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How To Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes

ABSTRACT. This Note advocates a new approach to determining the severability of long, complex omnibus statutes. It first examines the legal basis for the Supreme Court's current approach to severability, outlined in the three severability principles of *Alaska Airlines, Inc. v. Brock*. The Note argues that although two of the principles are constitutional-law principles, the third is federal common law—a fact that gives courts flexibility to tailor severability doctrine to the special characteristics of omnibus lawmaking. The Note then proposes a solution to the problem of applying severability doctrine to omnibus statutes: the constitutional incompatibility option, an approach pioneered by the German Constitutional Court. When employing the constitutional incompatibility option, courts engage in a dialogue with the legislature by severing the unconstitutional portions of a statute while temporarily enjoining the decision's effect. Applied in the United States, the constitutional incompatibility option would give Congress the opportunity to rewrite a partially unconstitutional omnibus law and would save courts from having to dismantle a massive legislative project on account of a minor constitutional blemish.

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INTRODUCTION

When the Supreme Court decided *National Federation of Independent Business v. Sebelius* (*NFIB*) in 2012,[1] the public and the press focused on the Court's merits rulings.[2] Another important aspect of the opinion received relatively little notice. The four joint dissenters—Justices Scalia, Kennedy, Thomas, and Alito—spelled out the remedy they would have chosen had their merits position prevailed: they would have struck down the Affordable Care Act (ACA), that massive legislative project, in its entirety.[3]

The dissenters invoked a novel legal theory to justify this far-reaching remedy. In general, federal courts presume that a freestanding statutory provision, such as the ACA's individual mandate, is severable from the rest of the statute. As the length and complexity of the statute increases, so does the strength of this presumption—the more expansive a statute, the less problematic it should be to excise an unconstitutional provision. The dissenters in *NFIB* reversed this presumption. According to the dissenters, the ACA was a lengthy statute containing a multitude of provisions unrelated to its core purpose. The dissenters characterized it as a "Christmas tree" law, with "many nongermane ornaments."[4] They reasoned that, without proof that Congress would have enacted these "ornaments" in the absence of the individual mandate, the entire "Christmas tree" had to fall.[5] Under the dissenters' new theory, the unorthodox bargaining process that generates long, complex statutes—so-called "omnibus statutes"—makes provisions in these statutes presumptively inseverable. The length and complexity of a statute weighs against, rather than in favor of, severability.

Although it appears unlikely that the dissenters' "Christmas-tree" approach will gain much traction,[6] the question of how to determine the severability of

1. 132 S. Ct. 2566 (2012).

2. *See, e.g.*, Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES (June 28, 2012), http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html [http://perma.cc/JRM2-63H5]. The Court upheld the individual-mandate provisions of the ACA as a valid exercise of the Taxing Clause power and invalidated the provision allowing the Secretary of Health and Human Services to withdraw existing Medicaid funds if states declined to expand their Medicaid programs. 132 S. Ct. at 2601, 2607.

3. *NFIB*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

4. *Id.* at 2675. For example, the law contains a provision "requiring chain restaurants to display nutritional content." *Id.*

5. *Id.* at 2675-76.

6. Since *NFIB* was handed down, no federal court has signaled its approval of the "Christmas-tree" principle in a case in which it applied severability doctrine. *See* Exec. Benefits Ins.

omnibus bills remains important to resolve. An increasing number of federal statutes follow the pattern of the ACA.[7] Today's Congress tends to pass long, complex statutes that reflect numerous compromises and bargains. Because omnibus statutes do not fall under the purview of a single congressional committee, they are less likely than ordinary statutes to be internally consistent.[8] Further hindering courts' interpretive enterprise, omnibus statutes are rarely accompanied by clear records of legislative intent. As one

Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014); United States v. Brune, 767 F.3d 1009, 1019 (10th Cir. 2014); Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 434 (5th Cir. 2014); Ameur v. Gates, 759 F.3d 317, 324-25 (4th Cir. 2014); United States *ex rel.* Bunk v. Gosselin World Wide Moving N.V., 741 F.3d 390, 405 (4th Cir. 2013); Hamad v. Gates, 732 F.3d 990, 1000-03 (9th Cir. 2013); Sanders Cty. Republican Cent. Comm. v. Fox, 717 F.3d 1090, 1092 n.1 (9th Cir. 2013); Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott, 717 F.3d 851, 871 (11th Cir. 2013); MacDonald v. Moose, 710 F.3d 154, 166 (4th Cir. 2013); Bell v. Keating, 697 F.3d 445, 463-64 (7th Cir. 2012); Hightower v. City of Boston, 693 F.3d 61, 77-78 (1st Cir. 2012); Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1340-41 (D.C. Cir. 2012); Villegas-Sarabia v. Johnson, No. 5:15-CV-122-DAE, 2015 WL 4887462, at *14 (W.D. Tex. Aug. 17, 2015); Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., No. 1:14-CV-00292-SEB-TAB, 2015 WL 1013508, at *11 (S.D. Ind. Mar. 6, 2015); Frank v. Walker, 17 F. Supp. 3d 837, 863 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014); Edwards v. Beck, 8 F. Supp. 3d 1091, 1097-1101 (E.D. Ark. 2014); Democratic Party of Haw. v. Nago, 982 F. Supp. 2d 1166, 1175 (D. Haw. 2013); Burrow v. Sybaris Clubs Int'l, Inc., No. 13 C 2342, 2013 WL 5967333, at *2-3 (N.D. Ill. Nov. 8, 2013); Barrett v. Claycomb, 976 F. Supp. 2d 1104, 1135 (W.D. Mo. 2013); United States v. King, No. 99 CR 952-1, 2013 WL 4008629, at *21 (N.D. Ill. Aug. 5, 2013); Hodge v. Talkin, 949 F. Supp. 2d 152, 190 (D.D.C. 2013), *rev'd*, 799 F.3d 1145 (D.C. Cir. 2015); Marcavage v. City of Syracuse, No. 5:12-CV-00761 (LEK/DEP), 2013 WL 3788569, at *5-6 (N.D.N.Y. June 6, 2013); Haw. Pac. Health v. Takamine, Civil No. 11-00706 SOM/KSC, 2013 WL 1858554, at *2-3 (D. Haw. May 1, 2013); United Food & Commercial Workers Local 99 v. Bennett, 934 F. Supp. 2d 1167, 1194-95 (D. Ariz. 2013); Yount v. Salazar, 933 F. Supp. 2d 1215, 1235 (D. Ariz. 2013); Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, 915 F. Supp. 2d 574, 611 (S.D.N.Y. 2013); Williams v. Puerto Rico, 910 F. Supp. 2d 386, 392 n.3 (D.P.R. 2012); Act Now To Stop War & End Racism Coal. v. District of Columbia, 905 F. Supp. 2d 317, 353 (D.D.C. 2012); Jackson Women's Health Org. v. Currier, 878 F. Supp. 2d 714, 720 (S.D. Miss. 2012); Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health, No. 09-CV-3032-EFS, 2012 WL 2720874, at *4 (E.D. Wash. July 9, 2012). Even the *NFIB* joint dissenters themselves have neglected the "Christmas-tree" principle. Since *NFIB*, those four Justices have joined a majority opinion striking down part of a federal statute three times: in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014); and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In none of those cases did the Justices strike down an entire statute in light of the "Christmas-tree" principle.

7. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991); William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1452 (2008); Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 623 (2014).

8. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 760 (2014).

congressional staffer recently noted, "[I]f you care about regular order, [omnibus legislation] gets very scary because it's a humongous deal negotiated by people who really don't understand."[9]

Severability will continue to pose a dilemma for courts reviewing massive statutes like the ACA. On the one hand, most omnibus statutes contain a large number of constitutionally unproblematic provisions that a court could cleanly sever from the unconstitutional provisions.[10] On the other hand, severability doctrine forbids courts from altering a statute in ways that conflict with the intent of Congress.[11] When deciding the severability of provisions in a long, intricate piece of omnibus legislation, courts often lack reliable indicia of which provisions Congress thought essential, and which provisions it would not have enacted outside of the omnibus vehicle.

Courts have not yet grappled with this dilemma.[12] The Supreme Court has held numerous provisions in omnibus statutes unconstitutional. In these cases,

9. *Id.* at 761.

10. At oral argument in the *NFIB* case, for example, Chief Justice Roberts stated: "[A] lot of this is reauthorization of appropriations that have been reauthorized for the previous 5 or 10 years and it was just more convenient for Congress to throw it in in the middle of the 2700 pages than to do it separately. I mean, can you really suggest—I mean, they've cited the Black Lung Benefits Act and those have nothing to do with any of the things we are talking about." Transcript of Oral Argument at 16, *NFIB*, 132 S. Ct. 2566 (No. 11-393).

11. The *NFIB* dissenters correctly noted this aspect of severability doctrine. *See NFIB*, 132 S. Ct. at 2668-69 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

12. This oversight should not come as a surprise. In general, severability doctrine has not produced a quantity of scholarship or jurisprudential theory commensurate with its importance. Although severability doctrine can have "profound consequences," it is usually an "afterthought" for judges and scholars. John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 204 & n.1 (1993). And, as John Nagle notes, the Supreme Court's test for severability was first stated in 1932. *Id.* at 204 & n.2 (citing Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 234 (1932), *overruled by* Phillips Petrol. Co. v. Oklahoma, 340 U.S. 190 (1950)). This is still more or less correct, although recent cases have restated and reshaped the test in significant ways. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508-10 (2010); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328-31 (2006); United States v. Booker, 543 U.S. 220, 245-49 (2005); *see also* Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 53-54 (2011) (discussing the "modern test" of *Free Enterprise Fund*, which reshaped the doctrine by making "functionality" analytically antecedent to an inquiry into legislative intent and the legislative bargain). And, as Nagle noted, the seminal article on severability was written in 1937. Nagle, *supra*, at 204 & n.3 (citing Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937)). Robert Stern's article is still authoritative. *See, e.g.*, *Booker*, 543 U.S at 280 (Stevens, J., dissenting in part) (citing Stern's article as an influential authority on severability). Both of these events occurred before the "age of statutes" and the modern administrative state. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (describing the transition from the common law into the "age of statutes"); ANNE M. KORNHAUSER,

the Court rarely undertakes an express severability analysis; when it does inquire into severability, it does not grant doctrinal significance to the omnibus nature of the statute.[13] For severability purposes, the Court treats omnibus statutes the same as ordinary statutes.

Like the Court, the scholarly community has not yet addressed the unique challenges of applying severability doctrine to omnibus statutes. Several scholars who have written on severability have discussed omnibus statutes to show why the doctrine must favor severability in at least some instances: in their view, it would be absurd to strike down massive statutes containing a hodgepodge of provisions because of a small constitutional defect in a single provision.[14] Mark Movsesian and John Nagle go further, arguing that the existence of omnibus bills shows that Congress generally intends for courts to sever unconstitutional provisions from otherwise constitutional statutes.[15] In contrast, scholars who attack the presumption of severability attempt to show

DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930-1970 (2015) (discussing the rise of the administrative state).

13. The *NFIB* dissenters claimed that "[t]he Court has not previously had occasion to consider severability in the context of an omnibus enactment like the ACA, which includes not only many provisions that are ancillary to its central provisions but also many that are entirely unrelated." *NFIB*, 132 S. Ct. at 2675 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). This claim is incorrect. Consider two recent opinions that the *NFIB* dissenters either wrote or joined: *Executive Benefits v. Arkison*, 134 S. Ct. 2165 (2014); and *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Both cases concerned the Bankruptcy Amendments and Federal Judgeship Act of 1984. At no point in either *Stern* or *Executive Benefits* did the Court contemplate that Congress's defective labeling of some claims as "core" threatened the constitutionality of the entire Act. That Act was an omnibus measure that set up the current system of bankruptcy courts, which handle millions of bankruptcy cases each year. *See, e.g.*, *Table F, U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending During the 12-Month Periods Ending June 30, 2014 and 2015*, U.S. CTS. (June 30, 2015), http://www.uscourts.gov/statistics/table/f/bankruptcy-filings/2015/06/30 [http://perma.cc/PPJ8-3SH6] (showing at least one million bankruptcy cases terminated each twelve-month period). Similarly, in *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), the Court considered the constitutionality of 2 U.S.C. § 441a(a)(3), a provision of the Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002. *McCutcheon*, 134 S. Ct. at 1442. Both of these Acts contain many provisions unrelated to § 441a(a)(3), which set aggregate limits on campaign donations. The Court did not raise the issue of severability in its opinion.

14. *See, e.g.*, Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 370 (2007); Eric S. Fish, *Severability as Conditionality*, 64 EMORY L.J. 1293, 1314-15 (2015); Klukowski, *supra* note 12, at 91-92 (2011); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 780 n.197 (2010).

15. Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 80-81 (1995); Nagle, *supra* note 12, at 252 (1993).

why total invalidation of an omnibus statute is unproblematic or unlikely to occur.[16]

This scholarship tends to assume that severability is a one-size-fits-all doctrine, that a single approach to severability can serve all statutes.[17] But the literature on severability should not treat omnibus statutes as the bogeyman or reductio ad absurdum of the severability debate. Instead, as this Note argues, severability doctrine can and should be tailored to fit the unique features of omnibus statutes. Omnibus statutes differ from paradigmatic single-purpose legislation in important ways, and courts should take these differences into account when assessing their severability.

After diagnosing the flaws of the current severability doctrine, this Note proposes an alternative approach that would modernize severability doctrine for the age of omnibus statutes. Part I describes the current severability doctrine and explores the quandary that omnibus lawmaking poses for that doctrine. Omnibus statutes differ from regular statutes in three important ways, all with significance for severability doctrine. First, no single congressional intent governs. Second, the provisions are not necessarily related to or dependent on one another. Finally, judges often lack the capacity to prevent spillover effects from findings of partial unconstitutionality.

Part II describes the potential legal bases for the three principles of current severability doctrine: the severability-default principle, that courts should generally only invalidate the unconstitutional portions of partially unconstitutional statutes; the independent-remainder principle, that courts must strike a partially unconstitutional statute down entirely if the remainder is not "fully operative as a law";[18] and the hypothetical-passage principle, that courts should strike the remainder down unless Congress would have passed it on its own. It reasons that severability doctrine is either constitutional law or federal common law. The distinction matters because courts can modify federal

16. *See* Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1518-19 (2011) ("It is not true, as some commentators fear, that denying severability could put an entire complex statute at risk, or even the entire U.S. Code. 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." (footnotes omitted)); Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 919 (1997) ("Severability clauses, on the other hand, do not enforce the legislative compromise; they protect the passage of complex omnibus clauses.").

17. *See, e.g.*, Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2329-30 (2015) (describing the pitfalls of omnibus lawmaking to show why statutory severability clauses (unlike administrative severability clauses) are a poor conveyor of intent).

18. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

common law for prudential reasons, but cannot change constitutional law as easily. It then traces the history of severability doctrine to determine which of the three principles are constitutional and which are federal common law. Two rules are constitutionally required: the severability-default principle and the independent-remainder principle. In contrast, the hypothetical-passage principle is prudential and may be applied at courts' discretion.

Given this leeway to bypass the hypothetical-passage principle, the Note argues that federal courts should employ a remedy developed by the German Constitutional Court: the constitutional incompatibility option. Part III introduces the concept of constitutional incompatibility and discusses its advantages over the Court's current approach to deciding the severability of omnibus legislation. When using the constitutional incompatibility option, the Constitutional Court declares a statute unconstitutional, but enjoins the effect of that declaration for a defined period of time. The grace period permits—but does not require—the German legislature to revise the law to make it constitutional. At the end of this period, in the event of legislative inaction, the court voids the unconstitutional statute to the extent of its unconstitutionality. The constitutional incompatibility option can serve the principles underlying severability doctrine in cases involving omnibus statutes more faithfully and effectively than the method currently used by American courts. Part IV addresses possible objections to the use of the doctrine of constitutional incompatibility in American law, and explores measures courts could take to mitigate the problems raised by these objections.

The *NFIB* dissent signaled the need for scholarly discussion about the severability of omnibus statutes. This dialogue must occur before another "Christmas-tree" law faces the proverbial axe. This Note spearheads the discussion in several ways. First, it develops the concerns about omnibus statutes that motivated the fearful symmetry[19] of the "Christmas-tree" approach. Second, the Note homes in on the origins and contours of current doctrine. Lastly, it proposes a doctrinal solution that respects the doctrine while accounting for the idiosyncrasies of omnibus lawmaking.

19. Apologies to William Blake. WILLIAM BLAKE, *The Tyger*, *in* SONGS OF INNOCENCE AND EXPERIENCE 35 (London, William Blake 1794) ("Tyger, Tyger, burning bright . . . What immortal hand or eye, / Dare frame thy fearful symmetry?"). Like Blake's tiger, the Christmas-tree approach is elegant, ruthless, and divinely inspired (insofar as it has no origins in the Court's previous severability jurisprudence).

I. OMNIBUS LAWMAKING AND SEVERABILITY

This Part articulates the jurisprudential problem motivating the Note. Federal courts employ a relatively stable and well-developed approach to severability: the *Alaska Airlines* doctrine. Certain characteristics of omnibus bills, however, make the *Alaska Airlines* doctrine difficult to apply in cases involving omnibus statutes.

A. An Introduction to Severability Doctrine

Alaska Airlines, Inc. v. Brock[20] sets forth three principles governing federal courts' approach to severability. Each principle ultimately derives from the constitutional separation of the judicial and legislative powers. As the *Federalist Papers* famously put it, the United States judiciary was meant to have "neither FORCE nor WILL, but merely judgment."[21] Constitutionally weak, unelected judges must defer to the lawmaking prerogative of elected representatives. The *Alaska Airlines* doctrine manifests this separation of powers in three different ways, in the form of three principles.[22]

The first principle is the presumption that "[a] court should refrain from invalidating more of the statute than is necessary."[23] It must be evident that Congress would have wanted an entire law struck down before a court may do so. Without this evidence, courts might frustrate the legislative intent of the people's representatives. The judiciary should, as a default, "maintain [an] act [of Congress] insofar as it is valid,"[24] excising only the portions contrary to the Constitution. This first principle creates a default rule of limited judicial intervention. For ease of reference, this Note calls this rule the "severability-default principle."

The second principle is that "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning

20. 480 U.S. 678 (1987).

21. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

22. Note that consensus does not exist as to the correct way to describe or categorize the *Alaska Airlines* doctrine. *See infra* note 78 and accompanying text. Eric Fish, for example, sees an additional "legislative intent" test in the *Alaska Airlines* opinion's language that the remainder of a statute must "function in a manner consistent with the intent of Congress." Fish, *supra* note 14, at 1305 (quoting *Alaska Airlines*, 480 U.S. at 685). This Note uses the same tripartite characterization of the *Alaska Airlines* doctrine as Justice O'Connor used in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 327 (2006).

23. *Alaska Airlines*, 480 U.S. at 684 (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984)).

24. El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 96 (1909).

independently."[25] This principle represents a countervailing presumption that, if the surviving portions of a partially unconstitutional statute are not "fully operative as a law,"[26] the whole statute should be struck down. The second principle acknowledges that, in some cases, respecting the balance of powers means invalidating rump portions of legislation that Congress could not possibly have meant to enact. This Note refers to this second rule as the "independent-remainder principle."

The final principle is that "[an] unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted"[27] in other words, courts should inquire whether a severed statute "will function in a *manner* consistent with the intent of Congress."[28] The third principle directs the judge to imagine what Congress would have done in her shoes, faced with the choice of severing an unconstitutional provision or invalidating an entire statute. If Congress would have passed the remainder on its own, then it should stand. Otherwise, it should fall. For example, the existence of a so-called "severability clause" is strong, but not conclusive, evidence of Congress's intent. A severability clause, as its name suggests, is a statutory provision that instructs courts on whether to sever unconstitutional provisions from the remainder of the statute.[29] If a statute contains a severability clause, courts will generally follow the clause's command.[30] This Note refers to this third rule as the "hypothetical-passage principle."

Free Enterprise Fund v. Public Co. Accounting Oversight Board[31] illustrates how these principles interact with each other in practice. In *Free Enterprise Fund*, the Court examined the constitutionality of the statutory removal procedure in place for members of the Public Company Accounting Oversight Board (PCAOB).[32] Both the Board members and their supervisors, the

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

26. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

27. *Id.* at 685.

28. *Id.*

29. A severability clause usually takes the following form: "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby." Stern, *supra* note 12, at 115-16.

30. *See Alaska Airlines*, 480 U.S. at 686. *But see* Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (stating that severability clauses are an "aid merely; not an inexorable command"); 2 SUTHERLAND STATUTORY CONSTRUCTION § 44:8 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2009) ("Because of the frequency with which it is used, the separability clause is regarded as little more than a mere formality.").

31. 561 U.S. 477 (2010).

32. *Id.* at 486-87.

Commissioners of the Securities and Exchange Commission, were removable only for neglect or malfeasance.[33] The Court found that this double insulation violated the President's power to "execute the laws."[34]

The Court's severability analysis incorporated all three *Alaska Airlines* principles. The analysis started by recognizing the severability-default principle, noting that "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact."[35] The unconstitutional removal procedures, the Court argued, were confined to two minor provisions of the Sarbanes-Oxley Act;[36] following the severability-default principle, the Court could limit its invalidation to those two provisions.[37]

The Court next considered whether the independent remainder or hypothetical passage principles foreclosed this solution, and concluded that they did not. The Sarbanes-Oxley Act would remain "fully operative as a law" without the problematic provisions; the rest of the law would function essentially unchanged with those minor provisions removed. Furthermore, no evidence existed that Congress, "faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will"; hence the remainder would have hypothetically passed on its own.[38] The Court held the tenure provisions severable.

Free Enterprise Fund is a recent example of how the Court's doctrine typically decides the severability of a statute. As the next Section of this Part argues, this approach can run into problems when applied to omnibus statutes.

B. Problematic Features of Omnibus Lawmaking

Omnibus lawmaking depends on the use of one statutory vehicle—one piece of proposed, debated, amended, and enacted legislation—to pass a number of provisions. The legislative practice of bundling unrelated provisions into single pieces of legislation is nothing new; it predates the Founding.

33. *Id.*

34. *Id.* at 496.

35. *Id.* at 508 (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328-29 (2006)).

36. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

37. *Free Enterprise Fund*, 561 U.S. at 509 ("The Sarbanes-Oxley Act remains 'fully operative as a law' with these tenure restrictions excised." (quoting New York v. United States, 505 U.S. 144, 186 (1992))).

38. *Id.*

Colonial legislatures bundled provisions,[39] and Congress adopted the practice. As Larry Tribe and Phillip Kurland have noted, the first piece of appropriations legislation passed by the First Congress included unrelated provisions.[40]

Although Congress has always bundled provisions, for the first 150 years of the Union bills tended to be relatively short and single purposed. Even during the New Deal, when the scope of federal lawmaking expanded dramatically, Congress did not pass bills anywhere near the size or complexity of the ACA.[41]

The practice of bundling has changed dramatically in recent decades. Congress passed the first recognizably modern omnibus measure in 1950.[42] The 1970s and 1980s witnessed a dramatic increase in omnibus lawmaking.[43] Indeed, from 1949 to 1994 the number of statutes passed by Congress each session decreased by half—in part because of omnibus lawmaking's rise.[44] From 1948 to 2006, the average length of a bill increased from 2.5 pages to 15.2 pages.[45] According to political scientist Glen Krutz, by the early 1990s Congress was enacting sixteen percent of legislative provisions via omnibus

39. *See* J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 470-471 (1990) (acknowledging the colonial practice of bundling legislation). Note that most states now have constitutional or statutory restrictions on omnibus lawmaking. *See, e.g.*, MO. CONST. art. III, § 23 ("No bill shall contain more than one subject which shall be clearly expressed in its title . . . .").

40. Letter from Laurence H. Tribe, Professor, Harvard Law Sch., & Phillip B. Kurland, Professor, Univ. of Chi., to Edward M. Kennedy, U.S. Senator (Oct. 31, 1989), *in* 135 CONG. REC. S26608-09 (daily ed. Oct. 31, 1989) (citing Louis Fisher, *The Presidential Veto: Constitutional Development*, *in* PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 22 (1988)).

41. The Social Security Act, for example, took up twenty-eight pages of the *Statutes at Large*. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935). The ACA, by contrast, consumed over nine hundred pages of the same publication. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Because the *Statutes at Large* reporter has changed format in the intervening years, this comparison does not precisely capture the difference in the two bills' lengths; still, it illustrates the relative size of a major New Deal law as compared to today's megastatutes.

42. GLEN S. KRUTZ, HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS 90 (2001) ("[I]n 1950 . . . the first omnibus bill [the Omnibus Appropriations Act of 1950] was put together and passed.").

43. *Id.* at 56 fig.4.4, 100-01.

44. *Id.* at 55, 56 fig.4.3.

45. Christopher Beam, *Paper Weight*, SLATE (Aug. 20, 2009, 6:12 PM), http://www.slate.com/articles/news_and_politics/explainer/2009/08/paper_weight.html [http://perma.cc/7956-H6YW].

measures.[46] Congress's increasing use of omnibus lawmaking has attracted both criticism[47] and support.[48]

Omnibus laws differ from ordinary legislation both in form and in the manner in which Congress passes them. Barbara Sinclair defines omnibus laws as "[l]egislation that addresses numerous and not necessarily related subjects,

46. KRUTZ, *supra* note 42 at 58 tbl.4.3. To arrive at this figure, Krutz coded the provisions that had "hitched a ride" on omnibus measures during these congressional sessions using the *CQ Almanac* entries for legislation introduced during the sessions. *Id.* at 58.

47. The underlying normative debate about omnibus lawmaking undoubtedly has and will have doctrinal consequences. Critics claim that omnibus vehicles reduce the quality of lawmaking by sacrificing congressional involvement for the sake of efficiency. Provisions inserted in omnibus measures receive less consideration in committee hearings and floor debate. Members do not have as meaningful an opportunity to consider or amend provisions passed through an omnibus measure. KRUTZ, *supra* note 42, at 8, 36, 77-78, 141; Peter C. Hanson, *Abandoning the Regular Order: Majority Party Influence on Appropriations in the U.S. Senate*, 67 POL. RES. Q. 519, 522 (2014). Critics claim that this leads to formulaic, one-size-fits-all lawmaking, ROBERT KEITH, CONG. RESEARCH SERV., RL32473, OMNIBUS APPROPRIATIONS ACTS: OVERVIEW OF RECENT PRACTICES 7 (2008); encourages unsavory compromises and logrolls; prevents input from lobbyists and the public, Loree Bykerk, *Lobbying Unorthodox Lawmaking*, 83 INT'L SOC. SCI. REV. 115 (2008); reduces members' accountability for the policies they enact, KRUTZ, *supra* note 42, at 141; and hides controversial provisions in massive, must-pass measures, *id.* at 2. A final criticism—one that has been particularly trenchant in conservative circles—is that omnibus lawmaking disturbs the balance of power between Congress and the President. This criticism was most influential during the debate in the late 1980s and 1990s over the line-item veto, and particularly the existence of an "inherent" line-item veto power. The consensus that emerged was that omnibus lawmaking is constitutional despite this effect on the balance of powers, if not normatively desirable. *See, e.g.*, Letter from Lawrence H. Tribe & Phillip B. Kurland to Edward M. Kennedy, *supra* note 40 (laying out the case for the constitutionality of omnibus lawmaking and the unconstitutionality of the inherent line-item veto). *But see* Sidak & Smith, *supra* note 39 (arguing that even though there is evidence that the Framers believed the legislative power includes the power to bundle provisions into bills, the Framers could not have foreseen and would not have approved of bundling on the scale of modern-day omnibus lawmaking); J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J.L. & POL. 39, 51 (1992) (arguing that constitutional limits exist on the size of bills because of the problem of congressional aggrandizement; for example, Congress could not pass all of its legislative work for a session in a single omnibus vehicle).

48. Supporters point to the usefulness of omnibus bills in unclogging Congress's increasingly Augean legislative machinery. Omnibus lawmaking is efficient. *See generally* Glen S. Krutz, *Getting Around Gridlock: The Effect of Omnibus Utilization on Legislative Productivity*, 25 LEGIS. STUD. Q. 533 (2000) (providing empirical evidence that omnibus lawmaking does in fact increase legislative productivity). It helps Congress get its work done, especially at the end of a session. KRUTZ, *supra* note 42, at 9. In an era of gridlock and intransigence, it provides a powerful tool for reaching compromise and enacting needed legislation. *See* Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, 2002 ISSUES LEGAL SCHOLARSHIP 1, 2.

issues, and programs, and therefore is usually highly complex and long."[49] Unlike most ordinary legislation, omnibus bills tend to be fast-tracked through Congress or even bypass the committee and conference system entirely.[50] Congressional leaders assemble the bills themselves and bring them to the floor with little or no committee consideration.[51] The individual provisions of the bills receive less debate than they would under ordinary lawmaking procedures.[52] They almost always pass,[53] and they tend to pass with large bipartisan majorities.[54] Presidents generally do not veto them.[55]

Omnibus laws can be divided into two categories. The first includes laws that legislate about a single subject or issue and yet are nonetheless long, massive, and complex, containing many different policy prescriptions ("single-subject" omnibus bills). Laws that address certain subjects tend to take an omnibus form for two reasons: they are difficult policy areas in which to legislate, and they tend not to fall under the jurisdiction of a single committee.[56] The ACA and the Omnibus Crime Control Act of 1990 are examples of this first type of omnibus bill.[57]

The second type of omnibus bill is important or must-pass legislation that serves as a vehicle for a grab bag of provisions that have no unifying subject area ("multisubject" omnibus bills). Appropriations bills and continuing resolutions are the most common form of this second type of omnibus bill. They are "must-pass" laws: without them the federal government would lose authority to spend money and operate.[58] Glen Krutz has identified a few

49. BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 112 (4th ed. 2011).

50. *See* KRUTZ, *supra* note 42, at 3. In orthodox lawmaking, congressional committees draft legislation and refer it to the chamber as a whole; after both the House and Senate approve versions of a bill, the chambers appoint a conference committee to iron out their differences. Omnibus lawmaking sometimes bypasses these procedures: a small coterie of lawmakers (typically involving the leadership) drafts and shepherds legislation through Congress without relying on committees or conferences. *See id.* at 3-4.

51. *See id.* at 32.

52. *See id.* at 3.

53. *See id.* at 62.

54. *See id.* at 78; Hanson, *supra* note 47, at 529-30 tbl.3.

55. *See* KRUTZ, *supra* note 42, at 6-7.

56. *See id.* at 81, 84 tbl.6.1, 85 (describing policy areas in which single-subject omnibus lawmaking occurs).

57. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.

58. Both the House and Senate have rules in place intended to prevent the inclusion of legislative provisions in appropriations measures, but these rules are ineffective in practice; significant portions of appropriations bills now consist of legislative provisions. ROBERT

subject areas in which Congress tends to enact policy by grafting bills onto must-pass omnibus legislation: health care, defense, macroeconomics, crime and family issues, and foreign affairs.[59] Policies in these areas "hitch a ride"[60] on omnibus measures for a few reasons: they fall within the bailiwick of multiple committees, they are traditionally dealt with as part of the budget process, or they involve logrolls or earmarks that benefit individual members.[61]

Omnibus laws have characteristics that pose problems for severability doctrine. First, the size and complexity of omnibus measures makes it difficult to determine how closely related one measure is to the rest of the bill. This, in turn, makes it difficult to apply the independent-remainder principle: a judge faces obstacles measuring the bill's ability to function independently of an unconstitutional provision. In a short, standalone bill, it is relatively easy to tell how crucial a provision is to the bill's ability to effectuate its purpose. The more moving parts a complex bill has, the harder it is for a judge to sort out the machinery. Just how essential is the individual mandate to the ACA's program of reforms? Presumably, this problem is more acute for single-subject omnibus bills, which have many moving parts that are often related to each other. The issue is attenuated for multisubject bills, in which the statutory parts are less likely to be substantively interdependent. A multisubject bill's provisions are typically thrown together for legislative convenience, not because one part of the law relies upon or affects another.

Second, the process used to pass omnibus bills complicates the severability analysis. As Elizabeth Garrett has noted,[62] and as Abbe Gluck and Lisa Bressman have confirmed empirically, omnibus bills involve the "throwing together" of legislation drafted in different committees.[63] They are therefore

KEITH, CONG. RESEARCH SERV., RL30619, EXAMPLES OF LEGISLATIVE PROVISIONS IN OMNIBUS APPROPRIATIONS ACTS 2-4 (2008) (noting that the rules, House Rule XXI and Senate Rule XVI, are ineffective because they are "not self-enforcing," they "may be waived," and they are "not comprehensive in their coverage and application").

59. KRUTZ, *supra* note 42, at 59 tbl.4.4.

60. *Id.* at 58.

61. *Id.* at 59-60. Policy grafted onto the second type of omnibus bill tends to be less radical or large-scale than policy enacted through the first type of omnibus. If a policy change is sufficiently high profile, conventional wisdom holds, members and the President will resist burying the change in an unrelated omnibus measure, for fear of making major policy decisions outside the normal lawmaking process and engendering public opposition. *Id.* at 111.

62. Garrett, *supra* note 48, at 6.

63. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 979 (2013); *see* Bressman & Gluck, *supra* note 8, at 757.

seen as less "internally consistent" than single-subject bills,[64] and come with less organized, clear, and reliable legislative history.[65] While Gluck and Bressman primarily use these findings to question the validity of judicial presumptions of consistent usage,[66] they are also relevant for the severability inquiry.

One phenomenon illuminated by the findings is that omnibus bills tend not to have a single set of authors or a single legislative purpose. The lack of a single author makes it harder to apply the hypothetical-passage principle. How integral did Congress think the unconstitutional provisions were to the rest of the bill? Would Congress have passed the remainder of the bill without the unconstitutional portions? If Congress included a severability clause, would it have wanted the clause to apply to all provisions, no matter how critical? The irregular, top-down legislative process used to pass omnibus bills creates holes in the legislative history and makes these questions more difficult to answer.[67] For example, if the process bypasses committee consideration of a bill, then there will be no committee report explaining the meaning of the bill's provisions; yet, as Bressman and Gluck's study indicates, committee reports are justifiably considered among the most reliable sources of legislative history.[68] Just as the uncoordinated authorship of omnibus bills poses a unique problem for statutory interpretation, it also complicates the severability inquiry.

A related issue is that the provisions contained in omnibus measures are less likely to have succeeded in standalone, up-or-down votes. As Elizabeth Garrett notes:

> Many of the separate policies included in an omnibus bill could not have been enacted unless they had been part of this particular form of legislation. Omnibus laws reflect delicate compromises that are either impossible or more costly when bargaining must take place across bills rather than within one proposal where all deals can be enacted simultaneously.[69]

While this characterization might be too sweeping, it is true that legislative bargaining is different for omnibus bills. Ordinary lawmaking requires

64. Gluck & Bressman, *supra* note 63, at 936.

65. *See id.* at 979.

66. *See id.* at 954-56.

67. *See* Bressman & Gluck, *supra* note 8, at 761.

68. *See id.* at 741, 757, 760-62.

69. Garrett, *supra* note 48, at 3.

substantive compromise: bridging gaps in policy preferences to reach legislative outcomes that have majority support.[70] Omnibus lawmaking, however, also depends heavily on procedural compromise: horse trading by congressional leaders and members to decide which provisions will go into a measure likely to pass.[71] Provisions that make it into omnibus bills need not have widespread support on policy grounds.[72] Procedural bargaining is more likely to occur in the process of drafting multisubject omnibus bills than single-subject bills; it makes more strategic sense to try to place an ornament on a must-pass Christmas tree.[73]

Like the lack of unified legislative intent, the prevalence of procedural bargaining makes it more difficult to apply the hypothetical-passage principle of *Alaska Airlines*. Applying that principle often requires courts to isolate the policy compromises that a congressional majority supported. For example, as noted above, the *Free Enterprise Fund* Court decided that a majority in Congress would have preferred a PCAOB with only one level of insulation from removal over having no PCAOB at all.[74] But imagine that the double-insulation provision was a pet project of a fence-sitting senator that the leadership had inserted into the Sarbanes-Oxley Act to achieve majority support. Hypothetically, if that provision were removed, that senator might not have voted for passage of the full Sarbanes-Oxley Act. That means that the remainder of the law would not have passed without the double-insulation provision, and the court would have to invalidate the entire law. Or maybe, if push came to shove, the fence-sitting senator would have recognized the absurdity of that position and abandoned her pet project, or the leadership would have inserted another pet provision to mollify her. No straightforward, neutral methodology allows a court to decide between these hypothetical outcomes.

70. *See* Amy Gutmann & Dennis Thompson, *The Mindsets of Political Compromise*, 8 PERSP. ON POL. 1125, 1129-30 (2010) (defending the importance of compromise in successful democratic lawmaking).

71. KRUTZ, *supra* note 42, at 2.

72. *Id.* at 33-34.

73. The *NFIB* dissenters raised the bargaining issue with respect to the ACA, a bill that fits more comfortably in the single-subject category. Query whether this was not a category mistake on the part of the dissenters. The ACA's passage was anything but assured. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, with a Flourish*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html [http://perma.cc/74QP-YJPY]. It did not have the "must-pass" status of a budget bill or appropriations package. It was therefore not an ideal vehicle for pet projects or logrolls. That the bill was not a must-pass measure makes it far less likely that the majority of Congress that voted for the ACA disagreed substantively with the law's provisions.

74. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 509 (2010).

The final problem is that, even where it is possible for courts to determine the relatedness of an omnibus bill's provisions and Congress's intent, the process is costly. Omnibus bills are long; some have hundreds of provisions and contain hundreds of thousands of words.[75] Jurists have limited resources and can ill afford to read through and understand these bills, provision by provision, and decide what stays and what goes. Admittedly this danger, which the *NFIB* dissenters also raise, is easy to exaggerate: it is typically not difficult to tell, even from a table of contents, which parts of an omnibus bill are relevant to a severability determination. The ACA's table, for example, lists many provisions as "Miscellaneous."[76] Judges are not policy experts, however, and it is possible to imagine situations in which the complexity and length of omnibus measures would pose a special challenge to judicial resources. It is also possible to imagine these logistical challenges leading to uncertainty about which parts of the law still stand after a judicial decision. Such uncertainty produces social costs, including mistakes, detrimental reliance, and chilling effects.

Omnibus statutes are not ordinary statutes, and courts should not treat them as ordinary statutes for purposes of severability doctrine. A straightforward application of the *Alaska Airlines* doctrine will fail to appreciate the unusual features of omnibus lawmaking and may place disproportionate burdens on the judicial branch. A new approach is needed.

II. THE PEDIGREE OF SEVERABILITY DOCTRINE

Can severability doctrine adapt to address the unique challenges posed by omnibus statutes? This Part establishes a methodology for exploring whether any room for flexibility exists in the current doctrine. It then uses that methodology to determine whether the principles of severability are constitutionally required or prudential.

75. The 2005 Transportation Bill, for example, includes over four hundred provisions. *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1(b), 119 Stat. 1144, 1144-53 (2005); *see also* Glenn Thrush, *GOP Wrote 5 of 10 Longest Bills*, POLITICO (Nov. 25, 2009, 11:47 AM), http://www.politico.com/blogs/on-congress/2009/11/gop-wrote-5-of-10-longest-bills-023067 [http://perma.cc/GT8H-D4ZV] (listing the longest bills as of 2009 by word count).

76. Edward G. Grossman, *Compilation of Patient Protection and Affordable Care Act*, OFF. LEGIS. COUNS., at iv (2010), http://housedocs.house.gov/energycommerce/ppacacon.pdf [http://perma.cc/A5QR-VD47].

The three *Alaska Airlines* severability principles are now well established.[77] It is less clear, however, from what source of authority they are derived. Are they judge-made, common-law principles? Constitutional principles? What freedom do courts have to change them? Judges have traditionally shied away from answering these questions; they apply severability doctrine, theirs not to reason why.[78] Severability doctrine will grow in importance, however, as courts find portions of Congress's increasingly prevalent omnibus legislation unconstitutional. It is essential to determine the sources of the doctrine and what freedom of action, if any, the federal judiciary has to modify the doctrine for omnibus legislation.

A. The Stakes of Determining Severability Doctrine's Source

Scholarly consensus holds that a legal doctrine can belong to a limited number of types of law: state law, federal statutory law, international law, "general [common] law," federal common law, and constitutional law.[79] For severability doctrine, we can easily rule out the first four types of law listed.[80]

77. Although not every application of severability doctrine acknowledges or gives equal weight to all three *Alaska Airlines* principles or reproduces them accurately, they are widely recognized as the prevailing test for severability. *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328-31 (2006); United States v. Booker, 543 U.S. 220, 258-59 (2005); Nagle, *supra* note 12, at 205; Rachel J. Ezzell, Note, *Statutory Interdependence in Severability Analysis*, 111 MICH. L. REV. 1481, 1484-85 (2013) ("The Supreme Court set forth its modern severability framework in *Alaska Airlines, Inc. v. Brock*.").

78. Bd. of Nat. Res. v. Brown, 992 F.2d 937, 947 (9th Cir. 1993) ("The test for severability has been stated often but rarely explained."); Nagle, *supra* note 12, at 205; A. Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071, 1092 (1988) (book review) ("To this day, the Court has never offered a constitutionally satisfactory explanation of its severability decisions."). *Alaska Airlines* cobbled its three principles together from previous cases without spending any time providing jurisprudential justification for *why* they constitute the correct test for severability. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (calling the test for severability "well established" and declining to provide further insight into its origins). Justice O'Connor came closer to justifying them in her opinion for the Court in *Ayotte*. 546 U.S. at 328-31. Even in *Ayotte*, however, the analysis is still relatively cursory. It provides a couple of first principles that inform severability doctrine (e.g., "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem") and then restates the three *Alaska Airlines* principles in a bit more depth. *Id.* at 328.

79. Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 771 (2013).

80. Federal severability doctrine is not state law. States each have their own severability doctrines that are not the same as the doctrine that governs the severability of federal statutes. *See, e.g.*, Cal. Tow Truck Ass'n v. City and County of San Francisco, 797 F.3d 733, 755 (9th Cir. 2015) (applying California state severability doctrine). Severability doctrine is

We are therefore left with two possibilities: severability doctrine is federal common law or it is constitutional law.[81]

This Note teases out whether severability doctrine is federal common law or constitutional law for one simple reason: constitutional principles place

also not federal statutory law. Although statutory evidence of congressional intent is taken seriously in the federal courts' severability doctrine, there exists no general statute governing the severability question. Severability doctrine also does not belong to the pre-*Erie Railroad Co. v. Tompkins* category of "general common law"; post-*Erie*, that is no longer a viable category. Gluck, *supra* note 79, at 773 n.72. *But see* Ryan Scoville, *The New General Common Law of Severability*, 91 TEX. L. REV. 543 (2013) (arguing that, after *Ayotte*, severability doctrine is in fact general common law of the type whose existence *Erie* denies). Finally, severability doctrine is clearly not international law.

81. Another type of law that should be considered is the set of judge-made rules that courts have developed to govern their decision making. Among these are rules of statutory interpretation and rules about the internal procedures of courts (such as how many votes are necessary to decide a case). These rules typically do not fit the two categories of the Supreme Court's definition of federal common law: they have no bearing on federalism interests and Congress has not licensed the federal courts to create them. *See infra* notes 88-89 and accompanying text. Furthermore, Congress's power to legislate about and override these rules is contested. The Supreme Court has indicated that some rules related to judicial decision making may be overridden. *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 766 (1997). Even so, some scholars and at least one state court believe that the Constitution confers the sole power to make some rules—rules of statutory interpretation, for example—on the judiciary. According to this view, a congressional enactment that directs courts how to interpret statutes violates their interpretive prerogative and is unconstitutional. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 99-100 (2003); Linda D. Jellum, *"Which Is To Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 842 (2009); Ryan, *supra*, at 775-76, 787, 799-800 (describing an inherent power of the judiciary to preserve its unique role of "render[ing] 'dispositive judgments' in particular cases and controversies," meaning that Congress may not interfere with courts' "deliberative functions" (citations omitted)). *But see, e.g.*, Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 768 (1992) (arguing that Congress has the power to direct the interpretation of federal statutes).

However we understand this special category of rules, severability doctrine does not belong within it. Severability is not part of the core powers and functions that these rules serve. Severability is related to judicial decision making in an abstract sense, because courts announce severability decisions in the opinions that they issue after deciding a case. But in every situation where severability is relevant, the court's finding of partial unconstitutionality decided the case. Severability is not like a rule of statutory interpretation, which affects how a court applies the law to a particular case. It is also not a "remedy," properly understood, because it does not affect the legal rights and obligations of the parties before the court. It is a prospective announcement of the state of the law in the wake of the finding of partial unconstitutionality. *See infra* note 275 and accompanying text.

greater constraints on judges.[82] Constitutional law involves a special mode of interpretation. Constitutional principles are supposed to be fundamental and fixed, products of courts discovering "what the law is"[83] rather than judicial manufacture.[84] Once a judge interprets a constitutional provision, there should be a heavy presumption against changing that interpretation. The formulation of federal common law, on the other hand, involves a greater degree of judicial freedom. When making federal common law, judges respect constitutional principles – federal common law, after all, may not violate the Constitution[85] – but they also take into account prudential concerns and common-sense judgments in a manner that would be controversial if used in constitutional law.

Furthermore, constitutional principles bind judges in a way that federal common law does not. True, federal common law is binding under the doctrine of stare decisis. Because the application of federal common law principles depends on prudential considerations, however, judges can distinguish or disregard them when prudential considerations so dictate. Constitutional principles, on the other hand, are unaffected by prudential concerns. The Constitution binds absolutely.[86]

82. As this Part later discusses, federal common law also differs from constitutional law in that most (if not all) federal common law may be overridden by an act of Congress, whereas constitutional principles cannot be. *See infra* notes 90-93 and accompanying text. This distinction is irrelevant to the argument of this Note – it does not discuss a potential legislative solution to the problem of applying severability doctrine to omnibus statutes – but it could matter if such a solution were proposed.

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

84. This distinction comports with the "declaratory theory of law" that Justice Scalia (among others) has espoused. David Lehn, *Adjudicative Retroactivity as a Preclusion Problem:* Dow Chemical Co. v. Stephenson, 59 N.Y.U. ANN. SURV. AM. L. 563, 574-75 (2004); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("'[T]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is,' not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it – discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be." (alteration in original) (citations omitted)). According to this theory, "[a] change in [constitutional] law is really a correction: the previous statement of law simply resulted from 'a failure at true discovery'; the 'old' law was 'never the law.'" Lehn, *supra*, at 574 (quoting Linkletter v. Walker, 381 U.S. 618, 623 (1965)). The Court has adopted a version of this theory. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993).

85. *See* Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

86. *See Marbury*, 5 U.S. (1 Cranch) at 138 ("The courts of the U. States are bound to take notice of the constitution."). Of course, one could make the realist objection that, when push

B. How To Determine the Source of Severability Principles

The biggest barrier to determining whether severability doctrine constitutes federal common law or constitutional law is that whereas constitutional law is relatively easy to define—legal rules and principles emanating from judges' interpretation of the Constitution—federal common law does not have a single, generally accepted definition. This Section first introduces two competing definitions of federal common law, one more restrictive than the other. It then describes a methodology for determining whether severability doctrine is federal common law or constitutional law: one must examine how tightly related the rules of severability are to the Constitution.

The Supreme Court currently favors a restrictive understanding of federal common law. As the Court stated in *Texas Industries, Inc. v. Radcliff Materials, Inc.*:

> [This] Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." These instances are "few and restricted," and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," and those in which Congress has given the courts the power to develop substantive law.[87]

This definition tells us three things about federal common law. First, federal common lawmaking occurs in only two defined categories. One category—the protection of "uniquely federal interests"—is what most people likely have in mind when discussing federal common law. It includes doctrines such as the one articulated in *Boyle v. United Technologies Corp.*, which gives federal contractors immunity from state-law tort liability.[88] The other category applies to situations where statutes implicitly or explicitly authorize courts to fill in substantive gaps. In *Textile Workers Union of America v. Lincoln Mills of Alabama*, for instance, the Supreme Court found that Congress had licensed

comes to shove, a federal court could change a principle of constitutional law as easily as a federal common law rule. Perhaps it is "naïve" to suppose that there are any meaningful limits on judges' flexibility to alter rules of constitutional law. *See James M. Beam*, 501 U.S. at 548-49. Insofar as the Court respects the distinction between courts' ability to alter one versus the other, *see* sources cited *supra* note 84, this Note respects it as well.

87. 451 U.S. 630, 640 (1981) (citations omitted); *see also* Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405, 407 (1964) (providing similar definitions).

88. 487 U.S. 500, 504 (1988).

the federal courts to fill in the gaps of federal labor law.[89] Second, courts cannot create federal common law in substantive areas where Congress would not have the power to legislate.[90] Principles of federalism constrain the federal courts' power to make federal common law. Third, Congress always has the power to override federal common law.[91] Congressional legislation trumps and displaces the common-law rules that federal judges create.

Severability doctrine cannot fall under the Supreme Court's definition of federal common law. Due to a lack of conclusive constitutional or historical evidence (or scholarly consensus), it is unclear to what extent Congress may legislate in the field of severability[92] or override judge-made severability doctrine.[93] It is evident, however, that severability doctrine does not belong in either of the two categories of federal common law recognized by the Court. The first category, rules of decision that protect uniquely federal interests, arises only when federalism concerns are at stake.[94] Federalism concerns are irrelevant for severability doctrine because it only applies to the federal courts and federal statutes; it cannot have an effect on the balance of power between state and federal law. The second category, in which courts are licensed to fill in the interstices of federal legislation, is inapplicable to severability doctrine because Congress has never attempted to legislate general rules of severability that apply across statutes.[95] Severability doctrine is not interstitial lawmaking authorized by Congress.

89. 353 U.S. 448, 451 (1957).

90. *See* 3 CYCLOPEDIA OF FEDERAL PROCEDURE § 6:15 (3d ed. 2015); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 927 (1986) (describing the Supreme Court's understanding of the scope of federal common law); Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 643 (2004).

91. City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.'" (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931))).

92. Congress arguably legislates about severability when it includes so-called "severability clauses" in statutes. Courts do not always treat these clauses as binding, however, so it is hard to say that such clauses are evidence that Congress can make law in the area of severability. *See* Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (stating that severability clauses are an "aid merely; not an inexorable command").

93. To the author's knowledge, this question has never been litigated, and Congress has never attempted to override the Court's severability doctrine.

94. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 726-28 (1979) (basing the Court's power to create federal common law on the balance of federal and state interests); Bernadette Bollas Genetin, *The Powers That Be: A Reexamination of the Federal Courts' Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule*, 57 BAYLOR L. REV. 587, 668 (2005).

95. Note, however, that Congress regularly writes severability clauses into statutes. *See infra* notes 229-232 and accompanying text. Individual severability clauses are a different beast

If severability doctrine does not fit within the Supreme Court's definition, can it still constitute federal common law? The answer is yes—possibly. Scholars have long recognized that federal courts create common-law-like rules outside of these categories.[96] They have consequently developed definitions of federal common law that are more expansive than the Court's current version. Martha Field elaborated one of the most expansive understandings in a 1986 article, defining "federal common law" as "any rule of federal law created by a court . . . *when the substance of that rule is not clearly suggested by federal enactments*—constitutional or congressional."[97] In other words, every time a court creates a federal rule that is not tied sufficiently tightly to the Constitution or a federal statute—including when a rule interprets but is not necessarily required by either of them—it creates federal common law.[98] Because Field's definition is among the broadest available, severability doctrine must at least satisfy Field's criteria, or else federal common law must be eliminated as a possible source of law.

Using Field's definition, the line between constitutional law and common law can be drawn by examining how directly the rules are taken from the Constitution. Is this a situation in which the Constitution—interpreted as the Constitution is generally interpreted—dictates the rules that the federal courts apply? If so, then it is constitutional law. Or is it a situation where the rules are the prudential outcropping of federal courts' need to make their powers to determine the law and remedy disputes effective in practice? If this is the case, then it is federal common law.

To illustrate the distinction, consider the category of legal rules and principles that Henry Monaghan called "constitutional common law."[99]

from general severability rules because they are generally interpreted under the *Alaska Airlines* framework as mere expressions of the intent of Congress rather than positive law—an understanding corroborated by the Supreme Court's declaration that severability clauses are not dispositive of the severability of statutes, *Dorchy*, 264 U.S. at 290, which they would have to be if they were positive law.

96. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 616-26 (6th ed. 2009) (describing several conceptualizations of federal common law).

97. Field, *supra* note 90, at 890.

98. According to Field, the federal courts' power to create federal common law should be constrained by two principles. First, courts need to have a source of authority for the rules they create: they have to derive the authority to create rules from the Constitution or a statute. *Id*. at 935. Second, federal common law cannot violate federalism: judge-made federal rules cannot unduly intrude upon the states. *Id*. at 888. These principles keep judge-made law in check.

99. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14 (1975).

Constitutional common law comprises the rules and principles that federal courts develop to make judicial review effective. Examples include the exclusionary-rule remedy of *Mapp v. Ohio*[100] and the damages remedy of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[101] Under the exclusionary rule, the government may not admit evidence gathered during an unconstitutional search or seizure in a criminal trial. When granting a *Bivens* remedy, courts award damages to persons whose constitutional rights were violated. The Supreme Court has acknowledged that neither of these remedies flows directly from the Constitution; instead, they were "judicially created" to give effect to constitutional rights by deterring unlawful police conduct.[102]

Monaghan analogized these rules to normal federal common law. Most federal common law fills gaps in federal statutes in light of their text, structure, and purpose. Constitutional common law does the same, but the *Constitution* is the relevant federal law.[103] When there are gaps in the Constitution's ability to regulate the government's powers, the federal courts fashion rules to give effect to the Constitution. They appear to be creatures of constitutional law, but they are not: they are federal common law. Why? Because the rules do not derive directly from the Constitution, and the Constitution does not require them; they are prudential judicial creations. The Court in *Bivens* determined that *some* scheme of relief needed to exist for certain constitutional violations, and so it made one "in the absence of affirmative action by Congress."[104] Consequently, courts have greater leeway in applying the principle of *Bivens* than they would a rule of constitutional law: if Congress establishes an adequate remedial scheme for a constitutional violation, then courts need not fashion a *Bivens* remedy.[105] This flexibility is what separates constitutional law from federal common law—and it is this same flexibility that determines whether severability doctrine can be modified to accommodate omnibus statutes.

100. 367 U.S. 643 (1961).

101. 403 U.S. 388 (1971).

102. United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

103. Monaghan, *supra* note 99, at 14.

104. 403 U.S. at 395-96.

105. Carlson v. Green, 446 U.S. 14, 18-19 (1980) (stating that "victims of a constitutional violation" do not have the right to a *Bivens* remedy if "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and [is] viewed as equally effective").

C. *Determining Which Aspects of Severability Doctrine Are Constitutionally Required*

To figure out whether the *Alaska Airlines* principles are constitutional law or common law, this Section of the Note engages with the history of severability doctrine. It looks at two constitutional provisions that have shaped the *Alaska Airlines* standard: Article III's conferral of the "judicial Power" on the federal courts, and Article I, Section 7's requirement that statutory "Law" pass through the bicameralism and presentment procedures. It concludes that the first two elements of the *Alaska Airlines* standard—the severability default and independent remainder principles—are constitutionally required. The hypothetical-passage principle, however, is a prudential federal common law requirement that courts may overlook in appropriate situations.

The literature has so far not sought to discover whether any portions of severability doctrine are constitutionally required.[106] Aside from brief mentions of severability's role in *Marbury v. Madison*, the literature on American severability doctrine has either neglected or misunderstood the doctrine's roots.[107] In fact, two recent articles make the profoundly erroneous claim that the doctrine originated in the nineteenth-century application of contract-law principles to judicial review.[108] Others claim that there was no severability doctrine in the Founding Era, and therefore no constitutional foundation for

106. The approach this Note takes is agnostic as to the correct focus of constitutional interpretation. It does not mean to or need to argue that the original understanding of severability ought to be the sole determinant of courts' behavior, because it posits it as consistent with the modern approach to severability.

107. *See, e.g.*, Tobias A. Dorsey, *Sense and Severability*, 46 U. RICH. L. REV. 877, 886-87 (2012) (tracing severability back to *Marbury*); Fish, *supra* note 14, at 1301 (beginning with *Marbury*); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 661 (2008) (same); Klukowski, *supra* note 12, at 11 ("The doctrine governing severability in American statutory interpretation finds its roots in the nineteenth century."); Nagle, *supra* note 12, at 212 (beginning with *Marbury*); Lars Noah, *The Executive Line Item Veto and the Judicial Power To Sever: What's the Difference?*, 56 WASH. & LEE L. REV. 235, 236 n.8 (1999) (tracing severability back to *Marbury*); Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 232 (2004) (same). *But see* Walsh, *supra* note 14, at 756 (discussing the possibility of tracing the origins of severability to *The Federalist No. 78*).

108. Movsesian, *supra* note 15, at 43 (1995) ("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." (emphasis added)); *see also* Campbell, *supra* note 16, at 1508 (2011) ("Severability has its genesis in the common law of contracts . . . .").

severability doctrine.[109] A review of the relevant history, however, demonstrates that severability doctrine is as old as judicial review itself.

This Section uses this history to identify whether the *Alaska Airlines* principles are constitutional law or federal common law. It reaches the following conclusions: the severability-default principle—that the Constitution invalidates only the unconstitutional portions of a partially unconstitutional statute—derives from the original understanding of Article III courts' power of judicial review. It is therefore a constitutional-law principle. The independent-remainder principle—that a statute is inseverable if its remaining portions are not fully operative as a law—stems from the separation-of-powers principle of Article I, Section 7. It is also a principle of constitutional law. In contrast, the hypothetical-passage principle—that a statute is inseverable if Congress would not have passed the remainder on its own—does not derive from any constitutional provision and is not constitutionally required. It is therefore a creature of federal common law.

1. *The Severability-Default Principle: Locating Severability Doctrine in Article III Limits on the Judicial Power*

The first principle of the *Alaska Airlines* doctrine, the severability-default principle, is a presumption that courts should invalidate only the statutory provisions that conflict with the Constitution. As explained below, this principle was drawn directly from the Founding-Era understanding of the limits of judicial review. Federal courts, in other words, have always thought this principle to be constitutionally required. It is therefore a creature of constitutional law.

This Section explores the original understanding of federal courts' Article III power to "say what the law is,"[110] and in particular the original conception of the constraints on judges' power to strike down federal statutes. In both theory and practice, the Constitution has always been understood to require a default rule of severability. The Note uses four types of sources to make this historical claim: state-court cases decided prior to the Constitutional Convention, which demonstrate the American judiciary's initial severability practices; statements in *The Federalist Papers*, which reflect the Founding-Era

109. *See* Walsh, *supra* note 14, at 769 ("[T]he identification of partial unconstitutionality as a problem for analysis in its own right did not occur until after the modern intent-based approach to severability emerged."); Mary C. Aretha, Comment, *Scanning the Horizon: The Supreme Court's Severability Analysis Post-*National Federation of Independent Business v. Sebelius, 2013 MICH. ST. L. REV. 853, 858 ("The Constitution does not speak to the issue of severability.").

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

understanding of the metes and bounds of Article III judicial review; the post-ratification practices of the Supreme Court, which confirm the purchase of that understanding; and recent Supreme Court cases, which affirm its longevity.

Pre-1787 state court judicial review provides the earliest possible source of insight into the original understanding of severability.[111] On at least eight occasions from 1778 to 1787, state courts invalidated or refused to enforce acts of the state legislatures on constitutional grounds.[112] Two of these cases – both testing the constitutionality of statutes with more than one provision – provide insight into how courts of the Founding Era treated partially unconstitutional laws. As these cases indicate, Founding-Era judges presumed that courts should only invalidate laws to the extent of their unconstitutionality – a presumption later incorporated into the original understanding of Article III.

The first case to illustrate this presumption of severability was the New Jersey case of *Holmes v. Walton*.[113] The case involved a challenge to an act passed during the Revolutionary War that authorized patriots to seize loyalist goods if the owner of the goods intended to transfer them to the British.[114] The law allowed juries of fewer than twelve persons to determine the legality of seizures.[115] In September 1780, the New Jersey Supreme Court found that trying seizure cases with juries of fewer than twelve persons violated the New Jersey Constitution.[116]

The New Jersey Supreme Court's holding did not invalidate the entire seizure statute, illustrating that it considered severability to be the default remedy for partial unconstitutionality. Prior to deciding *Holmes*, the judges of the court sent a letter to the New Jersey legislature. The letter expressed their concerns about the effect of their impending decision on the state's war efforts and recommended that the legislature clarify what would happen if the jury

111. 1787 was, of course, the year of the Constitutional Convention. Unlike many constitutional doctrines, the constitutional history relevant for the Article III analysis does not date back to English law. 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 941-42 (1953). Judicial review was a novel American experiment that departed from English precedent. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 292 (1969).

112. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933-34 (2003). *But see* 2 CROSSKEY, *supra* note 111, at 974 (denying that these eight cases, as well as an "undiscovered" 1788 Massachusetts case, were clear examples of the right of judicial review).

113. Austin Scott, Holmes vs. Walton*: The New Jersey Precedent: A Chapter in the History of Judicial Power and Unconstitutional Legislation*, 4 AM. HIST. REV. 456 (1899) (describing *Holmes v. Walton*).

114. *Id.* at 456-57.

115. *Id.*

116. *Id.* at 463.

provision were declared unconstitutional.[117] In June 1780, as a result of this letter, the legislature passed a law indicating that courts had the power to retry cases found defective on constitutional grounds on the merits, instead of automatically dismissing them.[118] Loyalists who violated the substantive prohibitions of the Seizure Act did not win their property back by default on account of the Act's partial constitutional infirmity.[119] According to a nineteenth-century New Jersey historian, the outcome of the *Holmes* case stood for the principle that "a law is no law only so far as it is in exact conflict with the constitution; that all its other provisions if possible must stand."[120]

The same principle of default severability appeared in the New York case of *Rutgers v. Waddington*.[121] The defendant in that case, represented by Alexander Hamilton, argued that the state's Trespass Act violated the recently concluded peace treaty with Britain and the law of nations.[122] The Act provided a right of action to nonloyalists for property damaged during the British occupation.[123] It disallowed defendants from raising the customary defense of justified trespass due to military orders and authorization, in effect creating a strict liability regime for property claims arising out of the war.[124] The New York legislature had passed the statute before news of the peace treaty reached its members.[125] Hamilton argued that, in light of the peace treaty's implied general amnesty for all injuries stemming from the war, and its supremacy over acts of the legislature, the court ought to construe the act so as to exclude foreign (specifically British) subjects from its purview.[126]

Although the New York Court of Common Pleas rejected Hamilton's argument that the statute violated any explicit provision of the peace treaty,[127] it held that British subjects and anyone else "*clearly exempted* from the operation of this statute by the law of nations . . . could never have been *intended* to be

117. *Id.* at 462.

118. *Id.* at 462-63.

119. *Id.*

120. *Id.* at 463.

121. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 296 (Julius Goebel, Jr. ed., 1964).

122. *Id.*

123. *See* THE CASE OF ELIZABETH RUTGERS VERSUS JOSHUA WADDINGTON, DETERMINED IN THE MAYOR'S COURT, IN THE CITY OF NEW YORK, AUGUST 7, 1786, WITH AN HISTORICAL INTRODUCTION BY HENRY B. DAWSON, at xii-xv (Morrisania, Bradstreet Press 1866).

124. *Id.*

125. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 121, at 288.

126. *Id.* at 388.

127. *Id.* at 417.

comprehended within it by the Legislature."[128] The effect of the court's decision was to void the applicability of the Trespass Act only to the extent that it conflicted with a variety of higher law: the law of nations. The court presumed that the default remedy for the conflict was severance.[129]

Holmes and *Rutgers*, decided in the years leading up to the Constitutional Convention, help establish the original understanding of courts' powers to invalidate unconstitutional statutory provisions. *Holmes* and *Rutgers* were well-known state court cases that influenced the Founders' conception of how judicial review should function.[130] As these cases indicate, early American jurists thought it natural that courts engaging in judicial review would invalidate partially unconstitutional laws only to the extent of their unconstitutionality, excising unconstitutional provisions while continuing to enforce the remainder. Records of the Philadelphia Convention and the ratification debates contain no discussion of how judicial review would function in cases involving partially unconstitutional statutes. Several speakers,

128. *Id.* at 418.

129. The third state case, the 1786 Rhode Island case *Trevett v. Weeden*, does not evidence an alternative understanding of severability. *See* JAMES M. VARNUM, THE CASE TREVETT AGAINST WEEDEN: ON INFORMATION AND COMPLAINT FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER'S MEAT IN MARKET, AT PAR WITH SPECIE, TRIED BEFORE THE HONOURABLE SUPERIOR COURT IN THE COUNTY OF NEWPORT, SEPTEMBER TERM, 1786 (Providence, John Carter 1787). The facts of *Trevett* made severability irrelevant. In *Trevett*, the Rhode Island Superior Court of Judicature dismissed a criminal case in which a defendant was charged with violating the state's "paper-money laws" by refusing to accept paper bills as legal tender. 2 CROSSKEY, *supra* note 111, at 965-67. When the legislature asked members of the court to explain their action, they stated that they refused to "execute" a recent act of the legislature that had changed the procedure for prosecuting violations of the paper-money laws. The Act had eliminated trial by jury, gotten rid of the right of appeal, and amended the penalties for violating the laws. The judges' rationale was that the Act's denial of the right to a jury trial contravened Rhode Island's colonial charter. *Id.*; VARNUM, *supra*, at 1-2. The judges of the Superior Court of Judicature did not declare the act unconstitutional outright. J. HAMPDEN DOUGHERTY, POWER OF FEDERAL JUDICIARY OVER LEGISLATION: ITS ORIGIN; THE POWER TO SET ASIDE LAWS; BOUNDARIES OF THE POWER; JUDICIAL INDEPENDENCE; EXISTING EVILS AND REMEDIES 30 (1912). By dismissing the case, however, the court arguably refused to enforce a partially unconstitutional statute on account of one unconstitutional provision. The Rhode Island legislature did not follow the example of New Jersey in *Holmes* and allow retrial on the merits; instead, it removed all but one of the judges from office at the next available opportunity. *Id.* at 31. The continuing legitimacy of the penalty and right to appeal provisions of the impugned Act were never decided, however, because no prosecutions proceeded to trial.

130. DOUGHERTY, *supra* note 129, at 22-23 (discussing the influence of *Rutgers* on the Founders); WILLIAM MONTGOMERY MEIGS, THE RELATION OF THE JUDICIARY TO THE CONSTITUTION 135-38 (1919) (noting that at least four members of the New Jersey delegation to the Constitutional Convention were familiar with *Holmes* and arguing that they incorporated its principle of judicial review into what became the Supremacy Clause).

however, cited the state courts' practice of judicial review as a model for the federal judiciary.[131] One can infer that members of the Founding generation approved of the judges' severability practices in those cases or that, even if they held no opinion about those practices, these cases normalized the severability-default principle in their eyes.

Subsequent Founding-Era writings and cases support this inference. In *The Federalist No. 78*, Alexander Hamilton—who had argued *Rutgers*—explicitly anticipated that federal judges would apply the severability practices of *Rutgers* and *Holmes*:

> A constitution is . . . fundamental law. It therefore belongs to [courts] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute . . . .
>
> . . . .
>
> This exercise of judicial discretion, in determining between two contradictory laws is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other . . . . So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. . . .
>
> . . . .
>
> It can be of no weight to say that the courts, on the pretense of a [constitutional] repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes . . . .[132]

131. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 196 (William S. Hein 1996) (1891) (comments of Oliver Ellsworth); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, *supra*, at 299 (comments of Edmund Pendleton); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 28 (Max Farrand ed., 1966) (comments of James Madison).

132. THE FEDERALIST NO. 78, *supra* note 21, at 466-67 (Alexander Hamilton).

Hamilton argued to the ratifying public that the Constitution would not be a cudgel that willful judges[133] could wield to strike down congressional enactments with which they disagreed. He portrayed judicial review as a characteristically judicial—and therefore less threatening—enterprise, comparing it to the more familiar judicial task of reconciling two conflicting statutes. Hamilton promised that, under the proposed Constitution, federal courts would treat partially unconstitutional statutes as they would two conflicting laws, invalidating unconstitutional statutes to the extent that they contradicted the Constitution while continuing to enforce the nonconflicting remainder.[134] He (and the ratifying public) presumably expected that federal courts would follow the example of the New York Court of Common Pleas in *Rutgers*.

The early practice of the Supreme Court conformed to Hamilton's expectations. *United States v. Todd*[135] is believed to be the first Supreme Court case to present a question of the constitutionality of a statute and, more importantly, the first case in which the Court invalidated an act of Congress.[136] The Court decided *Todd* five years after the Constitution came into force; it is perhaps our best available indication of the Founding-Era understanding of the constitutional limits on judges' power to strike down partially unconstitutional statutes.

The facts of *Todd* are similar to those of the better-known *Hayburn's Case*.[137] A 1792 Act of Congress[138] assigned federal-circuit judges a role in determining the eligibility of Revolutionary War veterans for federal pensions. Under the Act, the circuit judges' decisions about eligibility were subject to review by the Secretary of the Treasury and, potentially, by Congress itself.[139] Judges were initially reluctant to perform this function because of two separation-of-powers concerns: first, that the role was not judicial in nature; and second, that executive officials and Congress should not have the power to

133. *See id.* at 464 ("[The judicial branch] may truly be said to have neither FORCE nor WILL but merely judgment.").

134. Walsh, *supra* note 14, at 756.

135. *See* United States v. Ferreira, 54 U.S. (13 How.) 40, 52 (1851) (Note by the Chief Justice, Inserted by the Order of the Court) (summarizing *United States v. Todd* and explaining that the case was never published); *see also* Wilfred J. Ritz, United States v. Yale Todd *(U.S. 1794)*, 15 WASH. & LEE L. REV. 220, 227-31 (1958) (reprinting all available papers from the *Todd* case).

136. BLAINE FREE MOORE, THE SUPREME COURT AND UNCONSTITUTIONAL LEGISLATION 78 (The Lawbook Exch. 2002) (1913); Ritz, *supra* note 135, at 227.

137. 2 U.S. (2 Dall.) 408 (1792).

138. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.

139. Act of Mar. 23, 1792, ch. 11, § 4, 1 Stat. 243, 244.

review the decisions of judicial officers.[140] Four Justices of the Supreme Court expressed their disapproval of the statute while riding circuit, which they communicated to Congress.[141] Two refused to perform their role at all; two of them acquiesced to carrying out the Act out of feelings of benevolence toward veterans.[142] They agreed to do so not in their judicial capacity, but as "commissioners."[143] Soon after, Congress revised the pension scheme and reassigned the circuit judges' duties so as to avoid the constitutional problems. To address the validity of pension claims decided under the old system, Congress passed a provision requiring the Secretary of War to "take such measures as may be necessary" to get the Supreme Court to determine whether these adjudications by "certain persons styling themselves commissioners" were valid.[144]

In *United States v. Todd*, the Court reached the question that Congress wanted answered.[145] Three "commissioners" (including two Justices of the Court) had in 1792 found Yale Todd of North Haven, Connecticut, eligible for a pension for injuries suffered during the war.[146] United States Attorney General William Bradford brought a suit before the Court seeking the return of the money that had been awarded to Todd, on the grounds that the commissioners' adjudication was invalid.[147] The Court agreed with Bradford.[148] The Justices did not provide a remedy for the statutory defect (or a reasoned opinion at all);[149] in light of the revised statutory scheme, there was no practical reason for them to do so.

The history of *Hayburn's Case* and *Todd* demonstrates that the judges of the new federal courts understood limits to exist on their power of judicial review: severability was the default. The Justices did not put into question the validity of the rest of the 1792 pension scheme; they only nullified the unconstitutional eligibility determinations. Like the judges in *Rutgers*, courts refused to "execute" an act of the legislature to the extent they thought it was unconstitutional. Like the judges in *Holmes*, they engaged in dialogue with Congress to resolve the statutory defect.

140. Ritz, *supra* note 135, at 223.

141. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.*.

142. *Id.*

143. *Id.*

144. Act of Feb. 28, 1793, ch. 17, sec. 3, 1 Stat. 324, 325.

145. Ritz, *supra* note 135, at 227.

146. *Id.* at 229.

147. *Id.* at 229-30.

148. *Id.* at 230.

149. *Id.*

The Marshall Court embraced this understanding of severability as the default remedy for partially unconstitutional statutes, further confirming the constitutional underpinnings of the severability-default principle. In its first two decisions declaring acts of Congress unconstitutional, *Dred Scott v. Sandford* and *Marbury v. Madison*, the Court invalidated statutory provisions that it deemed repugnant to the Constitution, while leaving the rest of the relevant statutes—the Judiciary Act of 1789 and the Missouri Compromise—in force.[150] Later decisions continued this trend.[151]

The Court's severability practice in these cases reflected Chief Justice Marshall's understanding of the limits of judicial review. In an 1829 case, *Bank of Hamilton v. Dudley's Lessee*,[152] Justice Marshall advanced a conception of severability that mirrored the state courts' practices in *Holmes* and *Rutgers*. In his opinion for the Court, the Chief Justice instructed an Ohio state court that, "[i]f any part" of the Ohio occupancy statute at issue in the case "be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States or of the state."[153] Although the severability of state statutes has, as a formal matter, become the province of state law rather than Article III,[154] the dicta in *Bank of Hamilton* provides a clear window into the method underlying the Marshall Court's severability practices. The Marshall Court believed that courts ought to excise unconstitutional provisions from laws without voiding the laws' constitutional portions.[155]

An unbroken line of evidence from the Founding Era thus indicates an original assumption that judges should retain rather than discard the constitutional remainders of partially unconstitutional statutes. The Constitution grants the federal courts the power of judicial review over acts of Congress. It also requires them to treat the Constitution as a form of higher law that invalidates those acts—but only so far as they conflict. This assumption derived from the Founding-Era conception of the Constitution (as a type of "higher law") and of the Constitution's requirements in the event of conflict with ordinary law (reconciling its provisions with those of lesser laws). The severability default arose as a principle of constitutional law; it is a

150. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452 (1856); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

151. *See, e.g.*, Justices v. Murray, 76 U.S. (9 Wall.) 274 (1869); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869); Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1867).

152. 27 U.S. (2 Pet.) 492 (1829).

153. *Id.* at 526.

154. Leavitt v. Jane L., 518 U.S. 137, 139 (1996) ("Severability is of course a matter of state law.").

155. Walsh, *supra* note 14, at 757.

byproduct of the original understanding of the limits on Article III judges' ability to use the Constitution to invalidate statutes.

The more difficult question is whether the severability-default principle remains constitutional law. As Section II.C.2 elaborates, changes in the nineteenth century caused judges to change the way they apply the severability-default principle. "Refrain[ing] from invalidating more of [a] statute than is necessary"[156] sometimes means declaring a statute inseverable and striking down the entire thing, including portions that do not directly conflict with the Constitution.[157] Furthermore, as noted at the outset of this Section, judges and scholars have largely lost sight of the severability-default principle's constitutional origins.[158] Has the principle essentially become a federal common-law rule, a mere factor to weigh in the severability determination, or maybe even a tautological formalism, applicable except when it is not?

The answer appears to be no: the severability default remains an inflexible constitutional principle. The Justices continue to maintain that they may not strike down any more of a statute than "necessary" to satisfy their constitutional role.[159] Although they might sometimes misinterpret "necessary" and err too much on the side of inseverability, they still recognize the need to demonstrate why inseverability is a "necessary" remedy, rather than the default.[160] Furthermore, they ground their continued reliance on the principle in the same constitutional norms that Hamilton used to defend judicial review in *The Federalist Papers*. They "try not to nullify more of a legislature's work than is necessary, for [they] know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"[161] They recognize that a judge properly exercising her judicial role must invalidate as little of a statute as possible. The original understanding of the limits on judicial review is still at work. There is still an upper bound on how much of a statute judges can justifiably strike down.

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

157. *See infra* Section II.C.2.

158. *See supra* notes 106-109 and accompanying text.

159. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006); *see, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508 (2010).

160. *But see* Campbell, *supra* note 16 (arguing for a default remedy of inseverability).

161. *Id.* at 1520 (quoting *Ayotte*, 546 U.S. at 328-30).

2. *The Independent-Remainder Principle: Locating Severability Doctrine in Article I, Section 7's Definition of Statutory "Law"*

This Section traces the origins of the independent-remainder principle of the *Alaska Airlines* doctrine: judges must strike down the remaining portions of partially unconstitutional statutes unless they are "fully operative as a law."[162] It analyzes the cases in which the Supreme Court developed this principle. Based on these cases, it argues that the principle is constitutionally required by the Court's understanding of Article I, Section 7 of the Constitution[163]: judges may not constitutionally rewrite federal statutes, even to save them, because only statutory provisions that go through bicameralism and presentment are valid law.

First, let us consider an obvious question. If the original understanding of Article III contemplates that courts will strike down statutes only to the extent of their unconstitutionality, one might wonder: are the second and third principles of the *Alaska Airlines* doctrine unconstitutional? These principles, after all, direct courts to go beyond the original understanding of severability; in some cases, courts may strike down a partially unconstitutional law in its entirety.

The reason for this apparent evolution is that the independent remainder and hypothetical passage principles of the *Alaska Airlines* doctrine emerged in response to changing conditions. The shift in the Court's approach to severability in the late nineteenth century was a result of its increasing willingness to exercise its powers of judicial review.[164] The federal courts invalidated very few federal statutes in their early years. The more a court strikes down statutes, the more the hard cases of severing unconstitutional from constitutional provisions will present themselves—in particular, cases where a statute functions poorly in the absence of its unconstitutional portions. None of the Founding-Era cases presented such a concern. In *Marbury v. Madison*, for example, it was easy for the Court to conclude that the Judiciary Act of 1789 continued to function as law after excising the invalid mandamus

162. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

163. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . . .").

164. *See, e.g.*, Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1183 n.12 (1984) ("Because the concept of severability has no meaning unless a court can declare a statute unconstitutional, it is not surprising that the possibility of declaring a law only partially invalid received little attention during the years when the Supreme Court was consolidating its power of judicial review.").

jurisdiction provision.[165] Subsequent developments—and in particular, increasingly complex statutes—have forced the federal courts to clarify when the remainder of severed statutes can qualify as valid law. When doing so, the Court did not supersede the original understanding of severability; it simply addressed novel questions about severability doctrine's metes and bounds that did not arise in Founding-Era dockets. The federal courts developed the independent-remainder principle in response to these novel questions.

To figure out whether the second *Alaska Airlines* principle is constitutionally required, we must understand how it developed. The phrase "fully operative as a law" first appeared in the Supreme Court's jurisprudence in 1894.[166] The Court had developed the principle two decades earlier, however, in a line of cases including *United States v. Reese*,[167] *Keokuk Northern Line Packet Co. v. City of Keokuk*,[168] and *Albany County Supervisors v. Stanley*.[169] In those cases, the Court stated that the remainder of a partially unconstitutional law must be struck down unless the constitutional provisions are "severable" from the unconstitutional ones[170]—or, in other words, unless they are "unaffected" by the excision and can "stand alone" as law.[171]

Although these early cases did not provide much detail about what the terms "severable" or "fully operative as a law" meant, the Court intended them

165. *See* Walsh, *supra* note 14, at 757.

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

167. 92 U.S. 214, 221 (1875) ("We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not.").

168. 95 U.S. 80 (1877).

169. 105 U.S. 305 (1881).

170. *Keokuk*, 95 U.S. at 89 ("The ordinance of Keokuk has imposed no charge upon these plaintiffs which it was beyond the power of the city to impose. To the extent to which they are affected by it there is no valid objection to it. Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case."). In *Keokuk*, the Court determined that tonnage fees imposed on vessels docked at a municipal wharf in Keokuk, Iowa, were constitutional fees for services rather than unconstitutional restraints on trade. *Id.* at 87-88. The Court considered near the end of the opinion whether the state statute that granted Keokuk the authority to impose landing fees had unconstitutionally given the municipality the power to restrain trade through fees unconnected to wharfing services. (The Court had previously invalidated such fees in *Cannon v. City of New Orleans*, 87 U.S. 577, 581 (1874).) The Court found that it could "sever[]" the statute's grant of power to impose fees for wharfing services from the power to impose unconstitutional tonnage fees, and that "[w]hen those provisions are attempted to be enforced, a different question may be presented." *Id.* at 88-89. In essence, the Court saved the constitutionality of the statute by construing its grant of authority narrowly.

171. *Stanley*, 105 U.S. at 312 (quoting *In re* Trade-Mark Cases, 100 U.S. 82, 98 (1879)).

to indicate that judges may not "give to the words used by Congress a narrower meaning than they are manifestly intended to bear."[172] Excision of unconstitutional statutory provisions or applications in accordance with the severability-default principle necessarily does violence to a congressionally enacted text: courts decline to enforce the whole law as written. Unless Congress included explicit instructions about severability, such as a severability clause, "nothing in the language of [a] statute" will "authorize" a court's "distinction" between constitutional and unconstitutional applications or provisions.[173] A court could, in theory, always rewrite a partially unconstitutional statute to the point that it becomes constitutional, and never have to declare a law inseverable.[174] The independent-remainder principle stands for the proposition that there are limits on this judicial violence: the severability-default principle does not license courts to usurp the legislative role.

Subsequent cases have fleshed out how much judicial rewriting is too much. In *Hill v. Wallace*,[175] the case cited by *Alaska Airlines* as an example of the independent-remainder principle at work, the Court invalidated an otherwise constitutional provision of the Future Trading Act because a different, unconstitutional provision was so intertwined with it that the constitutional portion could not fully operate as law without the unconstitutional section.[176] Section 4 of the Act placed a tax on futures contracts for grain.[177] The tax was subject to several exceptions, including when the futures contract was made "through a member of the Board of Trade designated by the Secretary of Agriculture as a contract market."[178] To receive this designation, the Board of Trade had to comply with regulations issued by the Secretary.[179]

The Court applied the independent-remainder principle in its holding. The Court found that Congress exceeded its power under the Taxing Clause in enacting the tax in section 4.[180] As a result, the Court invalidated the regulations promulgated by the Secretary. The Court found that these regulations were "so interwoven" with the unconstitutional tax that "they can

172. *In re Trade-Mark Cases*, 100 U.S. at 98.

173. *Stanley*, 105 U.S. at 313.

174. *See, e.g.*, *infra* notes 260-262 and accompanying text (discussing Justice Powell's concerns about excessive judicial revision in Califano v. Westcott, 443 U.S. 76 (1979)).

175. 259 U.S. 44 (1922).

176. *Id.* at 70.

177. *Id.* at 63.

178. *Id.*

179. *Id.* at 63-64.

180. *Id.* at 68.

not be separated."[181] Because of the way the Act was structured, the Secretary's power to issue regulations would have made no sense in the absence of the unconstitutional tax provision. To make the Act coherent, the Court would have had to reinterpret the Act to give the Secretary freestanding authority to issue regulations governing contract markets. The need for such extensive judicial revision meant that the regulations were not operative as law on their own.

The constitutional provisions that undergird the independent-remainder principle are Article III[182] and Article I, Section 7's definition of statutory "law."[183] Article I, Section 7 lays out the process by which Congress may pass "bills" and create statutory "law."[184] Valid federal legislation has to go through the presentment procedures that the Section outlines: both Houses of Congress must pass an identical bill that the President must sign.[185]

The Supreme Court's Article I, Section 7 jurisprudence indicates that these are the only procedures by which statutory law may constitutionally be made. Notable cases in this line of jurisprudence include *INS v. Chadha*[186] and *Clinton v. City of New York*.[187] In both of those cases, the Court conceived of Article I, Section 7 as a guarantor of the separation of powers.[188] Whether a one-house resolution originating in Congress, as in *Chadha*, or a line-item veto by the President, as in *Clinton*, legislation that does not pass through bicameralism and presentment undermines the constitutional balance created by the Framers.[189] A bundle of provisions must go through presentment together. If another branch is responsible for authoring legislation, the legislation is

181. *Id.* at 70.

182. U.S. CONST. art. III, § 2.

183. *Id.* art. I, § 7, cl. 2.

184. *Id.*

185. *Id.*

186. 462 U.S. 919 (1983).

187. 524 U.S. 417 (1998).

188. *See id.* at 439 ("The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself."); *Chadha*, 462 U.S. at 946 ("These provisions of [Article I, Section 7] are integral parts of the constitutional design for the separation of powers.").

189. *See Chadha*, 462 U.S. at 951 ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); *see also Clinton*, 524 U.S. at 439-40 (quoting this language from *Chadha* in the context of the line-item veto).

unconstitutional. *Clinton* shows that this principle applies even when another branch *removes* portions of legislation passed by Congress.[190]

The independent-remainder principle relates directly to Article I, Section 7. If a law is not workable as a result of partial judicial invalidation—if it makes so little sense as an independent piece of legislation that no judge can apply it without rewriting it—then courts should strike it down. Otherwise, by rewriting the statute to save it, courts would be adding language that did not go through the Article I, Section 7 presentment procedures.[191]

From its earliest severability cases, the Court's explication of the independent-remainder principle suggests that it understood the Constitution to require that principle on presentment grounds. In *United States v. Reese*, one of the first cases to apply the "fully operative as a law" concept, the Court stated that extensive judicial revision of a statute as part of a severability determination "would, to some extent, substitute the judicial for the legislative department of the government . . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."[192] The judiciary, reasoned the *Reese* Court, may not be the author of legislation. Otherwise, it would be acting as a legislature, in violation of the constitutional principle that Congress is the sole author of legislation.[193]

190. 524 U.S. at 440 ("Our first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.' What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the 'finely wrought' procedure that the Framers designed." (footnote omitted) (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940))).

191. Of course, the principle also applies to situations where courts do not literally rewrite the words of a statute but, by altering its scope of application, substantially change its import.

192. 92 U.S. 214, 219-21 (1875).

193. Admittedly, some of this reasoning in *Reese* might be interpreted to rely on a due-process rationale rather than on Article I, Section 7. Due process requires courts to strike down unconstitutionally vague penal statutes because people need notice of the crimes for which they might be punished. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 59-60 (1999). The Court's willingness to cite the *Reese* language in nonpenal contexts, however, indicates that it understands the "fully operative" principle to have a broader constitutional basis. *Hill v. Wallace*, 259 U.S. 44, 70 (1922), and, more recently, *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006), applied this language from *Reese* to noncriminal cases. *Ayotte*, confusingly, cites *Reese* after reciting the hypothetical-passage principle rather than the independent-remainder principle (separating it from the former, however, with the words "[a]ll the while," indicating that Justice O'Connor thought *Reese*'s reasoning applicable to multiple principles). *Ayotte*, 546 U.S. at 330. *Reese*, however, makes no mention of a principle similar to the hypothetical-passage principle—that would have been anachronistic, since the Supreme Court first applied the hypothetical-passage principle six years later in *Allen v. Louisiana*, 103 U.S. 80 (1880). *See infra* Section II.C.3.

Recent cases have continued to link the independent-remainder principle of *Reese* to broader constitutional ideas regarding the separation of powers under Article I, Section 7. In *Ayotte*, for example, the Court described the independent-remainder principle as arising out of courts' "limited . . . constitutional mandate" that prevents them from engaging in "quintessentially legislative work" and "invasion of the legislative domain."[194] It is hard to see how the Constitution, as the Court has interpreted it, could not require such a principle. The independent-remainder principle is a direct result of the "finely wrought and exhaustively considered [presentment] procedure"[195] that preserves the balance of powers. It is a constitutional principle.

3. *The Hypothetical-Passage Principle: Locating Severability Doctrine in Prudential Comity Concerns*

The same cannot be said for the hypothetical-passage principle of the *Alaska Airlines* doctrine. According to that principle, judges must invalidate an entire statute unless they determine that Congress would have passed the remainder independently.[196] That principle was developed in the late nineteenth century as a consequence of the statutory interpretation methodology that the Supreme Court favored at the time: purposivism.[197] This theory presumes that statutes have a single, overriding purpose and that individual provisions should be interpreted in light of the act's overall purpose.[198] Unlike the severability default and independent remainder principles, the hypothetical-passage principle is best understood as federal common law.

On its surface, the hypothetical-passage principle has some similarities to the independent-remainder principle: both limit the judiciary's ability to interfere with the legislature's prerogative to write statutes. But the two inquiries are distinct. The independent-remainder principle asks whether or not a partially unconstitutional statute's remainder can stand as a coherent, independent law without judicial revision. The hypothetical-passage principle, on the other hand, asks whether the specific Congress that enacted the bill as a

194. 546 U.S. at 329-30.

195. INS v. Chadha, 462 U.S. 919, 951 (1983).

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

197. *See infra* notes 199-210 and accompanying text.

198. WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 84-88 (1999) (discussing how Chief Justice Shaw departed from Chief Justice Marshall's approach to statutory interpretation by looking at legislative intent in terms of the "whole act" rather than the "literal" meaning).

whole would have enacted the remainder if it had known of the bill's partial unconstitutionality. The question is not whether the judiciary would need to rewrite the statute in order to enforce it, in violation of Article I, Section 7. Instead, the question is whether courts should defer to Congress by refusing to apply an otherwise enforceable remainder because Congress would not have passed the remainder on its own.

The hypothetical-passage principle can be characterized as a creature of federal common law for two reasons. First, it entered the Supreme Court's jurisprudence as a common-law principle, drawn from the Court's purposivist understanding of statutory interpretation. Second, according to the Court's Article I, Section 7 jurisprudence, the hypothetical-passage principle is not constitutionally required, and therefore it cannot be a direct interpretation of the Constitution.

There is clear evidence that the hypothetical-passage principle is a common-law rule: it was borrowed from a Massachusetts judicial decision, and it was based on prudential statutory interpretation concerns rather than on constitutional commands or principles.

The Supreme Judicial Court of Massachusetts pioneered an alternative to the Marshall Court's approach to severability[199] in the 1854 case *Warren v. City of Charlestown*.[200] The case concerned a law enacted to merge the cities of Boston and Charlestown. The plaintiffs alleged that the statute failed to provide adequate political representation to the residents of Charlestown.[201] Deviating from its past practice of invalidating only unconstitutional portions of statutes,[202] the court held: "When the parts of a statute are so mutually connected and dependent, . . . 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," all of the parts are void if any one of these dependent parts is found unconstitutional.[203]

The *Warren* rule was a principle of statutory interpretation. Chief Justice Shaw, the author of *Warren*, was one of the great theorists and proponents of purposivism – the doctrine that courts should interpret statutes in light of the legislature's purpose in enacting them.

199. Stern, *supra* note 12, at 79-80.

200. 68 Mass. (2 Gray) 84, 99-100 (1854).

201. *Id.* at 92-93.

202. *See, e.g.*, Fisher v. McGirr, 67 Mass. (1 Gray) 1, 1 (1854) ("Where part only of a statute is repugnant to the constitution, that part only will be adjudged void.").

203. *Warren*, 68 Mass. (2 Gray) at 99.

The *Warren* test is based on this theory of interpretation. The test applies where the legislature "intended [the parts of a statute to work] as a whole"[204] — in other words, where purposivism is the appropriate interpretive methodology. Later in the opinion, Chief Justice Shaw explained: "[I]f 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."[205] On the other hand, "if the main objects and purposes of the act are constitutional, they may be carried into effect, although there may be isolated clauses, or separate or independent enactments" that are unconstitutional.[206] In other words, Chief Justice Shaw was concerned with the constitutionality of the act's "entire scope and purpose." If the act's entire purpose was unconstitutional, then courts could not give effect to any of the act's provisions. In light of the act's null and void purpose, courts must interpret the act's provisions to be null and void as well, even if they are fully operative as a law, because individual provisions must be interpreted in light of the whole act's purpose. The *Warren* principle, then, was originally conceived as an application of statutory interpretation methodology.

Warren was a very influential decision, and a number of other state courts adopted its approach in the decades after it was decided.[207] In the 1880 case *Allen v. Louisiana*,[208] the Supreme Court introduced the severability principle of *Warren* into its jurisprudence. The Court cited the *Warren* test verbatim.[209]

The fact that the hypothetical-passage principle came into the Supreme Court's jurisprudence via the Massachusetts court does not necessarily mean it is common law. The Supreme Court could conceivably borrow from a state court's interpretation of the Federal Constitution as persuasive authority. But the *Warren* rule was not drawn from the federal Constitution. The Court adopted the *Warren* principle during the period where it was embracing purposivism, the era of *Holy Trinity Church v. United States*.[210] It is reasonable to suppose that the Court understood the principle as a common-law import related to the proper method of interpreting statutes — a principle not drawn from or required by any jurisdiction's constitution. It did not presume that the principle was mandated by the Federal Constitution.

204. *Id.* at 84.

205. *Id.* at 99-100.

206. *Id.* at 97.

207. *See, e.g.*, Lathrop v. Mills, 19 Cal. 513, 523 (1861); State v. Wheeler, 25 Conn. 290, 299 (1856); Slauson v. City of Racine, 13 Wis. 398, 404 (1861).

208. 103 U.S. 80 (1880).

209. *Id.* at 83-84.

210. 143 U.S. 457 (1892).

There is another argument that the hypothetical-passage principle is not constitutional law: the Court's jurisprudence indicates that the principle cannot be constitutionally required. If we wanted to locate a constitutional basis for the hypothetical-passage principle, we might look again to Article I, Section 7. Statutory law must go through the presentment procedures to be valid.[211] Arguably, if a court determines that Congress would not have enacted the remainder of a partially unconstitutional bill on its own, the remainder would violate the presentment requirement—it could not hypothetically have passed through the Article I, Section 7 procedures.[212]

But the same Article I, Section 7 jurisprudence that justifies the independent-remainder principle dictates that the hypothetical-passage principle cannot be constitutionally mandated. Congress has the power to present complete bills to the President, subject to an up-or-down veto.[213] *Chadha*, *Clinton*, and other cases confirm the importance of this requirement.[214] It is in the very nature of Congress's power that it may include provisions in bills that would not pass through the presentment procedures on their own.[215] If we impose a requirement on Congress that all hypothetical permutations of a bill have sufficient support to pass on their own, we profoundly limit Congress's lawmaking power and disturb the balance of powers.[216] The hypothetical-passage test is not *contrary* to the Constitution; courts might justifiably decline to enforce a statutory remainder with weak hypothetical congressional support. But the Constitution does not require such a result.

Furthermore, trying to tie the hypothetical-passage principle to the Constitution ignores the role of the President in the presentment process. Requiring a showing that a majority of Congress would have enacted the remainder of a partially unconstitutional statute forgets that presidential assent is needed before a bill becomes law.[217] The hypothetical-passage principle's failure to take account of the President's role in enacting statutes is further evidence that the *Warren* principle does not sound in Article I, Section 7. When

211. *See supra* notes 185-190 and accompanying text.

212. *See* Campbell, *supra* note 16, at 1498-99; *see also* Fish, *supra* note 14, at 1316.

213. U.S. CONST. art. I, § 7.

214. *See supra* notes 185-190 and accompanying text.

215. *See supra* notes 71-72 and accompanying text.

216. When the other branches place constraints on Congress's lawmaking powers, they disturb the balance of powers. *See* Clinton v. City of New York, 524 U.S. 417, 440-41 (1998) ("What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the 'finely wrought' procedure that the Framers designed.").

217. *See* U.S. CONST. art. I, § 7, cl. 2.

applying the principle, courts examine the will of Congress.[218] They do not care about the bill's hypothetical ability to fulfill all of the presentment requirements. There is another setting in which courts conspicuously tend to care about only Congress's (and not the President's) role in enacting legislation: statutory interpretation.[219] The hypothetical-passage principle's solicitude for Congress's intent is a means of deferring to the branch that writes statutes when figuring out how to give them force—just as in statutory interpretation.[220] It is not a means of enforcing the presentment requirement.

Put another way, the Constitution did not enact Chief Justice Shaw's purposivism.[221] Reasonable jurists disagree about which principles of statutory interpretation are valid. That is one reason why Abbe Gluck considers them federal common law[222]: they are applied too inconsistently and haphazardly to be constitutional. There is no consensus that the Constitution requires the purposivism underlying *Warren*. Textualists, for example, argue that a statutory text encodes legislative bargains that judges should neither inquire into nor disturb.[223] A corollary is that statutory provisions do not have to relate to a statute's overriding purpose—or even to have garnered hypothetical majority support—for courts to enforce them.[224] So long as a statutory provision went through the presentment procedures, textualists ought to agree, courts may constitutionally give it effect.

None of this is to say that the *Warren* principle does not make prudential sense. It accords with courts' general desire to serve the intent of Congress when applying statutory law.[225] If a court finds clear evidence that Congress would not have wanted the remainder enforced, it may be a wise exercise of the

218. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) ("The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that *Congress* would not have enacted." (emphasis added)).

219. Kathryn Marie Dessayer, Note, *The First Word: The President's Place in "Legislative History,"* 89 MICH. L. REV. 399, 402 (1990) (describing the "near-exclusive focus on congressional materials" in statutory interpretation).

220. 2A SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 30, § 45:5.

221. *Cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

222. *See* Gluck, *supra* note 79, at 778-79.

223. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431 (2005); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-23 (1997) (critiquing the idea of legislative intent).

224. Manning, *supra* note 223, at 431 ("Legislative outcomes necessarily hinge on arbitrary (or at least nonsubstantive) factors such as the sequence in which alternatives are presented." (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64 (1988))).

225. 2A SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 30, § 45:5.

judicial role not to enforce it. But the Constitution does not require this result. When courts strike down statutes based on the hypothetical-passage principle, they are operating in the realm of common law.

4. *Distinguishing the Independent-Remainder Principle from the Hypothetical-Passage Principle*

Judges and scholars often conflate the independent remainder and hypothetical passage principles. The *Alaska Airlines* opinion is confusingly written and makes the mistake easy. As noted in Section I.A, *Alaska Airlines* describes the independent-remainder principle in terms of congressional intent: "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."[226] To be clear, this characterization of the principle does not require courts to inquire into legislative intent in every case. Instead, it establishes an intent-based rationale for the independent-remainder principle, based on a presumption about Congress's collective mind.[227] The *Alaska Airlines* Court had no need to include this language, but it did—and that has led to confusion.[228]

226. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987).

227. The *Alaska Airlines* opinion makes this evident when it goes on to describe an additional inquiry into "whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 685.

228. The *NFIB* dissenters succumbed to this confusion. They ignored the severability default and independent remainder principles when describing the test for severability. Instead, they characterized the entire severability inquiry in terms of legislative intent, dividing it into two parts:

> First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress intended . . . . Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion.

Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2668-69 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Confusingly, however, the dissenters equated the first part of this inquiry with *Free Enterprise Fund*'s recitation of the requirement that a statute's remainder be "fully operative as a law," *id.* at 2669 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 509 (2010)), a text-based test that requires no inquiry into congressional intent. Indeed, *Free Enterprise Fund* explicitly distinguishes the independent-remainder test from the *Warren* hypothetical-passage test, which it cites separately. *Free Enter. Fund*, 561 U.S. at 509. Similarly, the *NFIB* dissenters equated their test with the *Trade-Mark Cases*' admonishment that courts refrain from "mak[ing] a new law" rather than "enforc[ing] an old one." *NFIB*, 132 S. Ct. at 2676 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (quoting *In re* Trade-Mark Cases, 100 U.S. 82,

It is important, however, to preserve the independent-remainder principle as distinct from the hypothetical-passage principle. It is true, in a strict sense, that the independent-remainder principle is related to respect for congressional intent. In the severability context, separation of powers is ultimately about respect for Congress's lawmaking powers. But, as noted in Section II.C.2, the independent-remainder principle's enforcement of the separation of powers is rooted in the presentment requirement of Article I, Section 7. The hypothetical-passage principle, on the other hand, enforces the separation of powers for prudential reasons. That can make a jurisprudential difference that one neglects if one assimilates the former principle into the latter.

Consider the following hypothetical situation: a statute requires "all American citizens" to pay a "Special Supplemental Tax" to the Federal Treasury. The Court finds the statute unconstitutional (on some sort of federalism or capitation tax[229] grounds) as applied to citizens of the states but not to those in the District of Columbia. Suppose, however, that congressional drafters have included a super-strong severability clause in the statute, which states: "It is the intent of Congress that the courts shall enforce this law's provisions, even after a ruling of partial unconstitutionality, to the greatest extent possible. Congress would have passed this law no matter what severability determination the Court might make." The Court now has to decide on severability. What should it do?

If we follow a legislative-intent-only approach, it seems clear that the Court would have to sever the unconstitutional portions of the statute and enforce the supplemental tax only as applied to citizens in the District of Columbia. Congress made a clear textual declaration recognizing that the Court might sever the law and stating that it *wanted* the Court to do so. Perhaps the legislative history also indicated that Congress wanted at least some people to pay the revenue-raising tax, and that it would throw equity to the wind. Such a determination, however, would be constitutionally problematic. True, the statute's severability clause ties Congress to the mast of whatever severability determination courts reach. But courts, by severing the statute in the manner suggested, would be radically revising the statutory scheme. It would be changing "all American citizens" to "American citizens living in the District of Columbia." As in *United States v. Reese*, the law's application to citizens in the District of Columbia, while perfectly constitutional, is too "intertwined"[230]

99 (1879)). These statements suggest that the dissenters are subsuming the textualist independent remainder principle into the intent-based hypothetical passage principle.

229. *See* U.S. CONST. art. I, § 9 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.").

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

with its application to citizens of the states to justify severing one from the other.[231] It is for Congress, not the Court, to rewrite the law in this manner. This is a situation in which the independent-remainder principle makes a jurisprudential contribution. The hypothetical-passage principle, on its own, leads to a constitutionally problematic result.

An analogous situation is not inconceivable. Congress frequently includes severability clauses in statutes, albeit with less insistent language. There are situations in which a severed statute may function as Congress intended—because Congress included a severability clause and would prefer limited or piecemeal application of a statute to none—but in which the function of the remaining statute is impermissibly altered.[232] Hence the continued need to leave room for both analyses in the doctrine and to avoid conflating statutory interdependence with legislative intent.

There is another reason to keep the two principles analytically distinct. As discussed in Section II.C.3, the hypothetical-passage principle is not constitutionally mandated; it is a prudential doctrine derived from the purposivist approach to statutory interpretation. Conflating this with the independent-remainder principle causes the judge to lose sight of the prudential nature of the hypothetical-passage principle. For example, one version of this conflation is that any alteration to a law that causes it to no longer "operate in the manner Congress intended" amounts to judicial rewriting and necessitates a finding of inseverability.[233] Adopting this version of the test would require courts to strike down entire statutes superfluously. If I tell a colleague, "Go to the butcher's and fetch me a leg of lamb, and then go to the fishmonger's and fetch me a salmon filet," and then a judge rules that the transportation of fish by those other than its end consumers is unconstitutional, the severed instructions would "operate in a manner" different from what I intended: I would only get a delivery of lamb and not fish. But the judge would not be rewriting the lamb instruction when severing

231. *See* United States v. Reese, 92 U.S. 214, 220-21 (1875).

232. *But see* Fish, *supra* note 14, at 1305. Indeed, Fish seems to admit as much later in the same article. *See id.* at 1342-43 ("Severability clauses are generally not applied to specific statutory text, but communicate a general legislative intention that pieces of the statute be treated as severable. That intention could be defeated in any particular case if severance would leave the remaining language incoherent or unenforceable.").

233. *NFIB*, 132 S. Ct. at 2668 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *see also id.* at 2674 ("Congress designed the exchanges so the shopper can compare benefits and prices. But the comparison cannot be made in the way Congress designed if the prices depend on the shopper's pre-existing health conditions. The prices would vary from person to person. So without community rating—which prohibits insurers from basing the price of insurance on pre-existing conditions—the exchanges cannot operate in the manner Congress intended.").

the fish instruction. That instruction would remain the same. The excision would pose no Article I, Section 7 problem.

The independent-remainder principle is concerned with judicial revisions that make the law *actually operate in a different way*: those that make the words mean something different, or mean nothing at all, or apply to different people or circumstances than they would without the excision. The hypothetical-passage principle, on the other hand, is concerned with whether a perfectly constitutional excision leads to a legislative scheme that Congress would not have enacted, and whether courts should, out of respect for Congress's legislative prerogative, invalidate the scheme entirely. When they rely on the hypothetical-passage principle, courts take the extraordinary step of refraining from enforcing duly enacted law. To justify this, the principle must represent a higher bar to invalidation than the nebulous standard of "operating in a different manner from what Congress intended." Hence the *Warren* principle's focus on a specific type of legislative intent: whether Congress would have wanted the unconstitutional provision separated, or, alternatively, whether Congress would have passed the remainder on its own. The independent remainder and hypothetical passage principles are distinct, and separately sourced: the former is a constitutional command, and the latter is federal common law.

III. THE CONSTITUTIONAL INCOMPATIBILITY OPTION

Part II showed that the *Alaska Airlines* doctrine is a mixture of federal common law and constitutional law. In particular, the first two principles of the doctrine—the presumption of severability and the requirement that a partially unconstitutional statute's remainder be "fully operative as a law"—are constitutionally required. The third principle—the inquiry into whether Congress would have enacted the statute's remainder independently—is a prudential, common-law principle.

This Part explores how judges can use these doctrinal foundations to form a severability doctrine tailored to omnibus statutes. Building on the discussion of omnibus lawmaking in Section I.B, it first examines the difficulties that courts may face when applying the three principles of the *Alaska Airlines* doctrine to omnibus statutes. It then introduces a partial remedy to these problems: the German Constitutional Court's incompatibility option. It argues that the incompatibility option better serves the constitutional and prudential concerns underlying severability doctrine than does the wholesale invalidation of partially unconstitutional statutes. Finally, it makes a positive case for what an American incompatibility option would look like and under what conditions judges should use it.

A. The Need for an Alternative Approach to Severability for Omnibus Statutes

Applying severability doctrine to omnibus statutes presents problems that do not arise when severability doctrine is applied to ordinary legislation. Section I.B identified three characteristics that distinguish omnibus lawmaking from conventional legislative practices. We can now pinpoint what difficulties these distinctions pose for the application of the *Alaska Airlines* doctrine.

First, the uncertain interdependence of an omnibus bill's provisions presents problems when applying the independent-remainder principle. For instance, in a strict sense, the ACA would function as law in the absence of the individual mandate. Uninsured individuals would no longer have an obligation to pay a penalty. The Act's other reforms are intelligible and implementable without this obligation. But, as the *NFIB* dissenters pointed out, the law would not function in the same way without the individual mandate. Most obviously, the missing tax increases would no longer fund the Medicaid expansion and federal subsidies that are crucial to the law's ability to reduce the uninsured population.[234] The *NFIB* dissenters—quoting the *Trade-Mark Cases*' enumeration of the independent-remainder principle—claimed that severance of the individual mandate would amount to "mak[ing] a new law, not . . . enforc[ing] an old one."[235] The *NFIB* dissenters overstated their case. Disrupting Congress's budgetary project cannot be what we mean by "writing new law"; otherwise any statutory addition or subtraction with budgetary implications would be judicial revision, and no laws would survive the independent-remainder principle.[236] Even so, we can undoubtedly imagine situations where excising a central provision of a complex, single-subject omnibus bill like the ACA would cause problems for judges when applying the independent-remainder principle.

Second, the murky procedures of omnibus lawmaking spell trouble for the hypothetical-passage principle. As discussed in Section II.C.3, the main prudential underpinning of this principle is the idea—familiar from the field of statutory interpretation—that courts should respect the intent of Congress when giving effect to legislation. The messiness and complexity of omnibus lawmaking mean that the presumptions undergirding the *Warren* principle—that acts have a single purpose, and that courts should refrain from undermining that purpose—do not apply. In omnibus statutes, the legal fiction

234. *Id.* at 2675.

235. *Id.* at 2676 (quoting *In re* Trade-Mark Cases, 100 U.S. 82, 99 (1879)).

236. The dissenters appear to conflate the second and third *Alaska Airlines* principles; for instance, they describe the budgetary implications as causing the law not to "operate in the manner Congress intended." *Id.* at 2675; *see supra* note 228 and accompanying text.

of legislative intent[237] fractures to the point of incoherence. On what, therefore, should judges base their hypothetical passage principle analysis?

Adding further complication is the prevalence of procedural—as opposed to substantive—bargaining, especially for multisubject omnibus bills. As previously discussed, another way to apply the hypothetical-passage principle is to determine whether Congress would have passed the bill had Congress known that a provision was unconstitutional. It is plausible for judges to analyze substantive bargaining—when lawmakers compromise or logroll to reach consensus policy positions—because most policies in a bill founded on substantive bargaining have hypothetical majority support. Individually, the bill's provisions might not have mirrored the policy preferences of any given member, but every member that voted for the bill preferred that the compromise mix of provisions become law. If the loss of one part of the bill through a finding of unconstitutionality would have made the remainder of the compromise unappealing, the judge should strike down the entire law. That is an undoubtedly complicated, but theoretically achievable, task.

Procedural bargaining complicates the analysis. As the *NFIB* dissenters noted, the ACA included many provisions that only one or two members would support, like a provision increasing Medicaid payments solely in Louisiana.[238] The *NFIB* dissenters thought that the presence of "ornaments" like these meant the entire ACA should be struck down because these legislative baubles would not have passed into law on their own. But the analysis is not that simple. As noted in Section I.B, omnibus measures founded on procedural compromise routinely attract outsized bipartisan support. Lawmakers vote for bills containing provisions that they would not have supported as stand-alone bills. They do so because they come to see the omnibus bill as "must-pass" legislation, which they will support even if they disagree with much of its substance. "Must-pass" status can be achieved in two ways. First, the bill might contain provisions that a congressional majority considers crucial to enact into law—for example, an appropriations bill funding a branch of government.[239] Second, a sufficient number of legislators might want to enact particular provisions strongly enough that they will tolerate

237. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 881 (1930) ("The 'intent of the legislature' is a futile bit of fiction.").

238. *NFIB*, 132 S. Ct. at 2675 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

239. *See, e.g.*, Maggie Severns, *Boehner's Last Fight with Obama*, POLITICO (Oct. 21, 2015, 3:15 PM), http://www.politico.com/story/2015/10/john-boehner-vouchers-education-schools-republicans-214984 [http://perma.cc/HXM8-HNXD] ("After the House passes its measure, voucher proponents' best bet is to tuck the program into a larger, must-pass law—and there are plenty of those in the congressional pipeline, including bills to increase the debt limit and keep the government funded past Dec. 11.").

other legislators' favored provisions in the same omnibus vehicle.[240] Grab-bag provisions—ornaments without a Christmas-tree trunk supporting them—surely exist.[241] To apply the *Warren* test faithfully, one must recognize this reality.

For judges to apply the hypothetical-passage principle to these laws, they would have to figure out on what basis a sufficient majority of lawmakers supported the law. Did a lawmaker consider the presence of the unconstitutional provisions necessary for her support? If so, the analysis is easy. If not, it gets murkier. In the absence of the severed provisions, would she have voted for an omnibus vehicle containing the remaining provisions? That would depend on whether she approved of the remaining policies, or, alternatively, whether she considered the vehicle to be a must-pass bill for one reason or another. Judges would have to delve deeply into the minds of individual members, only to arrive at a precarious and dubious legal fiction.

Finally, omnibus legislation presents logistical difficulties for courts applying the three *Alaska Airlines* principles. The length and intricacy of statutes have grown since the Marshall Court era. As far back as *Holmes v. Walton*,[242] courts and legislatures have recognized that an effective doctrine of severability requires the judiciary to set clear guidelines about which parts of a partially unconstitutional statute should remain good law.[243] If a court fails to do so, the public will face uncertainty about which parts remain in force.[244] Courts are ill-equipped, as Justice Scalia pointed out during the *NFIB* oral argument, to provide clear guidance on which of the thousands of provisions in

240. *See, e.g.*, Transcript of Oral Argument, *supra* note 10, at 27 ("The reality of the passage—I mean, this was a piece of legislation which, there was—had to be a concerted effort to gather enough votes so that it could be passed. And I suspect with a lot of these miscellaneous provisions that Justice Breyer was talking about, that was the price of a vote: Put in the Indian health care provision and I will vote for the other 2700 pages. Put in the black lung provision, and I'll go along with it. That's why all—many of these provisions, I think, were put in, not because they were unobjectionable.").

241. Of course, perceiving a bill as a grab bag of goodies will often depend on one's voting stance on the bill; it is unlikely that a supporter would ever admit that a bill is such a hodgepodge. *See, e.g.*, KRUTZ, *supra* note 42, at 2 (quoting Senator Robert Byrd's remark about the 1998 omnibus funds bill: "Do I know what's in this bill? Are you kidding? No. Only God knows what's in this monstrosity."); *Stimulus Package Earmarks Billions for Florida*, WOKV (Jan. 29, 2009, 6:22 AM), http://www.wokv.com/news/news/stimulus_package_earmarks_bill/npfK [http://perma.cc/QPY2-TN5W] (quoting Republican Representative Ander Crenshaw as saying that the 2009 stimulus package "really is just a grab bag of spending programs" and that "[i]t's almost like everything you ever wanted to spend money on but were too afraid to ask").

242. *See supra* note 113 and accompanying text.

243. *See NFIB*, 132 S. Ct. at 2668-69.

244. *See* Gans, *supra* note 107, at 687.

a complex statute would remain in force after the statute's partial invalidation.[245] Judicial opinions are relatively short, and judges generally do not have the expertise, time, or resources to review each provision in a complicated statute for constitutionality. There is some logic to scrapping such laws *in toto* and giving the legislature a chance to start anew. Using the hypothetical-passage principle, in other words, is attractive where a nontrivial portion of an omnibus statute is found unconstitutional.

American courts face a difficult choice when determining the remedy for a partially unconstitutional piece of omnibus legislation.[246] The *Alaska Airlines* principles produce indeterminate or prudentially unsatisfactory results when applied to omnibus statutes. Judges must apply the test, however: the severability default and independent remainder principles are constitutionally required, and the hypothetical-passage principle is conventionally employed. So, based on this test, they must decide on an ill-fitting remedy: try to sever the unconstitutional provisions, or strike down the full statute.

But there is a way out of the quandary. Courts have a superior alternative to the two options above: the remedy of constitutional incompatibility. The incompatibility option, as this Note calls it, gives judges a powerful tool to address the unique challenges of severing omnibus statutes. Section III.B describes the incompatibility option and the role that it plays in German constitutional jurisprudence.

B. The German Incompatibility Option

The German Constitutional Court possesses the power to declare unconstitutional statutes null and void – "*nichtig*" – in whole or in part.[247] In addition, the German Constitutional Court can declare an unconstitutional statute incompatible – "*unvereinbar*" – with the German Constitution (the Basic Law). When the court employs the incompatibility option, a law does not immediately become void. Rather, the court will suspend any voidance of the law for a defined period of time, giving the relevant legislature the opportunity to amend the law to make it constitutional.[248] Sometimes, the court will go so

245. *See* Transcript of Oral Argument, *supra* note 10, at 38 ("Mr. Kneedler, what happened to the Eighth Amendment? You really want us to go through these 2,700 pages?").

246. *See* Gans, *supra* note 107, at 665-66 ("[T]he Court is thrust into the job of rewriting the [partially unconstitutional] statute from a position of severe constraint.").

247. DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 35-37 (3d ed. 2012).

248. *Id.*

far as to set out specific changes that the legislature must make in order for the statute to achieve constitutionality.[249]

The German Constitutional Court has used declarations of incompatibility to remedy many cases that fall in the grey zone between unconstitutional provisions that are clearly severable from their parent laws and unconstitutional provisions that render the entire law invalid. The first incompatibility judgment came in 1958,[250] in what is known in English as the *Nudist Colony Case*.[251] The case involved the conviction of a couple for violating an antipornography statute by exposing their neighbors' daughter to magazines that advertised the nudist lifestyle. The court that convicted the couple ruled that it was no defense that the daughter's parents had given permission for her to view the nudist magazines, because under the law parents did not have the right to expose their children to pornographic images.[252] The constitutional court held that the law was incompatible with the Basic Law insofar as it interfered with parents' right to oversee their children's upbringing.[253]

The court's remedy did not void the law outright or limit its applicability. Instead, it set out the constitutional norms that the legislature had to follow to bring the law into compliance with the Basic Law. It held that the law would need to make available a defense that a child's guardian had authorized exposure to morally corrupt materials.[254]

The invention of the incompatibility remedy likely made little practical difference to the court's disposition of the case. It is very likely that, if the court had struck down the statute in its entirety, the legislature would have quickly passed a new version of the law that included a parental-consent exception. Severability was easy to decide in the *Nudist Colony Case* because it involved conduct that the legislature clearly intended to penalize up to the constitutional limit.

The divergence between American and German severability doctrine is sharper in cases involving issues of legislative bargaining. One of the most

249. *Id.* at 35-36.

250. *See* PETER E. HEIN, DIE UNVEREINBARERKLÄRUNG VERFASSUNGSWIDRIGER GESETZE DURCH DAS BUNDESVERFASSUNGSGERICHT 11 n.3 (1988) (listing cases where the German Constitutional Court has used the incompatibility remedy).

251. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 10, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 320. The English name is taken from KOMMERS & MILLER, *supra* note 247, at 840.

252. 7 BVERFGE 320 (¶ 8).

253. *Id.* ¶¶ 19-20.

254. *Id.* ¶ 19.

notable recent examples of the German Constitutional Court's incompatibility approach came in the *Asylum Seekers' Case*, when the court declared Germany's Asylum Seekers' Benefits Act unconstitutional.[255] As the court recognized in its judgment, the law resulted from a compromise between, on the one hand, Social Democrats in the Bundestag who wanted to provide welfare benefits to asylum seekers living in the country and, on the other, conservatives who feared that the benefits might make Germany a magnet for refugees. The Act set benefits for asylum seekers far below those provided to unemployed German citizens, and disallowed them from holding jobs.[256]

Over time, inflation eroded the value of the benefits and, in the meantime, the European Union's coordinated asylum regime reduced the number of refugees arriving in Germany. Additionally, in 2010, the German Constitutional Court announced that all German residents had a fundamental constitutional right to "a subsistence minimum that is in line with human dignity."[257]

The German Constitutional Court based its judgment in the *Asylum Seekers' Case* not only on the right to a subsistence minimum but also on Article 3, the Basic Law's version of the Equal Protection Clause. The court found that the legislature had provided no legitimate reason why asylum seekers received significantly lower benefits than German citizens. For its remedy, the court used the incompatibility approach. It announced that the Bundestag had to revise the Asylum Seekers' Benefits Act to meet constitutional requirements as soon as possible.[258]

This case is more difficult to analogize to American severability doctrine because the U.S. Supreme Court has not interpreted the U.S. Constitution to provide analogous positive welfare rights.[259] As a result, Congress would not face an affirmative burden to provide asylum seekers with benefits. To focus only on the equal protection aspect of the case, however, if an American court

255. BVerfG, July 18, 2012, 1 BvL 10/10, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html [http://perma.cc/5NP7-9ZTR].

256. *Id.* ¶¶ 2-45, 97.

257. BVerfG, Feb. 9, 2010, 1 BvL 1/09, ¶ 1, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bvl000109en.html [http://perma.cc/59QU-7HVD].

258. *See* BVerfG, July 18, 2012, 1 BvL 10/10, ¶¶ 99-109. The court applied a harsher remedy than normal in this case (providing retroactive higher benefits to asylum seekers) because it found that the legislature had deliberately ignored the effect of the court's 2010 holding on the right to a minimum existence in failing to revise the Asylum Seekers' Benefits Act. *Id.*

259. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973); Dandridge v. Williams, 397 U. S. 471, 484-87 (1970).

deployed the hypothetical-passage principle, it would have to invalidate the country's entire welfare regime for the unemployed. The benefits for asylum seekers were set deliberately low as part of a political bargain. If the legislature knew ex ante that it would have to provide asylum seekers with roughly the same level of benefits as German citizens (or else come up with a constitutionally acceptable reason for not doing so), this knowledge would potentially have altered the political calculus underlying the benefit levels authorized for both asylum seekers and citizens. The remedy of automatically setting asylum seekers' benefits at the same level as citizens' would disregard clear legislative intent. The only justifiable remedy would be for the court to void the benefits for both citizens and asylum seekers and expect the legislature to start again from scratch.

Relevant differences between German and American substantive law and judicial review aside, this example is more than hypothetical in American law. In the 1979 case *Califano v. Westcott*,[260] the Court confronted a statute that unconstitutionally discriminated on the basis of gender by withholding welfare benefits from unemployed mothers while extending them to unemployed fathers. The Justices agreed on the merits but disagreed on the remedy. Justice Powell, in dissent, wrote that the Court could not simply extend benefits to mothers under the statute:

> We cannot assume that Congress in 1968 would have approved this extension if it had known that ultimately payments would be made whenever either parent became unemployed. Nor can we assume that Congress now would adopt such a system in light of the Court's ruling that § 407 is invalid.[261]

After arguing in favor of nullifying the statute *in toto*, Justice Powell suggested that Congress could eventually use retroactive payments to make up for the resulting gaps.[262]

This was, *mutatis mutandis*, the remedy that the dissent favored in *NFIB*.[263] Because taking out the individual mandate and Medicaid expansion would disrupt Congress's ex ante bargaining, the Court could not allow the

260. 443 U.S. 76 (1979).

261. *Id.* at 95-96 (Powell, J., concurring in part and dissenting in part).

262. *Id.* at 96.

263. Nat'l Fed'n Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2675 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

bargained-for statutory "ornaments" to survive.[264] So the whole law had to go.[265]

C. An American Incompatibility Option

Suppose instead that the Supreme Court had declared the individual mandate and Medicaid expansion unconstitutional, but had implemented a German-style incompatibility remedy. The Court could have delayed the ACA's implementation for a reasonable period of time,[266] holding instead that all of the Act's provisions that were clearly severable from the individual mandate and Medicaid expansion would automatically go into effect if the legislature did not act.

Under this approach, the Court could have combined the constitutional baseline of invalidating a law only to the extent of its unconstitutionality with an opportunity for the legislature itself to make the political judgments necessary to fix the law. Congress, in turn, would have been able to revise the law without having to worry about the fate of clearly constitutional and severable provisions of the Act. And if a majority of Congress were to find the law entirely unsuitable absent the individual mandate and Medicaid expansion—which the dissent thought it would—it would also have had the option of repealing the law entirely. By engaging in interbranch dialogue, the courts and Congress would together come to a solution better than any available under current severability doctrine.[267]

This Section proposes an American incompatibility option in greater detail and identifies the situations in which the incompatibility option would outperform current severability doctrine. First, it argues that the incompatibility option would better address the unique severability problems that omnibus statutes present. It then demonstrates that the incompatibility option would accord well with the constitutional and common law principles of the Court's severability doctrine. Finally, it provides a brief summary of the considerations that should lead a judge to choose the incompatibility option.

264. *Id.*

265. *Id.*

266. This would not have been hard to do, given that many of the Act's provisions were not scheduled to go into effect until 2014, two years after the decision. *See Key Features of the Affordable Care Act*, U.S. DEP'T HEALTH & HUM. SERVICES (Aug. 13, 2015), http://www.hhs.gov/healthcare/facts-and-features/key-features-of-aca-by-year/index.html [http://perma.cc/B5V8-9KN7].

267. *Cf.* Gans, *supra* note 107, at 663-64 (discussing the benefits of interbranch dialogue).

1. *How the Incompatibility Option Would Address the Unique Characteristics of Omnibus Statutes*

The incompatibility option would often be a superior remedy to a declaration of severability or inseverability when deciding the severability of omnibus statutes. As discussed in Section I.B and Section III.A, several characteristics of omnibus statutes make it difficult to decide their severability: the burden of figuring out the interdependence of their provisions, the lack of unified legislative intent, the importance of procedural bargaining, and the logistical burden of parsing massive and complex laws.

The incompatibility option would better address the challenges that omnibus statutes pose for the application of the hypothetical-passage principle: spotty evidence of legislative intent and unconventional bargaining practices. The option would obviate the need for the judge to inquire into Congress's hypothetical intent based on a nonexistent legislative record or procedural practices on which the judge is not an expert. Instead, the judge would place the determination into Congress's hands: Congress could choose to let the remainder of the law stand or to revise the legislation. The incompatibility option would banish the specter of a judge throwing up her hands at the severability enterprise and letting a massive law fall on account of a minor constitutional issue. Instead, Congress and the judge would decide severability jointly.

Admittedly, the process would have its own drawbacks. The Congress that would pass a revised statute might not be the same Congress that passed the original. Cases can take years to wind their way through the courts and congressional turnover can occur quickly. Even so, a changed Congress would still be better situated to make the severability determination than a judge. Overlapping membership, institutional memory, a better understanding of congressional practices and expectations, combined with the reality that members would have to live with the consequences of their severability maneuvers,[268] all make Congress the superior actor to decide severability. Furthermore, the default would be to save the remainder of the statute in the absence of congressional action. Suppose that the party that was in the majority when the law was first passed found itself in a weaker position by the time a court made an incompatibility determination. That party would have the opportunity to block a revised law that it thought inferior to the severed version of the original.

268. In other words, if one party irresponsibly dismantles the other party's law when it is in the majority, it will have to pay the price for retaliatory behavior when it again finds itself in the minority. Judges do not face such pressures.

Moreover, the incompatibility option would not fully address the logistical difficulties of parsing omnibus statutes or of determining how a statute's provisions interrelate. A judge exercising the incompatibility option would still employ the severability default and independent remainder principles of the *Alaska Airlines* doctrine. The Constitution requires it. There is no way to alleviate the logistical burden of making these determinations.

Nonetheless, the incompatibility option offers room for creative judicial practice. The temporary injunction would give judges additional time to accommodate the length and complexity of omnibus statutes. The judge's initial order containing the fallback option could set out, in broad yet suggestive strokes, which types of provisions would be unconstitutional and, consequently, which other provisions would not be fully operative as law. During the injunction period, the judge could put additional effort into sifting through the legislation or delegate the task to a special master. The final order lifting the injunction could then express the judge's conclusive determination of severability in sufficient detail to guide judges, legislators, and the public.

2. *How the Incompatibility Option Would Harmonize with Current Severability Doctrine*

The incompatibility option would constitute a new remedy, not a new doctrine. It would avoid the harsh consequences that can arise when applying the hypothetical-passage principle, not provide a new test for severability. The incompatibility option would furnish judges with an alternative means to give effect to prudential principles that make up the *Alaska Airlines* doctrine. It would allow judges to meet the requirements of the two constitutionally mandated principles and to incorporate the prudential concerns raised by the third without having to declare an entire omnibus statute inseverable. The incompatibility option would be an elegant way of applying *Alaska Airlines* while taking into account the unique characteristics of omnibus statutes.

The incompatibility option requires the judge to denote a fallback remedy in the event that Congress takes no action during the period of the injunction. The fallback remedy would specify the portions of a partially unconstitutional law that judges could not enforce upon the injunction's expiration: both the actually unconstitutional portions (as required by the severability-default principle) and the portions of the statute so dependent on the unconstitutional portions that they would not operate as law in their absence (as required by the independent-remainder principle). If Congress did nothing, then the portions of law constitutionally marked for excision would cease to have legal effect. If Congress replaced the law, the replacement law would not include the unconstitutional provisions. Any provisions that otherwise would have no longer been "fully operative as a law" would be rescued from constitutional

nullification by having gone through a second round of Article I, Section 7 procedures. (In other words, they would not be the result of judicial rewriting, having been approved by the elected branches.) No matter what, the remedy satisfies the severability default and independent remainder principles.

The declaration of incompatibility and the temporary injunction, furthermore, would satisfy the prudential concerns underlying the hypothetical-passage principle. The incompatibility option would promote interbranch respect: courts would not enforce statutes in a manner contrary to the will of Congress. Ordinarily, courts use the hypothetical-passage principle as a means of furthering comity; they strike severed laws from the books entirely, lest they enforce a legislative scheme that Congress would not have passed. The incompatibility option would advance comity in a different way by not enforcing, at least in the short run, a severed law that Congress may not have wanted—hence the temporary injunction. At the same time, the option would give Congress the opportunity to revise the severed law in line with the court's directive. Moreover, Congress could do so with full knowledge of its policy options: it would know which parts of the old law were unconstitutional and which parts would remain in force if it did not act. Finally, the incompatibility option would avoid nullifying statutory provisions that have been passed through the Article I, Section 7 procedures.[269]

Comity, after all, is a two-sided coin. On the one hand, Congress does not want courts to enforce laws that its members do not support. On the other hand, Congress *does* want courts to enforce duly enacted law. The constitutional incompatibility option would address both aspects of comity. It is a legitimate substitute for conventional application of the hypothetical-passage principle.

3. When Judges Should Employ the Incompatibility Option

This Section discusses the considerations that should guide judges in deciding whether to employ the incompatibility option. For long, complex statutes like the ACA, these considerations generally weigh in favor of using the incompatibility option. They may also occasionally make the option appropriate for shorter, more conventional statutes. Conversely, these considerations show that there are some omnibus measures for which the option is inadvisable. These considerations are aimed at serving the purpose of

269. *Cf.* Garrett, *supra* note 48, at 3 ("As with any legislation that passes both houses of Congress and is signed by the President or enacted over his veto, it deserves respect as a collective achievement of elected representatives.").

the hypothetical-passage principle by promoting comity between the judicial and elected branches in the unique context of omnibus lawmaking.

The first consideration that judges should take into account is whether Congress has offered any instructions about a statute's severability. As noted previously, evidence of legislative intent tends to be inconclusive or nonexistent for omnibus statutes. If it exists, however, it eases the decision-making process. Severability clauses and analogous expressions in the legislative history counsel against a finding of inseverability and in favor of pure severability or the incompatibility option. Sufficiently strong intent, like the super-strong severability clause hypothesized in Section II.C.4, might even counsel against the incompatibility option: if Congress clearly wanted pure severability, there is no point delaying implementation of the severed statute. At the same time, the knowledge that a court might send a statute back to a potentially different Congress might encourage congressional majorities to include more specific severability clauses in omnibus bills. On the other hand, inseverability clauses or expressions of contrary intent weigh in favor of a finding of inseverability or the incompatibility option, depending on the strength of the congressional instructions. If the evidence points to a weak preference for inseverability, then the incompatibility option might be a better course than pure inseverability.[270] Imagine a spectrum of evidence of legislative intent, from clearly in favor to clearly against: evidence at either extreme militates in favor of conventional determinations of severability or inseverability, while evidence in the middle should guide the judge toward the incompatibility option.

The second consideration relates to the protracted substantive bargaining that often characterizes complex legislation. For reasons of comity, a judge should weigh the importance of provisions marked for excision to the substantive bargain that produced the legislation. As with evidence of legislative intent, imagine a sliding scale. On one end, the excised provisions are tangential to the statute's substance, like the Black Lung Benefits Act was to the ACA.[271] For those, severability is preferable. On the other end, provisions may run to the heart of the substantive bargain, so that Congress would not have wanted the statute to stand in their absence. For those, inseverability is warranted. In the middle, incompatibility makes more sense.

The third consideration is procedural bargaining. As discussed previously, procedural bargaining ought to play a smaller role than substantive bargaining

270. The reason for this possibility is that legislative intent tends to be general. It may be that Congress weakly favored inseverability for a piece of legislation in the abstract. In a particular case where the constitutional blemish is small, Congress might prefer to weigh in rather than have the law fall completely.

271. *See supra* note 10 and accompanying text.

in the severability determination. There is no constitutional requirement that every provision enacted into law have hypothetical majority support. Nevertheless, we should consider a case in which a major set of provisions at the heart of an omnibus act (for instance, the individual mandate, the Medicaid expansion, and a host of other insurance reforms in the ACA) is ruled unconstitutional. Would the law's unrelated Christmas ornaments have to fall as well?

The key variable for judges to consider is the extent to which the invalidated provisions were procedurally essential to the bill's passage. In light of what we know about the legislative process for omnibus bills, this is a difficult threshold to reach. It is true that Congress may not have preferred the ACA to pass without one provision or another. But the ACA was an omnibus bill that included a grab bag of legislative projects, tangentially related to health, that members seized the opportunity to tack on. Congress's rules allowed them to do so. The Constitution allowed them to do so. Unless it is clear that a particular provision was a sine qua non of an omnibus bill's formation and passage, it disrespects Congress and its procedures to choose inseverability over the incompatibility option.

Judges, in other words, have two considerations to make. First, what kind of bill was this? Was it a bill crafted around a single provision or reform, or was it an omnibus bill that served as a vehicle for a number of unrelated provisions? Judges can point to evidence from the bill's title, length, and structure; the internal relatedness of its provisions; or whether it had a recognizable, customary role in Congress's lawmaking (for instance, that it was an annual appropriations bill) to determine Congress's expectations. Second, if it was an omnibus bill, did it have a must-pass provision without which the bill would not have materialized? For example, if the main provision in an omnibus measure created a new agency and a court declared that provision unconstitutional, inseverability would generally be the best approach. Otherwise, the much more sensible options would be severability (if the bill is clearly a grab-bag omnibus statute replete with unrelated measures) or incompatibility (if the evidence is more ambiguous).

Finally, the judge should consider extrinsic concerns that a reasonable legislator would take into account when deciding severability. These include the significance of the statute's reforms, the public's reliance interest in having the rest of the statute remain in force, the need for a clear and prompt determination of severability, and the perception of bias or judicial overreaching. The common thread of these concerns is the need to consider whether Congress or the judge is in the best position to determine severability. If the legislation is significant, it may be better for Congress to have the ability to make the severability determination itself, pursuant to a declaration of constitutional incompatibility and temporary injunction. The same goes if

injury to the public would result from invalidation of the statute's remainder. On the other hand, if the public would be better served by an immediate severability determination, rather than a drawn-out injunction and political debate, the judge might choose pure severability or inseverability. In general, a risk-averse judge may favor placing the ball in Congress's court by using the incompatibility option, rather than potentially making the wrong choice between severability and inseverability.

IV. ANSWERING OBJECTIONS TO THE INCOMPATIBILITY-OPTION APPROACH

This Part answers possible objections to the constitutional incompatibility approach. The first objection is that it is unconstitutional to transplant the incompatibility option into American law. The second is that the possibility of congressional inaction will nullify the potential benefits of the constitutional incompatibility option. The third objection is that the option produces too much uncertainty about the state of the law during the period in which the effect of the statute is enjoined. The final objection is that the incompatibility option insufficiently protects people harmed by enjoined declarations of unconstitutionality. Properly examined, however, none of these objections should prevent or discourage courts from employing the incompatibility option.

A. Objection One: The Constitutionality of Transplanting the Incompatibility Option into American Law

The strongest objection to American courts' adoption of the incompatibility approach is that the German and American legal systems are too different for one to import the remedial techniques of the other. The German Constitutional Court plays a strongly interventionist role in German lawmaking, regularly issuing advisory opinions.[272] American federal courts have the power to decide cases and controversies;[273] they do not engage in the same kind of supervision of the legislative process that the German Constitutional Court does. One must consider whether the incompatibility option would unconstitutionally aggrandize the federal courts' role in the balance of powers.

A careful analysis shows that the incompatibility option would not violate Article III's constraints on the federal courts' powers. The key question is

272. KOMMERS & MILLER, *supra* note 247, at 36.

273. U.S. CONST. art. III, § 2.

whether use of the incompatibility option requires the federal courts to issue advisory opinions. Under Article III, the federal courts only have jurisdiction over ripe, adversarial, and concrete cases or controversies in which the appropriate parties have standing to sue.[274] The incompatibility option does not undermine these requirements.

To begin, it is important to recognize that the incompatibility option is a remedy.[275] It is a tool used at the remedial stage of a federal suit, after the court has already determined that the application of a statute violated the Constitution. In order for a court to use the incompatibility option, it must have been properly seized of jurisdiction in a case involving a federal statute. There must be an Article III case or controversy.

With this in mind, we can imagine two ways that the incompatibility option—or, for that matter, any remedy—could cause a court's opinion to become advisory. First, it could cause the court's opinion no longer to address or affect the legal rights and obligations of the parties to the suit. This type of argument was used to challenge the Declaratory Judgment Act; declaratory judgments, so the argument went, are advisory because they declare the law without actually giving either party a remedy.[276] Second, the court's opinion could touch and concern legal issues outside the scope of the case or controversy. If a federal court has before it a case on alleged violations of the Clean Air Act, it would be advisory for the court to decide that the ACA is unconstitutional. We can picture these two arguments in the following way. At all stages of litigation, there needs to be fit between the Article III case or controversy and a federal court's jurisdiction. In the first case, the court's jurisdiction becomes underinclusive at the remedial stage: its opinion no

274. *See* Golden v. Zwickler, 394 U.S. 103, 108 (1969) (stating that federal courts do not issue advisory opinions).

275. Erik Zimmerman has argued that it is inappropriate to call severability a "remedial" doctrine because severability doctrine is not about making litigants whole but rather clarifying the continued validity of a statute's provisions. Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 NW. U. L. REV. 285, 302, 319-21 (2015). This Note follows the Court's tradition of treating severability as a remedy. *See id.* at 302 n.101 (citing cases that call severability a "remedy"). It is true, however, that the severability determination differs in some aspects from a typical remedy. *See id.* at 320-21 (noting that severability focuses on legislative intent rather than on the individual litigant and that severability determinations have greater precedential value). The Court treats severability as a separate question from the merits of a case. In *United States v. Booker*, 543 U.S. 220 (2005), for example, different Justices wrote the Court's opinion on the merits and on the question of severability. Ultimately, whether one considers severability a remedy or an application of "supplemental standing," *see* Zimmerman, *supra*, at 332-35, the result is the same: a federal court must be seized of Article III jurisdiction to decide severability.

276. *See, e.g.*, Edwin M. Borchard, Comment, *Constitutionality of the Declaratory Judgment*, 30 YALE L.J. 161, 163 (1920).

longer remedies the parties' injuries. In the second case, the court's jurisdiction is overinclusive: it rules on legal issues unnecessary to decide the case or controversy.

Neither situation occurs when a court employs the incompatibility option. With respect to the first case, it is worth recalling exactly what the incompatibility option involves. A court decides that a federal statute is at least partially unconstitutional. The court determines the appropriate remedy for the constitutional violation with respect to the parties, as well as with respect to the statute in question, invalidating only so much of the statute as is constitutionally required. The court then enjoins the effect of the remedy until a defined date. When that date is reached, the remedy goes into effect—including the aspect of the remedy that addressed the constitutional violation at issue. The incompatibility option, in other words, causes the court to address or affect the legal rights and obligations of the parties as it otherwise would.

The second case is more problematic for the incompatibility option, but it proves too much and is inconsistent with America's constitutional tradition. The United States made a similar argument in its severability brief in *NFIB*.[277] The ACA was severable, the government argued, because the plaintiff had standing to challenge only the constitutionality of the individual mandate, which was solely responsible for the plaintiff's injury. The government maintained that NFIB lacked standing to challenge the constitutionality of the law's remainder. The federal courts, therefore, did not have Article III jurisdiction to strike down the entire statute.[278] This is an interesting argument, and an intuitively attractive one. It comports with the Founding-Era approach to severability discussed in Section II.C.1, whereby judges did not adjudge the constitutionality of more of a statute than was at issue in a case. If the government's position is correct, however, then the whole of modern severability doctrine—including the independent remainder and hypothetical passage principles—is constitutionally suspect. Courts would never be able to invalidate an entire statute unless it was completely unconstitutional or unless a plaintiff was injured by every single provision of a law. Such a conclusion contravenes 150 years of constitutional history.[279] Moreover, it ignores the Article I presentment requirement discussed in Section II.C.2—namely, that in

277. Brief for Respondents at 16-19, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct 2566 (2012) (Nos. 11-393 & 11-400); *see also* Fish, *supra* note 14, at 1343-44 (advancing a similar argument).

278. Brief for Respondents, *supra* note 277, at 16-19.

279. *See* Zimmerman, *supra* note 275, at 322-27 (discussing the incongruity between this standing argument and the Court's longstanding approach to severability).

addition to deciding whether the parts of a statute at issue in a case are constitutional, courts must *also* decide whether the statute's remainder constitutes valid "law." The result could be inconsistent, incoherent statutes that Congress could never have enacted.

Furthermore, even if correct, this argument would not invalidate the incompatibility option. As discussed above, the incompatibility option does *not* require a court to rule on the constitutionality of parts of a statute beyond those at issue in the case or controversy. In fact, even assuming the government's position is correct in *NFIB*, the incompatibility option is a perfect addition to the *Alaska Airlines* doctrine, because it allows the court to stay within the government's understanding of Article III's bounds while preventing the practical problems that could arise from partial invalidation.

Not only does the incompatibility option, as a formal matter, not require the issuance of advisory opinions, it also does not violate the principle underlying the rule against advisory opinions: it does not aggrandize courts' power. The incompatibility option does not force Congress to take any action. If Congress does not act, then the default remedy—the least legislatively invasive remedy required by the Constitution—goes into effect after a period of time. Nor does the ability to delay its own judgment aggrandize a court's power. A delay in a judgment declaring an act of Congress partially unconstitutional—one intended, moreover, to give Congress the chance to replace the statutory scheme if it so wishes—does not place a burden on Congress or allow a court to intervene more than it otherwise could. The incompatibility option is judicially modest, especially in comparison to the alternatives.

Moreover, there are grounds to reject the premise of this objection: the incompatibility option is not alien to American judicial practice. The notion that courts and the legislature should participate in a dialogue when deciding how to fix an unconstitutional statute dates back to *Holmes v. Walton*, when the New Jersey Supreme Court recommended that the New Jersey legislature replace a partially unconstitutional statute prior to voiding it.[280] State courts have engaged in this sort of dialogic practice more recently.[281] Most importantly, federal courts have used the incompatibility option before. In the well-known case of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[282] the Supreme Court granted two stays of its ruling declaring the Bankruptcy Reform Act of 1978 unconstitutional in order to give Congress

280. *See supra* notes 113-120 and accompanying text.

281. *See, e.g.*, Abbott *ex rel.* Abbott v. Burke, 20 A.3d 1018, 1041-43 (N.J. 2011) (concerning right-to-education issues).

282. 458 U.S. 50 (1982).

time to replace the Act and avoid creating hardship for the public.[283] The Court essentially employed the incompatibility option. It did not even think to consider the idea that this exercise of power was unconstitutional. It is hard to argue that the incompatibility option cannot be imported into American law when the Supreme Court has already employed it.

B. Objection Two: The Problem of Legislative Intransigence

One could also object that the constitutional incompatibility approach might not have any chance of practical success in the United States. Congress's procedures create ample opportunities for a minority of the legislature to block new statutes.[284] If a minority favored a court's severability-default remedy, it could delay legislative action until the end of the interim period. The court's default remedy would become law without attracting the clear support of a legislative majority.

This objection, however, fails to show that the incompatibility option would exacerbate legislative intransigence more than courts' current menu of severability remedies. As it stands, if a court invalidates an entire law and sends it back to the legislature, a determined minority can prevent the repassage of even a single provision of the original law. In this event, the difference between the incompatibility option and total nullification would ultimately be between preserving constitutional portions of a law that had once attracted majority support and frustrating the majority's legislative project entirely. The former is surely the better outcome.

To make the advantages of the incompatibility option clearer, we can think about the two approaches in the following way. Under the hypothetical-passage approach, a court invalidates an entire omnibus statute and sends it back to Congress. Because of legislative intransigence, it is likely that Congress passes no new statute and every benefit that could have resulted from the legislative project is abandoned. The opponents of legislative action win. Under the incompatibility approach, if Congress does nothing, the nation is left with a law that is potentially imperfect but whose beneficial provisions are still in force. Ideologically motivated opponents of legislative action can do nothing to tear down the remainder of the law, unless they can convince Congress and the country that the remainder is too terrible to stand even in part. In an intransigent Congress, the only legislative action that will succeed is

283. *See* Note, *supra* note 164, at 1182 & n.7.

284. *See generally* William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756 (2012) (describing the "vetogates" inherent in the congressional lawmaking process).

action that improves the severed law. The incompatibility option, in other words, respects and favors legislative action—exactly what is needed in a period of gridlock.

C. Objection Three: The Effects on Vulnerable Individuals

One might still worry that, even if the incompatibility option were good for the nation as a whole, a severed law might create undue harms to particular individuals or groups. For example, if the Court were to rule that it was unconstitutional for the federal government—but not for state governments—to run health-insurance exchanges, that could impair the ACA's statutory scheme for millions of Americans. At the same time, this ruling would reduce the pressure on Congress to pass a new law, because the millions of Americans who would still benefit would not exert electoral pressure. Should courts not try to prevent this result?

There are two responses to this. The first is that this Note does not propose that constitutional incompatibility should *replace* the hypothetical-passage principle. If there is clear evidence that Congress would not have passed the remainder of a law through Article I, Section 7 procedures—particularly because the remainder of the law will be patently undesirable on its own—courts may still step in and invalidate the entire law.

But suppose that, while there is no such clear evidence, the resulting statutory scheme is still arguably undesirable. Should courts not step in then? No, they should not. Courts need not solve every ill that results from the application of constitutional principles. It falls to Congress to fix the problem. Furthermore, if we assume congressional gridlock would stymie *any new legislation*, it would still be more desirable for millions to have health insurance than for none to have it at all. In a period of legislative inaction, it is better to make the preservation of legislative action the default. It is far more dangerous, on the other hand, to give courts carte blanche to invalidate otherwise constitutional portions of laws, and thus to destroy entire statutory schemes.

D. Objection Four: The Problem of Uncertainty in the Interim

Finally, there is the problem of figuring out how the state should enforce a statute during the period allotted to Congress to develop its own remedy. One must concede that, for all of its flaws, the current severability regime has the virtue of clarity: courts, Congress, and the public know—or at least have some idea—on the day of the decision to what extent a law is voided. Under the incompatibility option, the minimum extent of a law's invalidity would be clear on the day of the judgment, but the fate of the law's constitutional and severable provisions would not.

The problem of uncertainty is not entirely absent from courts' current approach to severability. If the Supreme Court had struck down the ACA in its entirety, everyone who had relied on the law prior to the Court's ruling would have had to deal with the uncertainty of whether and when Congress would reenact the constitutional provisions of the law. The incompatibility option could in fact reduce this uncertainty by giving Congress a definite window to remedy a law before a court's judgment takes effect. Even so, it is undeniable that uncertainty would remain. Courts in particular would face the challenge of figuring out how to decide pending cases in the interim. It would be manifestly unfair for the state to enforce statutory provisions that the Supreme Court has declared unconstitutional for a certain period and then, at a predetermined time, cease to enforce those provisions.

Courts possess two means of ameliorating this problem. First, they could enjoin the effect of their decisions for only so long as is reasonably necessary for Congress to have a chance to enact its own remedy. Narrowing the duration of the injunction would reduce the period of uncertainty as to the law's fate.[285] Second, courts could follow the German example and not decide cases on the basis of the constitutionally incompatible law in the interim.[286] They could hold over cases until the end of the injunctive period.

Neither of these solutions would fully solve the problem of uncertainty, especially insofar as constitutional rights are concerned. The sky might not have fallen if an injunction had created a few months of uncertainty about the ACA's fate. But if the effect of a declaration of incompatibility were to keep someone wrongly in prison for that same period of time, or to squelch free expression, or to delay needed welfare benefits, the costs of the incompatibility approach would rise. This problem is precisely why the Court did not enjoin the effect of its decision in *Califano v. Westcott*.[287]

Courts should therefore deploy the incompatibility option selectively. In *Schachter v. Canada*,[288] the Canadian Supreme Court stated that courts should base their decision of whether to use a "delayed declaration[] of nullity"—essentially, the incompatibility option—on "considerations relating to the effect of an immediate declaration on the public."[289] The court also noted that this

285. It would, however, make it easier for a determined congressional minority to block any revision of the law: the minority would only have to impede repassage for a short period of time, whereas proponents of revision would have less time to mobilize support.

286. KOMMERS & MILLER, *supra* note 247, at 37.

287. 443 U.S. 76, 90 (1979) ("[A]n injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect.").

288. [1992] 2 S.C.R. 679.

289. *Id.* at 684.

remedy is especially appropriate to cases where voiding the law would "pose[] a potential danger to the public or otherwise threaten[] the rule of law."[290] Applying these principles to the severability decision would maintain the proper balance between respecting legislative intent and protecting individual rights.

CONCLUSION

This Note has explored and tried to address the defects of applying current severability doctrine to omnibus statutes. It looked at the flexibility that courts have to modify severability doctrine. It found that while the severability default and independent remainder principles—two of the three principles of current severability doctrine—are constitutionally required, the hypothetical-passage principle is a federal common law doctrine that can be bypassed on prudential grounds. Omnibus lawmaking presents a situation in which prudential concerns weigh against applying the hypothetical-passage principle to strike down an entire statute. Even so, there are prudential reasons to involve Congress in the severability decision in some way.

A solution to the problem exists: the constitutional incompatibility option. Under this approach, courts would engage in a dialogue with Congress. Courts would invalidate the unconstitutional portions of a law, but they would enjoin the effect of their decisions to give Congress time to rework the legislative scheme if it so desires. The incompatibility option does not violate any principle of American constitutional law and is even preferable in light of the climate of intransigence that currently envelops Congress. Most importantly, it addresses many of the special challenges that omnibus statutes pose to the application of canonical severability doctrine.

The hope is that this piece will spur the scholarship and judicial experimentation necessary to make the incompatibility option a productive constituent of American jurisprudence. There are many parameters that only further analysis and experience can elucidate. What is the appropriate length of time to enjoin the effect of a finding of partial unconstitutionality? How specifically should courts preview the remedy that takes effect in the event Congress does not act? How should federal agencies' experience with the "remand without vacatur" remedy[291] inform the correct approach to sending statutes back to Congress? All of these questions merit further study.

290. *Id.* at 715 (citations omitted).

291. "Remand without vacatur" refers to finding an agency's rulemaking process legally deficient without invalidating the rule itself. Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 279 (2005).

The incompatibility option is a relatively simple solution. The most common reaction to learning of it, I hope, will be: why don't courts do this already? The German Constitutional Court has employed the incompatibility option successfully for more than fifty years. American courts should adopt it. If they do, no federal court would have to deal with the difficult—and false—choice that the Supreme Court might have faced if it had decided the merits of *NFIB* differently. Courts can and should look beyond severability and inseverability.

Note that the traditional remand-without-vacatur remedy is conceptually different from the constitutional incompatibility option because there is no default remedy of partial invalidation if the agency does not act. Remand without vacatur either lacks "teeth," *id.* at 282, or leverages the devastating threat of invalidating the entire rule at the end of a specified period, *id.* at 306. The history of remand without vacatur could, however, provide valuable insight into how best to structure the constitutional incompatibility option.