform a writing to reflect the agreement that it thinks they would have made.”⁸² Substituting “Congress,” for “the parties,” makes these two excerpts from the Restatement (Second) of Contracts appear very similar to the rule of severability of statutes announced by the Court in *Alaska Airlines*.⁸³

The earliest Supreme Court case to announce the severability doctrine was an opinion by Chief Justice Marshall in *Bank of Hamilton v. Lessee of Dudley*.⁸⁴ His opinion for the Court dealt with a land

80. See *Movsesian*, *supra* note 3, at 43 (“Since the mid-nineteenth century, when they began to address the question seriously, courts have analyzed the severability of statutory provisions under a contracts approach. That is, in determining the severability of unconstitutional statutory provisions, courts have applied essentially the same test they employ to determine the severability of illegal contract terms. In contracts law, severability turns on the intent of the parties to the agreement. A court will sever an illegal term and enforce the remainder of an otherwise valid contract where the court concludes the term was not ‘an essential part of the agreed exchange,’ that is, where the court concludes the parties would have made the agreement even without the illegal term.” (citing RESTATEMENT (SECOND) OF CONTRACTS § 184(1) (1981) (footnotes omitted))).

81. RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. a (1981). As an equitable doctrine, reformation of a contract was not required; it was simply available to a court. See *id.* § 155 cmt. d. (“Since the remedy of reformation is equitable in nature, a court has the discretion to withhold it, even if it would otherwise be appropriate, on grounds that have traditionally justified courts of equity in withholding relief.”). Accordingly, in urging that courts not apply severability to statutes, I do not violate any rule that would be followed by courts in the area of contract from which the severability doctrine was drawn.

82. *Id.* § 155 cmt. b.

83. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

84. 27 U.S. 492 (1829).

conveyance and an effort to use the powers of equity to overcome an impediment in the legal scheme set up by Ohio.⁸⁵ In other words, it was a case deeply steeped in common law doctrine.⁸⁶ Because equity was available to effectuate the purpose of the Ohio statute, when part of that statute was held to violate the Seventh Amendment, Marshall opined that the rest of that statute should be held to apply.⁸⁷

Other early cases applying severability analysis also occurred in the context of the resolution of claims to personal property. Accordingly, the appeal of using common law approaches such as contract reformation was strong.⁸⁸ The analogy between reforming a contract with some impossible or illegal provisions and interpreting a statute with an unconstitutional provision is inexact, however. In light of a problem arising after the contract was written, the function of a court, using its equitable powers, is to put the parties (or their heirs and assigns) in as close a position as possible to what the original contract intended. It is an attempt to preserve the relative benefits and burdens between two parties: “Their mistake is one as to expression—one that relates to the contents or effect of the writing that is intended to express their

85. A piece of property had been conveyed by action of an Ohio statute to the administrators of an intestate estate. *Id.* at 520. Prior to the sale of that piece of property, the Ohio law had been repealed. *Id.* at 521. Nevertheless, the sale went ahead, and the purchaser made valuable improvements on the property. *Id.* at 524. Another Ohio law prescribed that in such a circumstance, the eventual conveyance of the land to its rightful owner (the intestate successor) would have to include payment to the intermediate holder for any improvements made. *Id.* at 525. The value of those improvements was to be decided by appointed commissioners, not by a jury. *Id.* This was held to violate the Seventh Amendment, since the value of improvements was an issue that, at common law, had to be decided by a jury. *Id.* The intermediate owner could still get compensation under the Ohio law, however, because the intermediate owner could apply to the equity side of the Ohio courts. *Id.* A state court sitting in equity could appoint the commissioners, and enjoin the conveyance of title until the value of the improvements, as evaluated by those commissioners, had been paid to the intermediate land owner. *Id.* at 525–26. What is most instructive about this first enunciation of the doctrine of severability by the Court (interestingly, in construing a state law) is its similarity to contract law. It was as though two parties had agreed to a conveyance of land between them by contract. One method of evaluating a part of the contract was impossible to effectuate. However, a court sitting in equity could find another way of making the evaluation. This, the court was instructed to do, so that the contract could go ahead and achieve its fundamental purpose.

86. RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. a (1981).

87. *Bank of Hamilton*, 27 U.S. at 526.

88. *See, e.g.,* *Huntington v. Worthen*, 120 U.S. 97, 102 (1887) (“The unconstitutional part of the statute was separable from the remainder. The statute declared that, in making its statement of the value of its property, the railroad company should omit certain items; that clause being held invalid, the rest remained unaffected, and could be fully carried out. An exemption, which was invalid, was alone taken from it. It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected.”).

agreement—and the appropriate remedy is reformation of that writing properly to reflect their agreement.”⁸⁹

Entirely different is the case where a portion of a statute is held unconstitutional. Here, the body most interested—Congress, or the relevant state legislature—is a continuing body, whose present incarnation can speak authoritatively to public policy, without concern about any other contracting party. The balancing of interests that led to the original statute is completely irrelevant to the decision of Congress or the state legislature as to what is the best public policy today. The members of that prior Congress—if, implausibly, they could all be summoned and speak with one voice—would lack standing. There is a constitutional successor-in-interest: the current Congress or state legislature. Returning the matter to them, by denying severability and striking down an entire statute, is entirely possible. By contrast, in the case of common law reformation, returning the contract to the parties would not be fair. There are two different parties who continue to exist, but whose relative positions of bargaining strength will have changed at least somewhat from the time they struck their bargain. Hence, a reviewing court could not summon the two parties and simply say, “Make a new contract now if you wish because the old one is no good,” without giving unfair advantage to one side or the other whose position had improved in the intervening years. A court, however, may do that to Congress or a state legislature. There is no unfairness in failing to honor an earlier agreement because the party that made the agreement, the earlier Congress or state legislature, has entirely devolved its authority to a new body, existing in the present.

Other commentators have criticized the analogy of severability to contract reformation, but have accepted the basic notion that a bill represents a bargain among legislators, and a court sets about trying to protect the benefit of that bargain.⁹⁰ The fault lies in how difficult it is to ascertain the legislative bargain.⁹¹ My view is different.⁹² The analogy to contract is flawed even if we know perfectly well what the legislators’ bargain was. That bargain became a bill whose author is not two separate parties, but the legislative body itself.

89. RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. a (1981).

90. See, e.g., Movsesian, *supra* note 3, at 58–71.

91. *Id.* at 69. Movsesian argues that the statute itself is the agreement, whereas in a contract, the writing is merely evidence of the agreement; hence, it is perilous to attempt to ascertain the bargain from legislative history. *Id.*

92. Movsesian additionally argues against the contract analogy by noting that average citizens, who are affected by statutes, cannot easily research legislative intent; whereas the parties to a contract can easily research their own intent. *Id.* at 69–73. This point strikes me as undeniable, but open to the rebuttal that once a court has construed an ambiguous statute by doing its research into legislative intent, the statute’s effect will have been clarified. Indeed, severability will make clear which parts remain and which don’t. If we abolish severability entirely, which I am advocating, the result would be even clearer and easier for the public to understand.

Once separated from the analogy to common law reformation of contracts, the doctrine of severability has no claim to legitimacy. As the Supreme Court repeated the doctrine, with slight variations, in the nineteenth century, it never provided a new or better premise.⁹³ Rather, the rule was repeated with the occasional comment that it was commonplace, or so well understood as not to require elaboration.⁹⁴ This was true whether the Court held for inseverability or severability as the default rule.

In the years following *Bank of Hamilton*, the Supreme Court went the other direction in several important cases, holding unconstitutional provisions inseverable from the rest of a statute, and so striking down statutes in their entirety.⁹⁵ The Court sometimes held simply that the intent of Congress or the legislature could not be effectuated by what was left of the statute after excising the unconstitutional part.⁹⁶ That,

93. See, e.g., *The Trade-Mark Cases*, 100 U.S. 82, 98–99 (1879); *Allen v. Louisiana*, 103 U.S. 80, 83–84 (1880); *Huntington v. Worthen*, 120 U.S. 97, 102 (1887).

94. See, e.g., *Field v. Clark*, 143 U.S. 649, 695–96 (1892).

95. See, e.g., *Allen*, 103 U.S. at 83–86.

96. See *id.* (striking down the entirety of a Missouri law authorizing a municipal bond because part of that law violated the Missouri Constitution, which required a prior vote by the legislature). The Court in *Allen* stated:

It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. “But,” as was said by Chief Justice Shaw, in *Warren v. Mayor and Aldermen of Charlestown*, “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.” The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.

Id. at 83–84 (citation omitted). Actually, the citation to Massachusetts Chief Justice Shaw’s opinion in *Warren* was to a headnote. See 68 Mass. (2 Gray) 84, 84 (1854). The relevant part of his actual opinion for the Supreme Judicial Court of Massachusetts was as follows:

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. The object of the act is the annexation; the merger of one municipality, and the enlargement of the other. This must necessarily affect the municipal and political rights of the inhabitants of both, guaranteed as they are by the constitution. The legislature manifestly felt it to be their duty, in accomplishing this object, to make provision for the preservation of these constitutional rights; if this object is not effectually accomplished, we have no ground on which to infer that the legislature would have sanctioned such annexation and its consequences. The various provisions of the act, therefore, all providing for the consequences of such annexation, more or less immediate or remote, are connected and dependent; the different provisions of the act look to one object and its incidents, and are so connected with each other, that if its essential provisions are repugnant to the constitution, the entire act must be deemed unconstitutional and void.

Id. at 99–100.

however, was not the only rationale. The Court also emphasized that severability would lead to the creation of a law that Congress or the state legislature had, in fact, not passed.⁹⁷ That point of view should be embraced again: “If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do”⁹⁸

C. SEVERABILITY IS NOT COMPELLED BY EFFICIENCY OF GOVERNMENT OPERATIONS

In holding for severability, the Court has emphasized the disastrous effect of striking down a large complex of statutory provisions because of the infirmity of some.⁹⁹ In the tariff case of *Field v. Clark*, the Court did not allow the unconstitutionality of a provision for bounties to be paid for the domestic production of sugar, which was contained in a larger statute that also imposed tariffs on imports, to jeopardize the continued applicability of the tariff provisions of the bill, lest federal revenues be jeopardized:

While, in a general sense, both may be said to be parts of a system, neither the words nor the general scope of the act justifies the belief that Congress intended they should operate as a whole, and not separately for the purpose of accomplishing the objects for which they were respectively designed. Unless it is impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.¹⁰⁰

The plaintiff, Marshall Field & Co., had sued to get a refund for import duties on woolen clothing, arguing that the import duties were imposed by the President in an unconstitutional delegation of legislative authority.¹⁰¹ Marshall Field & Co. also argued that the tariff act’s provision for subsidies for domestic production of sugar was beyond congressional authority to enact.¹⁰²

As there was one omnibus bill including both sugar subsidies and tariff provisions, the effect of the position I am advocating would have required holding the tariff provisions inapplicable if the sugar subsidies

97. *The Trade-Mark Cases*, 100 U.S. at 99.

98. *Id.*

99. *See, e.g., Field*, 143 U.S. at 696–97.

100. *Id.*

101. *Id.* at 665–67, 681.

102. *Id.* at 695. A third challenge was raised as well: that the bill had not followed the prescribed form of enactment and enrollment in both houses. *Id.* at 668–69. The Court rejected that argument, *id.* at 680, and the nondelegation-based challenge, *id.* at 692–93, but did not reach the sugar subsidy point because it was severable. *Id.* at 695–97.

were unconstitutional (a point the Court did not reach), and if, contrary to the facts of the case, Marshall Field & Co. were harmed by the sugar subsidy. Suppose, however, that a party with standing raised a successful challenge to the sugar subsidy. It would not follow that the federal government would suddenly be bereft of tariff revenues, then a large part of the federal treasury. The Court could stay the effect of its ruling to allow a reasonable time for Congress to reenact the tariff statute without the sugar subsidy.¹⁰³ Nor would striking down the entire act, import tariffs and all, result in refunds to all importers. The jurisprudence on nonretroactivity allows for a result that would not put the public treasury at risk. Even though the Court's holdings have shifted, from *Chevron Oil Co. v. Huson*¹⁰⁴ in 1971 to *Harper v. Virginia Department of Taxation*¹⁰⁵ in 1993, in favor of retroactively holding a tax unconstitutional, the *Chevron* Court's reference to equitable considerations¹⁰⁶ would in all likelihood continue to govern a claim made for a refund based on having paid tax under a provision whose constitutionality was not challenged. Retroactivity of tax refund claims is a doctrine already showing such malleability as not to preclude an accommodation to a new approach to severability.

In other contexts, in addition to raising revenue for the government it might be that ending the severability doctrine would cause some inconvenience as Congress was compelled to reconsider passing laws that

103. A recent example of a federal court using this power dealt with an unconstitutional Washington state law allowing in-state wineries and breweries to self-distribute, but requiring out-of-state competitors to use an in-state distributor. *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1256 (W.D. Wash. 2005). Either extending the requirement of an independent distributor to in-state wineries and breweries, or extending the benefit of self distribution to out-of-state wineries and breweries, could have remedied the discrimination. *Id.* at 1254. The trial court stayed its judgment to allow the state legislature the time to choose which solution it preferred:

The Washington Wine Institute argues that the Court should “stay the enforcement of its order for a period sufficient to permit the Washington legislature to act on the matter.” The Court agrees. The constitutional defects in the current Washington system present a policy choice between two alternatives, a decision that is within the discretion of the State Legislature. Regardless of the remedy chosen by the Court, the State Legislature could simply choose to adopt the other remedy during the upcoming legislative session, which starts in early January 2006. Therefore, the Court will stay the entry of judgment on this claim until April 14, 2006 to provide the Washington State Legislature with a sufficient period of time to act on this matter.

Id. at 1256 (citing *Population Servs. Int'l v. Wilson*, 398 F. Supp. 321, 340–41 (S.D.N.Y. 1975)) (citation omitted).

104. 404 U.S. 97, 106–07 (1971) (holding that a state law's statute of limitations should not apply retroactively).

105. 509 U.S. 86, 97 (1993).

106. See *Chevron*, 404 U.S. at 107 (“Finally, we have weighed the inequity imposed by retroactive application, for [w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.” (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (internal quotation marks omitted))).

otherwise would have been allowed to continue in operation. Perhaps no recent Supreme Court decision caused so many different laws to be changed as did *Chadha*, in which the Court addressed just such a consequence.¹⁰⁷ Admittedly, the Court applied severability analysis so that all of the affected laws did not have to be repromulgated, but the widespread nature of the effect of the Court's ruling was explicitly considered by the majority and by Justice White in dissent.¹⁰⁸ Nevertheless, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution," and the fact that hundreds of statutes were affected by the Court's ruling did not deter the Court from its holding.¹⁰⁹ If the major conclusion of this Article is accepted, that courts impermissibly exercise legislative functions when they engage in severability analysis, then, as in *Chadha*, inconvenience should not constitute an obstacle to correcting the flaw I have described.¹¹⁰

The major effect, therefore, of the rule I propose is to require Congress to repromulgate so much of the bill that was struck down as it

107. See *INS v. Chadha*, 462 U.S. 919, 958 (1983) ("The [one-house veto provision] doubtless has been in many respects a convenient shortcut . . ."). But see *id.* at 944 ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . .")

108. *Id.* at 944–45; *id.* at 967 (White, J., dissenting).

109. *Id.* (majority opinion) ("[O]ur inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies: 'Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940–49, nineteen statutes; between 1950–59, thirty-four statutes; and from 1960–69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.'" (quoting James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 *IND. L. REV.* 323, 324 (1977))); see also *id.* at 1002–03 (White, J., dissenting).

110. Nevertheless, the widespread use of the legislative veto, and, thus, the need to re-legislate in many different areas, constituted an argument in favor of severability analysis after the *Chadha* decision, in one commentator's view. See Note, *supra* note 3, at 1182–83; see also Gans, *supra* note 3, at 653 ("The chief virtue of severability is that it allows a court to create a new law quickly."). To that comment, I would argue that this is actually severability's chief vice: it allows a court to *create* a new law. Other commentators called for an omnibus congressional fix after *Chadha*, rather than awaiting the case-by-case determination of severability. See William F. Leahy, *The Fate of the Legislative Veto After Chadha*, 53 *GEO. WASH. L. REV.* 168, 190 & n.143 (1984); Elliott H. Levitas & Stanley M. Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 *HOFSTRA L. REV.* 593, 615 (1984). *Chadha* called for the possible invalidation of more federal statutes than virtually any other modern Supreme Court decision. See *Chadha*, 462 U.S. at 1002 (White, J., dissenting). If the proposal I am offering is workable in the *Chadha* context, therefore, it is truly workable. If the Court struck down every federal statute containing a single-house veto provision, in its entirety, Congress would likely react by repromulgating many of those statutes; and it is likely the President would sign each such law as it would entrench Presidential authority. There are some subcategories of statutes, however, that Congress may not wish to repromulgate without having the legislative veto. The alternative actually chosen, of course, was a case-by-case determination of whether a statute containing a legislative veto provision was severable from that provision. The approach I am advocating would have resulted in much more certainty, much sooner.

wishes when part of that bill is held unconstitutional. It is not true, as some commentators fear,¹¹¹ that denying severability could put an entire complex statute at risk, or even the entire U.S. Code.¹¹² The bill that passed Congress or the legislature containing the unconstitutional provision is all that would be at risk, leaving the code section or chapter unharmed.¹¹³ Judicial stays, expedited action by Congress, and equitable use of the doctrine of retroactivity can all mediate any perceived hardships to the effective functioning of government. Further, as this new approach took hold, Congress would learn the benefits of enacting shorter bills. Omnibus bills would jeopardize much; targeted bills would jeopardize much less. Inducing Congress to pass bills drawn more narrowly should be viewed as a positive for two separate reasons: the President would have a more meaningful chance to exercise the veto, and individual members of Congress would have a more meaningful chance to express their support for some provisions, and opposition to other provisions, otherwise contained in an omnibus law.¹¹⁴ Also, a more limited use of severability—or, as I advocate, complete abolition—would cause Congress and legislatures to devote more time to writing laws that are constitutional in the first instance.¹¹⁵

D. IT IS NOT DISRESPECTFUL TO A CO-EQUAL BRANCH TO REFUSE SEVERABILITY; IN FACT, IT IS QUITE THE OPPOSITE

The Court has explained its approach to severability as a modest one, motivated by respect for the co-equal branch of Congress or the

111. See, e.g., Gans, *supra* note 3, at 653.

112. See Dorf, *supra* note 63, at 370. Dorf argues:

Why just the provision rather than the Code section, the Code title, or the entire U.S. Code itself? Because the more extreme of these options are plainly implausible, courts never face a choice of *whether* to sever invalid provisions or applications from valid ones, but instead must always decide *how much* to sever.

Id. I disagree. The simple test is the bill that passed Congress containing the unconstitutional provision. There is no issue of whether Congress wanted the rest of the U.S. Code to continue in force, but there is a very real reason to doubt that Congress wanted a bill other than the one it passed to become law.

113. See Metzger, *supra* note 41, at 887 (“[I]t goes without saying that invalidation of one statute, even a statute the various provisions of which are held inseparable from each other, does not invalidate separately enacted or unrelated sections of the U.S. Code.”).

114. Recodifications of statutory chapters might be inhibited, however, because as a single bill they would put at risk the entire chapter of the U.S. Code, including provisions passed in many separate bills over many different years. A narrow exemption for bills that do no more than recodify existing statutes would not undermine the general benefit of what I am proposing. These cases should be easy to tell from omnibus bills that enact new law. To the extent a recodification includes something new, then that new provision should be separately voted on in any event, in order to allow members of Congress, and the President, to exercise their respective powers meaningfully. The consequence of the courts embracing my view on severability will weigh strongly against Congress attempting to add new provisions to recodifications.

115. See Gans, *supra* note 3, at 675; Jona, *supra* note 3, at 713–14.

sovereign authority of the individual states, as well as by its own institutional limitations on drafting laws.¹¹⁶ As noted above, the Court, in its most recent announcement of severability, explicitly referred to various ways of curing a constitutional infirmity, and used modest language: “[S]uch editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward.”¹¹⁷ This sounds very deferential.¹¹⁸ Four years before, in *Ayotte v. Planned Parenthood of Northern New England*, the Court went to some length to announce the same motivations underlying its application of severability analysis:

Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.

... [W]e try not to nullify more of a legislature’s work than is necessary, for we know that “[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” . . .

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

... [T]he touchstone for any decision about remedy is legislative intent, for a court cannot “use its remedial powers to circumvent the intent of the legislature.”¹¹⁹

I do not doubt the sincerity of the Court’s expression of deference. It is, however, profoundly misplaced.

Which intrudes more into the legislative function: to send a bill back to Congress to rewrite it because part is unconstitutional; or to rewrite

116. See, e.g., *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683–84 (1987). Commentators also take the view that severability is “deferential to legislative policies.” See, e.g., Adrian Vermuele, *Saving Constructions*, 85 *Geo. L.J.* 1945, 1947 (1997).

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

118. A similar expression of deference is found in the most recent example of the Supreme Court narrowing the reach of a statute while claiming it is not rewriting it. *Skilling v. United States*, 130 S. Ct. 2896, 2930 (2010) (noting that the Court’s task is “not to destroy the Act . . . but to construe it” (quoting *Civil Serv. Comm’n v. Letter Carriers*, 413 U.S. 548, 571 (1973)). *But see id.* at 2935 (Scalia, J., concurring in part and concurring in the judgment) (“The Court strikes a pose of judicial humility . . .”).

119. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–30 (2006) (citations omitted).

the bill into a form that Congress never approved, based on the court's best judgment of what Congress would have done originally if it had been informed of the court's ultimate ruling on constitutionality? The creation of a new law because of a court ruling intrudes much more profoundly upon legislative prerogative than telling the legislature that a previously passed bill is invalid in its entirety.¹²⁰ As one commentator noted in the context of inseverability clauses, bills almost always involve compromises; and when Congress or the state legislature has explicitly instructed that a compromise be kept (by requiring all of the provisions to be voided if any were), a court would show greatest respect by adhering to the expressed desire of the legislative branch.¹²¹ Nevertheless, courts have, from time to time, even ignored inseverability clauses, the legislature's explicit instruction as to its wish.¹²² How can that be squared with modesty, or deference to the legislative will?

Even without an inseverability clause, deference to a co-equal branch requires inseverability. Congress passed a bill with several parts and even though the product was flawed, Congress should have an opportunity to fix it. Of course, under existing doctrine, Congress can always "correct" the re-legislation resulting from the court's application of severability analysis. What keeps Congress from doing so, however, is that the court has created a new equilibrium. Political scientists have shown how difficult it is to move an equilibrium point in public policy, whereas if an entire approach to a public policy issue has been vitiated, there is no inertia of an existing solution to overcome.¹²³ Even without such inertia issues, for the period of time between the striking down of a statute and Congress's enactment of another, which can be a long time,

120. In an effort to avoid the choice between invalidating an entire statute, and eliminating a part that was necessary for the bill to pass, Professor Glenn Smith has recommended "plastic surgery." See Smith, *supra* note 3, at 461–76. This process would allow a court effectively to add language to a statute so as to reconstruct what Congress or the state legislature intended, when mere excision would leave a product that was not intended. *Id.* at 461–62. It is a candid admission that a reviewing court, in severability analysis, is, despite protestations, engaged in drafting legislation.

121. Friedman, *supra* note 3, at 914.

122. See, e.g., *Biszco v. RIHT Fin. Corp.*, 758 F.2d 769 (1st Cir. 1985), discussed in Friedman, *supra* note 3, at 907. Friedman found only state law examples of courts ignoring inseverability clauses. Friedman, *supra* note 3, at 907.

123. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992). See generally, ESKRIDGE ET AL., *supra* note 56, at 77–82, and sources cited therein. The existing policy (status quo) is marked on a policy continuum, and a sequential game is introduced to analyze the likelihood of moving from that status quo point, depending on the preferences of the House, Senate, and President. Eskridge & Ferejohn, *supra*, at 529–33. The court, via severability, would change that initial status quo point. As the preferences of the House, Senate, and President change over time, especially after intervening elections, there could be a desire to change the law. However, in the interim, if the court has acted, and through severability analysis changed the starting point, the result could well be more difficult to change than the starting point would have been had the law been struck down in its entirety. I need not prove that this is always so, only that it is one possible outcome, to demonstrate the inadequacy of the argument that Congress can always undo the court-created product of its constitutionality, and severability, rulings.

the issue remains as to which law should govern. During such an interval, which should be the law: the state of the law before the passage of the statute now held to be unconstitutional, or a version of the law that Congress never approved?¹²⁴

Unintended consequences result when a court tries to second-guess what Congress would have wanted through severability analysis. After the Watergate abuses of the 1970s, Congress considered many possible solutions to what was seen as the influence of money in politics, including complete disclosure and public financing.¹²⁵ Another solution was to impose a limit on how much money could be raised in federal elections, and a limit on how much could be spent as well—the solution that Congress passed.¹²⁶

What no one proposed was a rule that would allow individuals who were wealthy to be able to spend their own money without limit, while individuals who were not wealthy were restricted, as a practical matter, to spending what they could raise, with limits on how much they could raise from any other person. Yet that is the system we now have, after the Supreme Court struck down the limit on individual expenditure, but left intact the rest of the statute regarding limits on fundraising.¹²⁷ Chief Justice Burger, who dissented on the issue of severability, saw this very risk.¹²⁸

124. It is even possible that the legislative outcome, after a court has applied severability, is one that could never have been achieved through the normal legislative process. This will be the case where a piece of legislation was the product of a compromise between the executive and legislative branches. If the court invalidates only one side of a bargain, the side benefitting from the invalidation has no incentive to agree to corrective legislation. The court will thus have created what would never otherwise exist. This will also be the case where the legislation was the product of give-and-take between two blocks of legislators, neither of which had a majority. If the provision struck down was sought by one group but not the other, there will be no majority to undo the court's recasting of the bill.

125. See *Brief for the Attorney General and the Federal Election Commission*, Buckley v. Valeo, 424 U.S. 1 (1976) in 84 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 1975 TERM SUPPLEMENT 298, 311, 330 (Philip B. Kurland & Gerhard Casper eds., 1976) (discussing disclosure and public financing as alternatives).

126. Buckley v. Valeo, 424 U.S. 1, 7 (per curiam) (describing the Federal Election Campaign Act of 1971).

127. *Id.* at 143.

128. *Id.* at 254–55 (Burger, C.J., concurring in part, dissenting in part) (“One need not call problems of this order equal protection violations to recognize that the contribution limitations of the Act create grave inequities that are aggravated by the Court's interpretation of the Act. The Court's piecemeal approach fails to give adequate consideration to the integrated nature of this legislation. A serious question is raised, which the Court does not consider: when central segments, key operative provisions, of this Act are stricken, can what remains function in anything like the way Congress intended? The incongruities are obvious. . . . All candidates can now spend freely; affluent candidates, after today, can spend their own money without limit; yet, contributions for the ordinary candidate are severely restricted in amount—and small contributors are deterred. I cannot believe that Congress would have enacted a statutory scheme containing such incongruous and inequitable provisions.” (footnote omitted)).

If Congress knew it could not impose spending limits on candidates, it might well have opted for the alternative approach of disclosure. When the McCain-Feingold Act¹²⁹ was under consideration, the chairman of the House Administration Committee noted the unintended consequence of previous Supreme Court rulings on election laws, and recommended an inseverability clause for the new statute:

[T]he current law is in fact a product of the Supreme Court. It is not a product of Congress. If my colleagues look at the original Federal Election Campaign Act, there were a number of areas where the Congress acted comprehensively, as we are attempting to do now on a number of these bills. It not only dealt with individual contribution limits, it dealt with spending limits for elections. Congress passed a limit per election. Congress passed a limit on independent expenditures per election. . . .

If my colleagues look down here in terms of limit on candidates' personal funds, we talk about millionaire candidates and how we have to deal with that. Congress dealt with that, but the Court overturned that portion. . . .

My point is that for the last quarter of a century we have been dealing with a law which was not the way the Congress created it.¹³⁰

Other examples abound.¹³¹ Over fifty bills that became law with a legislative veto provision, with power being granted from Congress to the President, contained an explicit retention of a leash.¹³² Prior to the

129. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.).

130. 144 CONG. REC. 12,913 (1998) (statement of Rep. Thomas); *see also id.* at 13,003 (proposed amendment); *id.* at 12,903, 12,904 (statement of Rep. Frost) (noting the consequence of *Buckley* and indicating intent to support inclusion of an inseverability clause to preserve the entire act). The proposed amendment was not, however, accepted. *Id.* at 13,003. Representative Frank saw the attempt to insert an inseverability clause as a Trojan horse, hoping that the entire McCain-Feingold statute would be struck down because of the constitutional vulnerability of some of its provisions, most likely its definition of express advocacy. *Id.* at 12,936–37 (1998) (statement of Rep. Frank). Fred Kameny voices the same suspicion. Kameny, *supra* note 3, at 999–1000. I was privileged to be on the floor of the House on that day, as a member of Congress, and participated in the debate. My own recollection was that the inseverability provision was motivated not by any such disingenuous purpose, but rather by extreme frustration at how the balance of limits on spending and limits on contributions in the original federal elections law had been undone by the Supreme Court, which, in *Buckley* essentially struck down half of the quid pro quo, leaving limits on contributions but no limits on spending.

131. For instance, in *Free Enterprise Fund* the Court chose from among several possible constitutional fixes. It chose to remove the independence of the PCAOB, rather than, say, removing the PCAOB's ability to issue regulations. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3163–64 (2010). However, the independence of the PCAOB was very important to the Congress that adopted Sarbanes-Oxley. *See, e.g.*, 148 CONG. REC. 12,115, 12,116 (2002) (statement of Sen. Sarbanes) (“I believe, frankly, that we need to establish this oversight board in statute in order to provide an extra guarantee of its independence and its plenary authority to deal with this important situation.”); *id.* at 12,118, 12,119–20 (statement of Sen. Gramm). Sacrificing the executive functions rather than the independence of the PCAOB might have been preferred if Congress were made aware of the need to choose.

132. *See INS v. Chadha*, 462 U.S. 919, 1003 (1983) (app. to opinion of White, J., dissenting) (“This compilation, reprinted from the Brief for the United States Senate, identifies and describes briefly

enactment of each such law, Congress retained the power in question.¹³³ Would Congress have given the power to the executive, that it had possessed and exercised, without retaining some degree of supervision? Selling weapons to foreign governments, restructuring government agencies, approving pay for executive and judicial officers, deciding which foreign nationals could stay in the United States (a decision at issue in *Chadha*, and formerly exercised by Congress in the form of private bills): all these were important powers controlled by Congress.¹³⁴ Are we to believe that, after two centuries of exercising such powers, Congress would, in the twentieth century, surrender them to the executive, and get nothing in return?¹³⁵

What was more respectful to Congress's institutional expertise and constitutional prerogatives: to undo the individual bargain it reached with the executive in over fifty individual cases, handing the benefit in each case solely to the executive, or sending the fifty bills back to Congress to decide whether, and to what extent, it would part with its power, knowing this time that if it parted with power it could retain no leash on the executive? Respect for Congress, and for the states' legislative sovereignty,¹³⁶ should restrain, not promote, severability. It is consistent with the courts' duty to say what the law is, the Supreme

current statutory provisions for a legislative veto by one or both Houses of Congress. Statutory provisions for a veto by Committees of the Congress and provisions which require legislation (*i.e.*, passage of a joint resolution) are not included. The 55 statutes in the compilation (some of which contain more than one provision for legislative review) are divided into six broad categories: foreign affairs and national security, budget, international trade, energy, rulemaking and miscellaneous.”). Other commentators put the total at more than one hundred. *See* Steven W. Pelak, *Severability of Legislative Veto Provisions: An Examination of the Congressional Budget and Impoundment Control Act of 1974*, 17 U. MICH. J.L. REFORM 743, 745 (1984) (“Approximately 120 federal statutes contain legislative veto provisions.”); Eugene D. Cross, Comment, *Legislative Veto Provisions and Severability Analysis: A Reexamination*, 30 ST. LOUIS U. L.J. 537, 537 (1986) (“Approximately two hundred statutes contain legislative veto provisions . . .”).

133. Levitas & Brand, *supra* note 110, at 611–12.

134. *Id.* at 612.

135. One commentator answers that question in the affirmative, because of the extra burden Congress would otherwise have to take on itself. *See* Jonathan B. Fellows, Note, *Congressional Oversight Through Legislative Veto After INS v. Chadha*, 69 CORNELL L. REV. 1244, 1260 (1984). However, I and other commentators would answer it strongly in the negative. *See, e.g.*, Smith, *supra* note 3, at 399.

136. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 556 (9th Cir. 2004) (“Severability [of a state statute] is an issue of state law.”). Suppose a state follows the rule of presumptive inseverability. If a federal court accords deference to such a decision by a state legislature, why would it not accord the same deference to a congressional declaration of inseverability? In a recent citation to this principle, another panel of the Ninth Circuit curiously stated that “when the constitutionality of a state statute is challenged, principles of state law guide the severability analysis and we should strike down only those provisions which are inseparable from the invalid provisions.” *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 886 (9th Cir. 2008) (citing *Eden*, 379 F.3d at 556–57). If a state's jurisprudence holds against a presumption of severability, however, then the first part of this statement is in conflict with the second.

Court's ultimate responsibility to decide issues of constitutionality, maximum deference to Congress, in which all federal legislative authority is vested, and to the sovereignty of the states, to let no law be in force that did not pass the legislative branch. But because of severability, there are many laws in force today that did not.

CONCLUSION

From 1936 to 1968, the Supreme Court applied a presumption of inseverability to its interpretation of statutes.¹³⁷ The Court should revert to that practice and make the presumption conclusive. Any other approach involves courts in doing what was explicitly forbidden in *INS v. Chadha* and *Clinton v. City of New York*: creating a statutory outcome not approved by both houses of Congress and signed by the President, or passed over his veto. This suggestion is practical, as it prevailed (in presumptive form) during the most active legislative epochs in recent history: the New Deal and the Great Society. It will have the salutary effect not only of reserving to the legislative branch its proper function of balancing interests and passing a new law when its original attempt has to be redone, but also creating the impetus to craft laws more carefully and more narrowly from the start.

137. See *supra* notes 71–76 and accompanying text.
