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COMMENTS

PPACA AND THE INDIVIDUAL MANDATE: A HEALTHY APPROACH TO SEVERABILITY

Jenna L. Kamiat*

In 2010, Congress passed the Patient Protection and Affordable Care Act, legislation designed to comprehensively reform the U.S. health care system. Soon after the law’s passage, several lawsuits challenged the constitutionality of the individual mandate, a key provision requiring nearly every American to carry a minimum level of health insurance or face a penalty. Courts have split on whether the individual mandate is outside the scope of Congress’s constitutional authority, and those that have struck down the provision have had to address what fate should befall the remainder of the law.

Severability doctrine is the exclusive mechanism for the courts to deal with questions of partial unconstitutionality in statutes. As of this writing, three courts have addressed the mandate’s severability. All have come to divergent conclusions on if, and how much of, the law can be allowed to stand if the mandate is excised.

This Comment analyzes the split of authority regarding the severability of the individual mandate. It asserts that the approach taken by the Eleventh Circuit—striking the mandate while leaving the remainder of the law intact—is the appropriate course of action for the Supreme Court if it finds that the mandate is unconstitutional. This Comment concludes that the judiciary would overstep its constitutional boundaries if it were to strike additional provisions of PPACA, and that any subsequent re-working of the Act is a task reserved for the legislature.

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INTRODUCTION

The Patient Protection and Affordable Care Act¹ (PPACA or the Act) was enacted in order to confront a “profound and enduring crisis” in the health care industry.² Using a comprehensive scheme of tax measures and economic regulations, the legislation seeks to improve the universal availability of affordable health care, to furnish protections to consumers against discriminatory underwriting practices of insurance companies, and to reduce the amount of uncompensated medical care.³

In March 2010, President Obama signed PPACA into law, marking the most significant advance in health care policy since the creation of Medicare and Medicaid in 1965.⁴ But the reform “divided Americans like few other issues in recent memory,” and led to one of the “longest, most rancorous and most partisan debates” seen by Congress in years.⁵

PPACA’s emergence as a highly contentious object of public debate is due in great part to its minimum coverage provision⁶—the so-called

1. Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (2010) (codified as amended in scattered titles of U.S.C.). These two statutes are collectively known as PPACA, and will be referred to as such throughout this Comment in order to designate the health care legislation and its amendments.

2. Consolidated Brief for Respondents at 2, Nat’l Fed’n of Indep. Bus. v. Sebelius, --- S. Ct. --- (2011) (Nos. 11-393, 11-400), 2011 WL 4941020, at *2; see also Dan Balz, *Introduction* to WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA’S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 1, 4–6 (2010) [hereinafter LANDMARK] (tracing the origins of the health care debate to Theodore Roosevelt’s call for nationalized health insurance during his 1912 presidential bid, and noting its omnipresence in public policy discussions ever since).

3. Consolidated Brief for Respondents, *supra* note 2, at 2–3.

4. Balz, *supra* note 2, at 1.

5. *Id.* at 1–2. For a comprehensive discussion of the political forces that shaped the debate, see generally Ceci Connolly, *Part I: How We Got Here*, in LANDMARK, *supra* note 2.

6. T.R. Goldman, *Health Policy Brief: Legal Challenges to Health Reform*, HEALTH AFF. (Nov. 30, 2011), available at http://www.healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_58.pdf.

individual mandate.⁷ Many have argued that Congress overstepped its constitutional boundaries in passing PPACA,⁸ and various suits specifically challenging the validity of the individual mandate have commenced.⁹ As these challenges move through the judicial process, courts have disagreed on the primary issue of whether the minimum coverage provision of PPACA is a constitutional exercise of legislative power.¹⁰

The subsidiary issue of severability has been equally disputed yet less frequently discussed. Severability doctrine guides the judiciary when courts are faced with a statute that may be partially valid and partially invalid.¹¹ The inquiry is whether the valid components of a statute may be enforced separately from its invalid provisions, or whether a finding of partial unconstitutionality affects the legislation such that it must fail in its entirety.¹² Such a determination is second in importance only to the initial assessment of constitutionality,¹³ particularly in the case of PPACA, where the viability of an entire legislative scheme may turn on the constitutionality of a single provision.¹⁴

On November 14, 2011, the Supreme Court granted review of the Eleventh Circuit's decision on both issues: the constitutionality of the individual mandate and its severability.¹⁵ In March 2012, the Court heard a virtually unprecedented five-and-a-half hours of oral argument regarding the constitutionality of the individual mandate, including ninety minutes of argument about whether the remainder of the law may stand if the provision is struck.¹⁶ The Court is expected to issue its ruling in June 2012.¹⁷

The Court must ascertain whether finding the individual mandate unconstitutional so affects the functionality of PPACA that either the entire law must fall or certain related provisions must be struck down alongside it.

7. PPACA § 1501, 26 U.S.C. § 5000A (Supp. IV 2010). For an explanation of the individual mandate provision, see *infra* Part I.C.1.

8. Wilson Huhn, *Constitutionality of the Patient Protection and Affordable Care Act Under the Commerce Clause and the Necessary and Proper Clause*, 32 J. LEGAL MED. 139, 143 (2011).

9. See, e.g., *id.* at 142–43; Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight over Health Care*, 27 J.L. & POL. 177, 178–79 (2011); Ben Pershing, *Opponents of Health-Reform Bill Look to Supreme Court; Mandate Is Questioned; Democrats Dismiss Constitutionality Issue*, WASH. POST, Jan. 3, 2010, at A3; Warren Richey, *Attorneys General in 11 States Poised to Challenge Healthcare Bill*, CHRISTIAN SCI. MONITOR (Mar. 22, 2010), <http://www.csmonitor.com/USA/Justice/2010/0322/Attorneys-general-in-11-states-poised-to-challenge-healthcare-bill>.

10. For a summary of the pending litigation, see *infra* notes 142–46, 148 and accompanying text.

11. 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 44:1 (7th ed. 2009); see *infra* Part I.A.

12. 2 SINGER & SINGER, *supra* note 11, § 44:1.

13. *Id.*

14. Ryan M. Scoville, *The New General Common Law of Severability* 3 (Marquette Univ. Law Sch., Legal Studies Working Paper No. 11-22, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939944.

15. Florida *ex rel* Att'y Gen. v. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir.), *cert granted*, 132 S. Ct. 603 (2011).

16. See Goldman, *supra* note 6.

17. *Id.*

The lower courts have adopted sharply disparate lines of reasoning on this issue, and this split of authority has created substantial uncertainty about the future of health care reform—specifically, which aspects of the law will remain applicable if the Supreme Court finds the provision to be unconstitutional.¹⁸ The Court's decision will have important ramifications for the severability of complex and highly specialized legislation, and is an important aspect of the debate surrounding health care reform.

Two fundamental points of contention are (1) whether the individual mandate is so integral to PPACA that the law cannot fulfill its legislative purpose in the mandate's absence and therefore must be found inseverable,¹⁹ and (2) alternatively, if the individual mandate is so closely linked to the guaranteed issue and preexisting condition provisions that a finding of unconstitutionality would require all three provisions to be excised.²⁰ This Comment addresses the split of authority regarding these issues.

In Part I, this Comment explains the current state of the Supreme Court's severability jurisprudence and surveys the recent landscape of health care reform. Part II surveys the split of authority regarding the individual mandate's severability, as well as its ramifications for related provisions and for the law as a whole. This part explores the divergent arguments that have emerged regarding the application of severability doctrine, and how courts have undertaken the severability analysis in the context of PPACA and the individual mandate. Finally, Part III argues that, if found unconstitutional, the individual mandate is severable, meaning that the balance of PPACA should remain valid as law. This part contends that striking additional provisions of the Act would be an inappropriate, quasi-legislative act irreconcilable with severability's fundamental notions of judicial restraint and separation of powers. Upon a finding of unconstitutionality, any required rebalancing of the Act should be left to Congress.

I. SEVERABILITY AND HEALTH CARE REFORM

In order to understand the present disagreement over the individual mandate's severability, it is essential to review the Supreme Court's approach to the doctrine as well as the principal political and cultural dynamics informing the health care debate. Although the elements of severability analysis are clearly delineated, the doctrine's application is plagued by practical difficulties. Part I.A begins by providing an explanation of severability doctrine, and details the standards for severability analysis as enunciated and applied by the Supreme Court. This discussion highlights the lack of clarity and inconsistency in the Court's severability jurisprudence to provide context for the stark differences in

18. Petition for Writ of Certiorari at 9, *Sebelius*, 648 F.3d 1235 (No. 11-393), 2011 WL 4479107, at *9.

19. *See infra* Part II.A.

20. *See infra* Part II.B.

how lower courts have applied the doctrine to PPACA. Part I.B then briefly reviews the background of health care reform—notably, the concerns leading up to the passage of PPACA and the individual mandate. Finally, Part I.C outlines the key provisions of PPACA that are under scrutiny, focusing on the individual mandate and related insurance reforms.²¹

A. An Overview of Severability

1. Severability Doctrine Generally

A law is rarely unconstitutional in its entirety.²² The doctrine of severability governs whether a court may separate, or “sever,” the unconstitutional provisions or applications of a law, effectively excising them such that the constitutional provisions of the statute may remain in force.²³ This doctrinal inquiry is the exclusive mechanism by which courts grapple with issues of partial unconstitutionality in legislation.²⁴ Any finding that a statute is partially unconstitutional necessitates an inquiry into what will become of its constitutionally valid remainder;²⁵ thus, severability has a “long pedigree,” and has evolved into an integral and pervasive component of judicial review of any statutory scheme.²⁶ The applicability of sweeping legislative schemes may ultimately depend on the severability of one unconstitutional provision.²⁷

When undertaking a severability analysis, courts endeavor to determine whether a statute may remain in effect, and to what extent, if a portion of it is found to be unconstitutional.²⁸ The inquiry is guided by several interrelated concepts of statutory construction.²⁹ The cornerstone of these principles is that statutes should be interpreted to preserve their

21. This Comment does not analyze the constitutionality of the individual mandate, or PPACA's ability to achieve health care reform. Rather, this Comment focuses on providing a general overview of severability with an emphasis on how its principles have been (and should be) applied in a severability analysis of the individual mandate.

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

23. *Id.* at 740.

24. *Id.* at 745; see 2 SINGER & SINGER, *supra* note 11, § 44:20 (noting that since “legislative activity [is] rapidly expanding, many enactments will contain questionable elements,” giving severability an “increasingly important role” in litigation); see also *supra* notes 12–13 and accompanying text.

25. See, e.g., Walsh, *supra* note 22, at 741 (asserting that, “[s]een or unseen, severability doctrine is omnipresent in judicial review as currently understood,” and that “every holding of partial unconstitutionality that does not lead to total invalidation necessarily rests on severability, implicitly if not explicitly”); Scoville, *supra* note 14, at 3 (noting that “[t]he doctrine is frequently relevant because any holding of a statute's partial invalidity will give rise to questions concerning what to do with the valid remainder”).

26. Walsh, *supra* note 22, at 739–40 (tracing the origins of severability jurisprudence to *Marbury v. Madison*).

27. Scoville, *supra* note 14, at 3 (stating that severability “doctrine is powerful because the viability of large statutory schemes can hinge entirely on whether or not an unconstitutional component is severable”).

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

29. 2 SINGER & SINGER, *supra* note 11, § 44:1.

constitutionality whenever possible.³⁰ Courts are encouraged to exercise prudence and restraint when conducting inquiries into severability, guided by the idea that findings of constitutional invalidity “frustrate[] the intent of the elected representatives of the people” such that courts should “refrain from invalidating more of the statute than is necessary.”³¹ The current test³² requires courts to discern what the legislature would have done, rather than what it actually did.³³ Such a determination can be highly speculative³⁴ and stands in stark contrast to the nature of most other interpretive inquiries.³⁵ Thus, severability doctrine confers a substantial amount of discretion on the judiciary, potentially permitting courts to declare entire laws unconstitutional that are only partially invalid.³⁶ Nevertheless, courts generally presume severability, acknowledging their obligation to uphold portions of legislation whenever they can be separated from those that are invalid.³⁷

Courts and commentators have disagreed over the manner in which these principles have developed and been applied, generating scholarly criticism of severability doctrine on virtually every plausible basis.³⁸ The jurisprudence is murky in this area, as the Supreme Court has not always explained its enunciated severability standards, laying out conclusive rejections or presumptions with little indication of the underlying rationale, and “offer[ing] little explanation of why certain presumptions are warranted, how they operate, or how they relate to each other.”³⁹

30. *Id.*; see also *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909) (“[I]t is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality.”).

31. *Regan v. Time, Inc.*, 468 U.S. 641, 652–53 (1984) (plurality opinion); see also Michael D. Shumsky, *Severability, Inseparability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 240–41 (2004).

32. See *infra* notes 54–61 and accompanying text.

33. Walsh, *supra* note 22, at 740.

34. *Id.* at 749 (“Excision requires deployment of a destructive doctrine that is subject to manipulation because of the counterfactual speculation that it requires.”).

35. See *id.* at 740–41.

36. See *id.*

37. 2 SINGER & SINGER, *supra* note 11, § 44:1; see also *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909) (“[W]henver an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.”).

38. See Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 41–42 (1995) (noting that academic criticism has designated severability doctrine as simultaneously being “too malleable and as too rigid; as encouraging judicial overreaching and as encouraging judicial abdication,” as reliant and as indifferent to legislative intent, as too attentive and too inattentive to political concerns, and as generally lacking of “any coherent explanation”); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 76–77 (1937) (explaining that the Supreme Court fluctuated between negative and positive severability presumptions, employed conflicting rules inconsistently and without explanation, and disregarded explicit manifestations of Congress’s wishes). Stern’s article is widely acknowledged as the seminal work on severability. See Walsh, *supra* note 22, at 749.

39. Nagle, *supra* note 28, at 218; see also *id.* at 225 (“The confusion surrounding presumptions and the absence of a consistent effort to explain how severability fits within broader theories of judicial review and statutory construction has left all of the various tests

Consequently, severability doctrine has varied considerably over time with little context for its ideological shifts,⁴⁰ and lower courts have struggled to apply the doctrine uniformly.

The severability inquiry is “eased” when Congress specifically includes a severability clause in the body of a statute.⁴¹ A severability clause “creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.”⁴² Conversely, if Congress fails to include a severability clause, its absence does not raise a presumption against severability; the silence is “just that—silence.”⁴³ The absence of a severability clause may take on greater significance when one is included in earlier versions of the bill, but is later removed, but such an occurrence is also not dispositive.⁴⁴ Consequently, the Court maintains its focus on extrinsic indications of legislative intent and on the practical and functional viability of the post-severance statutory scheme.⁴⁵ A severability clause is therefore not dispositive of the issue, and merely “preserves the general presumption of severability.”⁴⁶

2. Severability Jurisprudence

The seminal case articulating the contemporary approach to severability⁴⁷ is *Alaska Airlines, Inc. v. Brock*.⁴⁸ Members of the airline industry challenged a legislative veto provision in the Employee Protection Program (EPP) duty-to-hire section of the Airline Deregulation Act of

used over the years unanchored by a principled approach.”); Shumsky, *supra* note 31, at 242–43 (suggesting that in the *Alaska Airlines* decision, “[a]s was typical of its prior jurisprudence in the area, the Court spent little time justifying the severability tests it enunciated”). *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987), articulates the contemporary approach to severability, and is discussed in further detail *infra* at note 48 and accompanying text. See also Stern, *supra* note 38, at 78 (“Only if the apparent inconsistencies in Supreme Court [severability] decisions are exposed and explained, as they have not been by the Court itself, can a conscious effort be made to formulate understandable and sensible principles for the future.”).

40. See Scoville, *supra* note 14, at 4. For further discussion on the inconsistent development of severability doctrine, see Nagle, *supra* note 28, at 218 (discussing the Court’s historical fluctuation between employing a presumption of severability versus one of inseverability); Shumsky, *supra* note 31, at 232, 245 (noting the Court’s historical tendency to disregard severability clauses).

41. *Alaska Airlines*, 480 U.S. at 686.

42. *Id.*; see also *INS v. Chadha*, 462 U.S. 919, 932 (1983); *Champlin Ref. Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932).

43. *Alaska Airlines*, 480 U.S. at 686; see also *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (“[T]he absence of an express severability provision in the Act [does not] dictate the demise of the entire statute.”).

44. See Brief of Amicus Curiae Family Research Council in Support of Appellees/Cross-Appellants and Affirmance in Part at 22–23, *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (2011) (Nos. 11-11021, 11-11067), 2011 WL 2530503, at *22–23.

45. See Shumsky, *supra* note 31, at 230.

46. *Id.* at 243.

47. See *id.* at 241 (referring to *Alaska Airlines* as the Court’s “leading contemporary opinion on severability”).

48. 480 U.S. 678 (1987).

1978.⁴⁹ These plaintiffs argued that the veto was unconstitutional, and that the entire EPP section of the Act needed to be invalidated as a result.⁵⁰ The Court first looked to the relevant section's language and structure, and determined that the duty-to-hire provision was sufficiently detailed and clear to stand on its own, independent of its accompanying provisions.⁵¹ The Court then examined the statute's legislative history, and, based on the relative unimportance of the legislative veto during congressional hearings, concluded that Congress would have enacted the rest of the EPP as well as the entire Airline Deregulation Act regardless of a legislative veto provision.⁵²

Two decades later, in *Ayotte v. Planned Parenthood of Northern New England*,⁵³ the Supreme Court articulated three interrelated principles that should inform any analysis of severability:

First, [courts should] try not to nullify more of a legislature's work than is necessary. . . .

Second, mindful that [the court's] constitutional mandate and institutional competence are limited, [courts] restrain [them]selves from "rewrit[ing] law to conform it to constitutional requirements" even as we try to salvage it. . . .

Third, the touchstone for any decision about remedy is legislative intent, for a court "cannot use its remedial powers to circumvent the intent of the legislature."⁵⁴

The inquiry into legislative intent is pivotal for a determination of severability.⁵⁵ A court must therefore examine whether the legislature would have preferred what is left of the statute to no statute at all.⁵⁶ This well-established test stipulates that "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."⁵⁷ In other words, the unconstitutional provision must be severed (and the remainder of the law left in force), unless the resulting statutory scheme is one that the legislature would not have enacted, or that is incapable of functioning independently.⁵⁸

This test further stipulates that courts must probe beyond whether the remainder of the statute is capable of functioning as a practical matter, to whether the remainder of the statute will "function in a *manner* consistent

49. *Id.* at 680–81.

50. *Id.* at 683.

51. *Id.* at 687–91.

52. *See id.* at 692–97; Shumsky, *supra* note 31, at 242.

53. 546 U.S. 320, 329 (2006) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988); *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)).

54. *Id.* at 329–30.

55. *See id.* at 330; Walsh, *supra* note 22, at 740.

56. *See Ayotte*, 546 U.S. at 330; Walsh, *supra* note 22, at 740.

57. *Alaska Airlines*, 480 U.S. at 684 (quoting *Buckley v. Valeo*, 421 U.S. 1, 108 (1976) (per curiam)).

58. *See id.*

with the intent of Congress.”⁵⁹ Thus, courts must ascertain whether or not the remaining provisions of the legislation can achieve their congressional purpose.⁶⁰ In ascertaining legislative intent, the Court looks to the language and structure of the law, as well as its legislative history.⁶¹

The Court in *Ayotte* went on to hold that wholesale invalidation of the New Hampshire law under scrutiny was an inappropriate remedy.⁶² The Court held that application of New Hampshire’s statute would only create constitutional issues in a few instances, and injunctive relief could have been crafted more modestly to enjoin the statute’s application in those limited instances, so long as such relief remained faithful to the intent of New Hampshire’s legislature in enacting the statute.⁶³

The Supreme Court’s decision in *New York v. United States*⁶⁴ further contributed to its severability jurisprudence, and is particularly instructive with respect to the divergence over PPACA’s individual mandate. A challenge was brought regarding a provision of the Low-Level Radioactive Waste Policy Act, which required states to properly dispose of waste generated within the state, or be forced to assume title to it and be held liable for any damages resulting from its non-disposal.⁶⁵ The Court concluded that the provision was unconstitutional, but held that it could be severed from the rest of the Act.⁶⁶

In that instance, Congress had enacted a comprehensive scheme to address the lack of regulation of radioactive waste.⁶⁷ The Court reasoned that “[c]ommon sense” suggests that if Congress creates a legislative scheme for a particular and explicit purpose, and that scheme includes various provisions operating to achieve that purpose, “the invalidation of one [provision] should not ordinarily cause Congress’ overall intent to be frustrated.”⁶⁸ Without a “take title” provision, the Act could still operate in accordance with Congress’s overall objective of encouraging states to regulate low-level radioactive waste within their borders, because the Act contained a variety of other incentives targeted toward furtherance of that goal.⁶⁹ When the purpose of a statute is not defeated by invalidation of the offensive provision, the Court concluded, the remainder of the legislation should remain in force.⁷⁰

59. *Id.*

60. *Id.*; see also *Goudy-Bachman v. U.S. Dep’t. of Health & Human Servs.*, 1:10-CV-763, 2011 WL 4072875, at *19 (M.D. Pa. Sept. 13, 2011).

61. *Alaska Airlines*, 480 U.S. at 687.

62. See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 331 (2006). The statute in question prohibited doctors from performing abortions on pregnant minors until 48 hours after written notice of a pending abortion was delivered to a parent or guardian. *Id.* at 323–24.

63. *Id.* at 330–31.

64. 505 U.S. 144 (1992).

65. *Id.* at 149–54.

66. *Id.* at 186.

67. *Id.* at 150–51.

68. *Id.* at 186.

69. *Id.* at 187.

70. See *id.*

The Court most recently echoed and applied its severability principles in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.⁷¹ The case involved a challenge to the provision of the Sarbanes-Oxley Act of 2002 that created the Public Company Accounting Oversight Board (Board).⁷² Members of the Board were to be appointed by the Securities and Exchange Commission (SEC), though the SEC was precluded from later removing these members except for good cause.⁷³ The petitioners claimed that this system violated principles of separation of powers, affording members of the Board two-layer insulation from the President.⁷⁴ In other words, the petitioners claimed that the statute violated the Constitution because the SEC could not remove Board members except for cause, and, in turn, the President could not remove SEC Commissioners except for cause.⁷⁵ Thus, the petitioners argued that members of the Board were delegated executive power but immunized from presidential control.⁷⁶ The petitioners contended that this arrangement was contrary to Article II's vesting of the executive power in the President,⁷⁷ and, accordingly, rendered the Board and "all power and authority exercised by it" unconstitutional.⁷⁸ Both the district court and court of appeals found the removal provisions permissible,⁷⁹ and thus did not reach the question of severability.

The Supreme Court disagreed with the petitioners' chosen remedy of wholesale invalidation, finding the removal provisions unconstitutional, but rejecting the contention that the constitutional violation undermined the entire existence of the Board.⁸⁰ The Court asserted that, after excising the invalid removal restrictions, the SEC could remove Board members at will, leaving only one permissible level of "good-cause tenure" between the President and the Board.⁸¹ Accordingly, the Court reasoned that the removal provisions were severable, and that the Sarbanes-Oxley Act remained "fully operative as a law" with the offensive provisions excised.⁸² Thus, absent evidence that Congress would not have enacted Sarbanes-Oxley without the removal provisions, the Court was bound to uphold the remainder of the law because it was capable of functioning independently.⁸³

The Court acknowledged that a variety of remedies could have been employed to remedy the constitutional violation, such as judicially re-

71. 130 S. Ct. 3138 (2010).

72. *See id.* at 3149.

73. *Id.* at 3147–48.

74. *See id.* at 3149.

75. *See id.* at 3148–49.

76. *See id.* at 3149.

77. *See id.* at 3147 (holding that the President's constitutional obligation to oversee the faithful execution of laws is impaired when an officer with delegated executive authority has multilevel protection from removal).

78. *See id.* at 3161.

79. *See id.* at 3149.

80. *See id.* at 3161.

81. *Id.*

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

83. *See id.* at 3161–62.

working the duties of the Board to modify its classification under the Constitution, restricting the enforcement powers of the Board, or asserting that Board members could be removable by the President in the future.⁸⁴ However, the Court emphasized that its inquiry was limited to questions of legislative severability; a holding more extensive than that would violate principles of judicial restraint and encroach upon the powers and responsibilities of Congress.⁸⁵ The Court noted that Congress could subsequently revise the legislation if it was displeased with the resulting, post-excision statute.⁸⁶

B. Health Care Reform

Prior to PPACA's enactment, the health insurance market was characterized by rapidly rising costs and diminishing participation.⁸⁷ The number of uninsured individuals in the United States has increased almost every year, rising by 8 million in the past decade, largely due to the escalating cost of maintaining health care coverage.⁸⁸ Commentators attributed non-participation to the insurance industry's profit-seeking strategies—namely, medical underwriting and discrimination based upon preexisting conditions.⁸⁹

A principal impetus for health care reform was the exclusionary effect of health-status underwriting practices employed by the private insurance industry.⁹⁰ In general, private insurance could companies either flatly deny coverage to individuals with preexisting conditions,⁹¹ or offer such individuals coverage at prohibitively higher premiums.⁹² This policy effectively excluded both impoverished and unhealthy individuals from

84. *Id.* at 3162.

85. *See id.*

86. *Id.*

87. Nan D. Hunter, *Health Insurance Reform and Intimations of Citizenship*, 159 U. PA. L. REV. 1955, 1973–74 (2011) (noting that increases in insurance premiums outpaced the rate of growth in income, and that, in 2007, forty-six million individuals were uninsured and one in four households elected not to pursue “medical care due to cost”); *see also* Amy Goldstein, *Priority One: Expanding Coverage*, in LANDMARK, *supra* note 2, at 73, 75.

88. Goldstein, *supra* note 87, at 75.

89. Hunter, *supra* note 87, at 1974. Medical underwriting is the process by which insurance providers determine and assign risk for particular policies—a costly process in itself which contributes to high premiums. Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability) at 26, *Florida ex rel Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (2011) (Nos. 11-393, 11-400), 2012 WL 588458, at *26.

90. *See* Lawrence O. Gostin & Elenora E. Connors, *Health Care Reform in Transition: Insurance Reform Without an Individual Mandate*, 303 JAMA 1188, 1188 (2010), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1382&context=facpub>; *see also* Hunter, *supra* note 87, at 1973 (“Expanding access to coverage required reforming two profit-boosting strategies that underlay these problems [of rising costs and diminishing participation]: medical underwriting and discrimination based on preexisting conditions.”).

91. Patients are deemed to have preexisting conditions when they receive a diagnosis or treatment for a medical condition or illness prior to seeking coverage. Gostin & Connors, *supra* note 90, at 1188; Hunter, *supra* note 87, at 1974–75.

92. *See* Gostin & Connors, *supra* note 90, at 1188; Hunter, *supra* note 87, at 1974.

obtaining insurance coverage by either pricing them out of the market or by an outright denial.⁹³

Reform efforts also targeted rapidly rising costs, specifically the costs resulting from consumption of medical services by the uninsured.⁹⁴ Congress found that when the uninsured seek medical treatment, many either cannot or choose not to pay for the full cost of their medical care, which subsequently shifts the costs to medical providers.⁹⁵ Medical providers must then impose higher charges, which shifts the unpaid costs to insurance companies.⁹⁶ Insurance companies then raise premiums on their outstanding health policies.⁹⁷ Thus, insured individuals incur higher premiums, and are essentially subsidizing the medical care of those who lack insurance.⁹⁸ The cycle perpetuates itself, as many who forego insurance do so because of high premiums.⁹⁹

The current health care market depends upon the efficiency of “risk pools.”¹⁰⁰ Theoretically, a functional system of private health insurance spreads aggregate risk and cost uniformly across the insured population in order for all individuals to receive affordable medical care when needed.¹⁰¹ When all individuals across a population are required to maintain coverage, premiums should remain stable and predictable because the high costs of unhealthy individuals are dispersed evenly throughout the entire population.¹⁰² Thus, in order to achieve material improvement in overall health care access, insurers likely need to insure everyone, thereby accepting more high-cost individuals, as well as more healthy individuals to mitigate increasing premiums.¹⁰³ Without this efficiency, premiums would be too high for large segments of the population to maintain adequate insurance.¹⁰⁴

93. See Gostin & Connors, *supra* note 90, at 1188; Hunter, *supra* note 87, at 1974.

94. *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1244 (11th Cir.), *cert. granted*, 132 S. Ct. 604, *cert. granted*, 132 S. Ct. 604, *cert. granted in part*, 132 S. Ct. 604 (2011); *see also* 42 U.S.C. § 18091(a)(2)(F) (Supp. IV 2010) (estimating that the cost of providing uncompensated medical care to uninsured individuals was \$43 billion during 2008).

95. *Florida ex rel. Att’y Gen.*, 648 F.3d at 1244; 42 U.S.C. § 18091(a)(2)(F).

96. *Florida ex rel. Att’y Gen.*, 648 F.3d at 1244.

97. *Florida ex rel. Att’y Gen.*, 648 F.3d at 1244; 42 U.S.C. § 18091(a)(2)(F).

98. *Florida ex rel. Att’y Gen.*, 648 F.3d at 1244.

99. *Id.* In fact, one of the plaintiffs arguing against the individual mandate was forced to drop her family’s health insurance policy “because the \$1,100-a-month cost was prohibitive” for a small-business owner. Emily Maltby et al., *Hurdle for Health-Law Suit*, WALL ST. J., Dec. 5, 2011, at A3.

100. Gostin & Connors, *supra* note 90, at 1188; Leitch, *supra* note 9, at 179–80.

101. Gostin & Connors, *supra* note 90, at 1188; Leitch, *supra* note 9, at 179.

102. Gostin & Connors, *supra* note 90, at 1188; Leitch, *supra* note 9, at 179–80.

103. Gostin & Connors, *supra* note 90, at 1188–89; Leitch, *supra* note 9, at 180.

104. Lawrence O. Gostin & Elenora E. Connors, *Health Care Reform — A Historic Moment in US Social Policy*, 303 JAMA 2521, 2521 (2010), available at <http://scholarship.law.georgetown.edu/facpub/384> (estimating that in 2008, 46.3 million individuals in the U.S. were uninsured, and 25 million were underinsured).

C. Key Provisions of PPACA

The central goal of PPACA is to help Americans obtain adequate and affordable health insurance.¹⁰⁵ It aims to achieve this goal by (1) expanding access to medical care by eliminating barriers to obtaining insurance coverage, (2) increasing the role of consumers in selecting their insurance, and (3) proscribing discriminatory practices of insurance companies against those with preexisting conditions.¹⁰⁶ More specifically, reform efforts sought to eliminate medical underwriting and discrimination based on health status in order to open the health insurance market to all individuals, and consequently expand coverage to those with the greatest need.¹⁰⁷ Congress believed that addressing these concerns would not only decrease the number of uninsured, but could also lead to a reduction in health insurance premiums, thus reducing the costs incurred industry-wide from both medical underwriting and uncompensated medical costs.¹⁰⁸

1. The Individual Mandate

The minimum coverage position, or individual mandate, is the focal point of the debates surrounding PPACA, and lies at the heart of the Act's insurance provisions.¹⁰⁹ Beginning in 2014, this provision will require most U.S. citizens, nationals, and legal aliens to maintain minimum essential health insurance coverage.¹¹⁰ Satisfactory coverage may be procured through an employer, enrollment in government health programs, or the purchase of an individual policy on the open market.¹¹¹ Failure to maintain adequate coverage will result in a penalty of \$695 per person (but not exceeding \$2,085 per family), or 2.5 percent of family income, whichever is greater.¹¹²

The law provides several exceptions to the minimum coverage requirement. For instance, individuals with incomes too low to file federal taxes will be exempted; additionally, an individual may petition for an exemption if the cost of obtaining and maintaining coverage will exceed 8 percent of household income.¹¹³ The law also contains exemptions for incarcerated individuals, Native American tribe members, and those who decline insurance for religious reasons.¹¹⁴ The law also provides a three-month grace period before a penalty is imposed for lack of coverage.¹¹⁵

105. Goldstein, *supra* note 87, at 73.

106. Gostin & Connors, *supra* note 104, at 2522.

107. Hunter, *supra* note 87, at 1974.

108. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1245–46.

109. Alec MacGillis, *The Individual Mandate: How It Will Work*, in LANDMARK, *supra* note 2, at 85, 85.

110. PPACA § 1501, 26 U.S.C. § 5000A(a)–(b) (Supp. IV 2010); *see also* Goldman, *Health Policy Brief: Legal Challenges to Health Reform*, HEALTH AFF. (Oct. 31, 2011), available at http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_54.pdf.

111. PPACA § 1501(f), 26 U.S.C. § 5000A(f); *see also* Goldman, *supra* note 110, at 2.

112. Goldman, *supra* note 110, at 2.

113. *Id.*

114. *Id.*

115. *Id.*

The individual mandate has been referred to as the “linchpin” of PPACA,¹¹⁶ and as Congress’s “magic bullet” to achieving near-universal coverage and lower aggregate industry costs.¹¹⁷ Theoretically, the mandate is an essential mechanism to achieve PPACA’s heightened regulatory scheme without scrapping a market-based system of health insurance in favor of a government-run single-payer insurance program.¹¹⁸ At a basic level of understanding, insurance operates by spreading risk.¹¹⁹ For example, Americans who receive health insurance through large employers share their costs broadly across this pool, where older employees pay the same amount as younger employees.¹²⁰ In the individual insurance market, the spreading of risk did not function as efficiently prior to the passage of reform because younger, healthier individuals could elect not to obtain coverage.¹²¹ Consequently, older, sicker participants comprise a large part of the individual insurance market, as they consume a higher amount of medical care. This skew in the participating population led to higher rates in the individual market, making it even less likely that younger or healthier individuals would decide to purchase insurance.¹²²

Under the guaranteed issue¹²³ and preexisting condition¹²⁴ provisions of PPACA, insurers are required to issue coverage to high-cost, unhealthy individuals.¹²⁵ Unless healthy individuals are simultaneously required to purchase insurance and become part of the overall risk pool, the private

116. See, e.g., Marc Siegel, *The Individual Mandate Is Obamacare’s Linchpin*, NAT’L REV. (Aug. 15, 2011, 4:00 AM), <http://www.nationalreview.com/articles/274576/individual-mandate-obamacare-s-linchpin-marc-siegel>.

117. Brief for Private Petitioners on Severability at 27, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 604 (2012) (Nos. 11-393, 11-400) 2012 WL 72440, at *27; MacGillis, *supra* note 109, at 87.

118. Hunter, *supra* note 87, at 1974.

119. MacGillis, *supra* note 109, at 87.

120. *Id.*

121. *Id.* Approximately one-third of individuals aged 20 to 29 elect not to obtain health insurance coverage. *Id.* This rate of non-participation is double that of individuals aged 30 to 64. *Id.*

122. *Id.*

123. PPACA § 2702(a), 42 U.S.C. § 300gg-1(a) (Supp. IV 2010) (“[E]ach health insurance issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage.”); see also *id.* § 2703(a), 42 U.S.C. § 300gg-2(a) (“[I]f a health insurance issuer offers health insurance coverage in the individual or group market, the issuer must renew or continue in force such coverage at the option of the plan sponsor or the individual, as applicable.”).

124. *Id.* § 2704(a), 42 U.S.C. § 300gg-3(a) (“A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.”); see also *id.* § 2705(a), 42 U.S.C. § 300gg-4(a) (prohibiting health insurance issuers from establishing rules for eligibility based on health status, medical condition (both physical and mental), claims history, prior receipt of medical care, medical history, genetic information, disability, evidence of insurability, or any other health-status-related factor determined appropriate by the Secretary of Health and Human Services).

125. See MacGillis, *supra* note 109, at 87 (“[I]nsurers argue, with justification, that if they have to offer affordable coverage to people with serious medical conditions, then they need to have younger and healthier people in the pool. And the only way to make sure that those people obtain coverage is to require it.”).

insurance market would have suffered from rising expenditures alongside reduced income from premiums.¹²⁶ The mandate is considered by some to be critical to mitigating those effects and to stabilizing the private health insurance market.¹²⁷ Mandating that healthy individuals purchase comprehensive insurance coverage would have the practical effect of giving a \$30 billion subsidy to insurance companies each year, thus affording insurers the means to provide coverage to high-risk individuals at artificially lower premiums.¹²⁸

Congress has also acknowledged in the Act itself that the individual mandate is crucial to the Act's overarching goals of expanding the availability of affordable health insurance coverage and protecting individuals with preexisting medical conditions:

[I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care. . . . The [individual mandate] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.¹²⁹

2. Guaranteed Issue, Preexisting Conditions, and Community Rating

In order to combat the negative effects of discriminatory insurance practices,¹³⁰ Congress enacted the guaranteed issue provision alongside the prohibition on preexisting conditions. This provision forces insurance companies to provide coverage to high-cost individuals by requiring insurers to both issue and renew coverage to applicants without gaps and exclusions in coverage.¹³¹ This provision works in conjunction with the preexisting condition exclusion prohibition, barring companies from denying or limiting coverage to individuals based on health status.

As of 2014, the guaranteed issue provision requires insurers to issue coverage to every employer or individual who applies in the individual or group markets.¹³² Insurers are also required to renew or maintain coverage at the insured's prerogative,¹³³ with limited exceptions such as fraud and premium nonpayment.¹³⁴ Insurers will also no longer be permitted to

126. *Id.*; Hunter, *supra* note 87, at 1975.

127. Hunter, *supra* note 87, at 1976.

128. Brief for Private Petitioners on Severability, *supra* note 117, at 27.

129. PPACA § 1501(a)(2)(I), 42 U.S.C. § 18091(a)(2)(I).

130. The most controversial insurance practices include denying coverage for preexisting conditions, or revoking coverage once an individual becomes sick. Alec MacGillis, *The Insured: It's Status Quo — for Now, in LANDMARK*, *supra* note 2, at 99, 101.

131. PPACA §§ 2702(a), 2703(a), 42 U.S.C. §§ 300gg-1(a), -2(a); Hunter, *supra* note 87, at 1974.

132. PPACA § 2702(a), 42 U.S.C. § 300gg-1(a); *see supra* note 123 and accompanying text.

133. PPACA § 2703(a), 42 U.S.C. § 300gg-2(a); *see supra* note 123 and accompanying text.

134. 42 U.S.C. § 300gg-2(b).

refuse or restrict coverage based on an individual's preexisting medical conditions, or on the basis of health status.¹³⁵

The community rating provision works in concert with the policy of guaranteed issue to prevent insurers from using health status as a factor when offering or pricing coverage.¹³⁶ Under the community rating provision, insurers may only vary individual premiums within a geographic area based on age and tobacco use.¹³⁷ Insurers are explicitly prohibited from varying premiums within a geographic area based on health status.¹³⁸ This forces insurers to consider all enrollees as part of a single risk pool.¹³⁹

II. SEVERABILITY OF THE INDIVIDUAL MANDATE: THE SPLIT OF AUTHORITY

Advocates of PPACA remain certain that the individual mandate is a valid exercise of Congress's constitutional authority, but assert that if the Supreme Court were to disagree, principles of judicial restraint counsel the Court to leave as much of the law intact as possible.¹⁴⁰ Opponents of the law contend that the individual mandate is unconstitutional, and because the mandate is integral to the overall goals of health care reform, the reform legislation must be invalidated in its entirety.¹⁴¹ This part scrutinizes the debate over the individual mandate's severability.

As of March 2012, the U.S. Court of Appeals for the Eleventh Circuit, and the U.S. District Courts for the Northern District of Florida, the Middle District of Pennsylvania, and the Eastern District of Virginia have found the individual mandate to be unconstitutional, thus proceeding to the question of the provision's severability.¹⁴² Of the district court opinions, the Northern District of Florida held that the mandate was not severable and invalidated PPACA in its entirety,¹⁴³ the Eastern District of Virginia found that the mandate was severable and excised it from the remainder of the

135. PPACA §§ 2704(a), 2705(a), 42 U.S.C. §§ 300gg-3(a), -4(a); *see supra* note 124 and accompanying text.

136. Petition for Writ of Certiorari at 2, 7, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011) (No. 11-393), 2011 WL 4479107, at *2, *7.

137. PPACA § 2701(a)(4), 42 U.S.C. § 300gg(a)(4).

138. *Id.* § 2701(a)(1)(B), 42 U.S.C. § 300gg(a)(1)(B).

139. *Id.* § 1312(c)(1)-(2), 42 U.S.C. § 18032(c)(1)-(2) (requiring all health insurance issuers to consider all enrollees in health plans offered on the individual and small group markets as members of a single risk pool).

140. *See, e.g.*, Consolidated Brief for Respondents, *supra* note 2, at 26-27.

141. *See, e.g.*, Brief for America's Health Insurance Plans as Amicus Curiae Partially Supporting Certiorari Review at 15-23, *Sebelius*, 132 S. Ct. 603 (Nos. 11-393, 11-398, 11-400), 2011 WL 5128125, at *15-23.

142. *See id.* at 4, 11. For updated information regarding the status of all cases pertaining to PPACA, *see Defending the Affordable Care Act*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/healthcare/index.html> (last visited March 23, 2012).

143. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1305-06 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *aff'd in part, rev'd in part sub nom.* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 604, *cert. granted*, 132 S. Ct. 604, *cert. granted in part*, 132 S. Ct. 604 (2011).

law,¹⁴⁴ and the Middle District of Pennsylvania reasoned that the mandate was severable but that additional, insurance-related reforms were too intertwined with the provision to effectively remain in force.¹⁴⁵ The sole circuit court to address the issue, the Eleventh Circuit, found that the mandate was severable, and upheld the remainder of the legislation.¹⁴⁶ The discord in these opinions is a striking example of the uncertainty inherent in applying modern severability doctrine.¹⁴⁷ These conflicting decisions have compounded the immense uncertainty surrounding health care reform by articulating four different potential schemes: PPACA as-is; PPACA without the individual mandate; PPACA without the mandate as well as a to-be-determined related set of provisions; and no PPACA at all.¹⁴⁸

Part II of this Comment details the doctrinal conflict regarding the application of severability to the individual mandate: whether a finding of unconstitutionality means the mandate can be excised on its own, requires additional excision of related provisions, or merits invalidation of the entire law. This part begins by examining the arguments relied upon by opponents of PPACA in arguing that the individual mandate is non-severable. It then discusses the reasoning presented in favor of severability, scrutinizing the conclusions that the mandate can be excised on its own or that related insurance provisions must be excised as well.

A. *The Argument that the Individual Mandate Is Not Severable*

The argument for non-severability rests on the view that a statute is a “carefully-balanced legislative bargain,” negotiated and crafted by Congress in order to strike a “delicate balance” between vast and competing concerns.¹⁴⁹ When legislation is passed in these circumstances, Congress is deemed to be voting on an entire package, not on discrete provisions.¹⁵⁰ Accordingly, an invalid provision should be dubbed non-severable if it is essential to the central objective of a statutory scheme, because Congress presumably would not have enacted the remaining statute if it fell short of Congress’s overarching goal for the legislative package.¹⁵¹

Proponents of non-severability find support for their conclusions in the text of PPACA, both in its explicit language and its lack of a severability clause. The text of PPACA counsels the provision’s non-severability by overtly characterizing the individual mandate as “essential to creating effective health insurance markets” where coverage is guaranteed and does

144. *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 789–90 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011).

145. *Goudy-Bachman v. U.S. Dep’t of Health & Human Servs.*, 1:10-CV-763, 2011 WL 4072875, at *19–21 (M.D. Pa. Sept. 13, 2011).

146. *Florida ex rel. Att’y Gen.*, 648 F.3d 1235.

147. *See* Scoville, *supra* note 14, at 3 n.5

148. *See* Brief for America’s Health Insurance Plans, *supra* note 141, at 4.

149. Brief of Amicus Curiae Family Research Council, *supra* note 44, at 7.

150. *See id.*

151. *Id.* at 8.

not exclude those with preexisting conditions.¹⁵² Thus, courts are arguably required to give effect to this language as an explicit pronouncement of congressional intent, the touchstone inquiry of whether an unconstitutional provision can and should be severed.¹⁵³

Arguments that the individual mandate is not severable are buttressed by empirical evidence indicating that implementing a guaranteed issue policy without a mandate requiring all individuals to carry insurance will lead to a so-called “premium spiral” that cripples the insurance market.¹⁵⁴ Proponents and opponents of the law have indicated that a mandate compelling individuals to maintain insurance coverage may be the only way to avoid a premium spiral while ensuring compliance with policies such as guaranteed issue and community rating.¹⁵⁵ Without requiring individuals to carry coverage, individuals presumably would wait to obtain health insurance until they required medical care.¹⁵⁶ A mandate provision minimizes this problem of adverse selection,¹⁵⁷ and keeps premiums under control by broadening the risk pool to include more healthy individuals.¹⁵⁸

In arguing for non-severability, the insurance industry contends that the Court should give great weight to the “backdrop of powerful proof” presented to Congress indicating that implementing guaranteed issue, community rating requirements, and preexisting condition provisions without an individual mandate would destabilize the nationwide insurance market.¹⁵⁹ Eight states had enacted insurance market reforms without an individual mandate, and experienced an overall destabilization in the market, most notably in the form of rising premiums and lower enrollment.¹⁶⁰ For example, Congress was presented with data from New Jersey indicating that implementing policies of guaranteed issue and community rating without a mandate had initiated a premium spiral, leading the individual insurance market to nearly collapse.¹⁶¹ Even if the mandate is not “truly essential to comprehensive reform . . . Congress *believed*” it was¹⁶² based on the substantial evidence presented to it throughout the legislative process.¹⁶³ Therefore, according to the insurance industry, Congress intended the individual mandate to be non-severable, and courts

152. *Id.* at 21–22 (quoting PPACA § 1501(a)(2)(H), 42 U.S.C. § 18091(a)(2)(I) (Supp. IV 2010)).

153. *Id.*; see *supra* notes 53–58 and accompanying text.

154. John F. Sheils & Randall Haight, *Without the Individual Mandate, the Affordable Care Act Would Still Cover 23 Million; Premiums Would Rise Less than Predicted*, HEALTH AFF., Nov. 2011, at 1. A premium spiral occurs when healthy individuals wait to purchase insurance until they actually require medical attention. This drives up overall premiums because the only individuals carrying insurance are high-cost, unhealthy individuals. Siegel, *supra* note 116.

155. See Siegel, *supra* note 116.

156. See Brief of America’s Health Insurance Plans, *supra* note 141, at 18.

157. See *infra* note 203.

158. See PPACA § 1501(a)(2)(I), 42 U.S.C. § 18091(a)(2)(I) (Supp. IV 2010).

159. Brief for America’s Health Insurance Plans, *supra* note 141, at 10–11.

160. *Id.* at 5.

161. See Consolidated Brief for Respondents, *supra* note 2, at 32.

162. Brief of Amicus Curiae Family Research Council, *supra* note 44, at 24.

163. Consolidated Brief for Respondents, *supra* note 2, at 32.

should invalidate PPACA in its entirety if the provision is to be found unconstitutional.

A finding of non-severability may also be supported by PPACA's lack of a severability clause, and the fact that two earlier versions of the bill had contained one.¹⁶⁴ The absence of a severability clause may be significant when one is included in earlier versions of the bill, but is later removed, because "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."¹⁶⁵ Although not dispositive, it does counsel the conclusion that Congress intended that the Act's provisions "operate together or not at all."¹⁶⁶ This element of PPACA's textual history, coupled with Congress's explicit assertion that the individual mandate is "essential" to accomplishing the law's target reforms, support the position that the individual mandate is not severable.¹⁶⁷

Further, advocates for non-severability state that if courts have "significant doubt" about whether Congress would have enacted PPACA without the individual mandate, there is a sufficient basis to invalidate the entire statute.¹⁶⁸ Courts should "err on the side of caution" by doing so and allowing Congress itself to reconsider the issue.¹⁶⁹ Invoking the principles of institutional competence and constitutional limitations, courts are urged not to excise invalid provisions if doing so would require rebalancing of a complex statutory scheme, as this would constitute a serious encroachment into the legislative domain that courts are neither permitted nor qualified to undertake.¹⁷⁰

The U.S. District Court for the Northern District of Florida held that the individual mandate provision of PPACA exceeded Congress's power under the Constitution, and that the mandate was not severable, rendering the

164. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1301 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *aff'd in part, rev'd in part sub nom.* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 604, *cert. granted*, 132 S. Ct. 604, *cert. granted in part*, 132 S. Ct. 604 (2011). The two prior versions of the bill that included a severability clause were H.R. 3200, 111th Cong. (1st Sess. 2009), and H.R. 3962, 111th Cong. (1st Sess. 2009).

165. *Russello v. United States*, 464 U.S. 16, 22–24 (1983); *see also supra* note 44 and accompanying text.

166. *See* Brief for Amicus Curiae Family Research Council, *supra* note 44, at 22 (quoting *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1267 (9th Cir. 1988)).

167. *Id.* at 23.

168. *See id.* at 12.

169. *Id.* (noting that "if [courts] are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall" (citing *El Paso & Ne. Ry. v. Gutierrez*, 215 U.S. 87, 97 (1909))).

170. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329–30 (2006) ("Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue But making distinctions in a murky constitutional context, or where line-drawing is inherently complex may call for a 'far more serious invasion of the legislative domain' than we ought to undertake." (quoting *United States v. Treasury Emps.*, 513 U.S. 454, 479 n.26 (1995))).

entire law unconstitutional.¹⁷¹ In *Florida ex rel. Bondi v. U.S. Department of Health and Human Services*, various parties, including twenty-six states, two uninsured private citizens, and a business association,¹⁷² challenged the minimum coverage provision of PPACA.¹⁷³ District Court Judge Roger Vinson granted summary judgment for the plaintiffs,¹⁷⁴ finding that Congress lacked the constitutional authority to promulgate the individual mandate under either the Commerce Clause or the Necessary and Proper Clause.¹⁷⁵ Further, Judge Vinson found that the individual mandate was not severable, and, accordingly, held that PPACA must be stricken in its entirety.¹⁷⁶

Judge Vinson articulated the severability analysis as consisting of a two-part test: (1) a determination of whether the remaining provisions can function independently of the stricken provision “in a manner consistent with the intent of Congress,”¹⁷⁷ and (2) an assessment of whether the statute’s text or legislative history indicate that Congress would have preferred no statute at all to a statute not containing the stricken provision.¹⁷⁸

As to the first part, the court noted that a complex, lengthy statute with hundreds of sections certainly has a number of provisions that are capable of functioning independently of the individual mandate, many of which had already taken effect.¹⁷⁹ However, the court noted that the focus of this determination is not a practical or technical inquiry, but rather one that asks whether the remaining provisions will comprise a statute that is in accordance with congressional intent.¹⁸⁰

The court then addressed the Act’s lack of a severability clause.¹⁸¹ The court acknowledged that the absence of a severability clause is insufficient to raise a presumption against severability on its own merits, but asserted that it still held potential relevance to the overall inquiry.¹⁸² The court went on to point out that the absence of a severability clause was particularly significant to an analysis of PPACA, as prior versions of the bill did contain one.¹⁸³ Judge Vinson reasoned that this meant a severability clause was intentionally omitted from the Act as enacted, particularly since the

171. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1305–06 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *aff’d in part, rev’d in part sub nom. Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 604, *cert. granted in part*, 132 S. Ct. 604 (2011).

172. *Id.* at 1263.

173. *Id.* at 1265.

174. *Id.* at 1307.

175. *Id.* at 1298.

176. *Id.* at 1305–06.

177. *Id.* at 1300 (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)).

178. *Id.* at 1300–01 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161–62 (2010)).

179. *Id.* at 1300.

180. *Id.* (citing *Alaska Airlines*, 480 U.S. at 684).

181. *Id.* at 1301.

182. *Id.*

183. *Id.*

individual mandate was highly controversial throughout the legislative process, giving Congress fair warning that legal challenges against the mandate were likely.¹⁸⁴ Judge Vinson concluded that the ultimate absence of a severability clause served as strong evidence that Congress believed the Act could not achieve its overarching aim of health insurance reform unless the individual mandate was included.¹⁸⁵

The court further seized on the government's statements conceding that the health insurance reforms of PPACA could not survive without the individual mandate.¹⁸⁶ Legislative debates and presidential speeches were all premised upon a goal of health insurance reform, and proponents of the bill repeatedly stressed that the legislation was the "means to comprehensively reform the health insurance industry."¹⁸⁷ In a memorandum seeking dismissal of the suit, the defendants stipulated to the essential role of the individual mandate in achieving a "comprehensive scheme [ensuring the availability and affordability]" of health insurance coverage, and noted that without all of the health insurance provisions working in tandem, regulatory reform would be ineffective.¹⁸⁸ Thus, the court analogized the situation to *New York v. United States*,¹⁸⁹ where the Supreme Court suggested that legislation should be struck in its entirety where its purpose would be undermined by invalidation of one or more of its provisions.¹⁹⁰ Judge Vinson concluded that the grouping of insurance provisions embodied the core of the Act.¹⁹¹

Balancing these concerns and findings with the guiding principles of severability enunciated in *Ayotte*,¹⁹² the court found that "reconfiguring an exceedingly lengthy and comprehensive legislative scheme" would be inconsistent with the overarching aims of separation of powers and judicial restraint.¹⁹³ If the courts were to sever the individual mandate from PPACA along with the other insurance reforms, the inquiry into whether each remaining section was intended by Congress to stand independently of the individual mandate would be an extensive, time-consuming, line-by-line analysis "tantamount to rewriting a statute" in order to ensure constitutional

184. *Id.* at 1301; *see also* *Russello v. United States*, 464 U.S. 16, 23–24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.")

185. *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1301.

186. *Id.* at 1301–02.

187. *Id.* at 1302 (citing *Morning Edition: Analyzing Democrats' Word Shift on Health Care*, NPR (Nov. 17, 2009); *News Conference by the President, July 22, 2009*, WHITE HOUSE (July 23, 2009), <http://www.whitehouse.gov/the-press-office/news-conference-president-july-22-2009>).

188. *Id.*

189. 505 U.S. 144 (1992); *see supra* notes 64–70 and accompanying text.

190. *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1303.

191. *Id.* at 1301 ("[T]he Act's health insurance reforms cannot survive without the individual mandate, which is extremely significant because the various insurance provisions, in turn, are the very heart of the Act itself."); *id.* at 1303 ("[T]he individual mandate is indisputably necessary to the Act's insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act.")

192. 546 U.S. 320 (2006); *see supra* notes 53–54 and accompanying text.

193. *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1304; *see supra* Part I.A.

conformity, and would essentially “second guess” what Congress would want to remain in effect.¹⁹⁴

The court concluded its assessment by likening PPACA to a “finely crafted watch” containing too many dependent and moving parts for the judiciary to “dissect out the proper from the improper, and the able-to-stand-alone from the unable-to-stand-alone.”¹⁹⁵ Such “quasi-legislative ‘line drawing’” would be a serious encroachment into the congressional realm; thus, according to the court, the Act as currently drafted is akin to a “defectively designed watch” that must be “redesigned and reconstructed by the watchmaker”—in this case, Congress, not the courts.¹⁹⁶

B. *The Argument that the Individual Mandate Is Severable*

1. The Mandate Is Severable on Its Own

Proponents of the individual mandate’s severability argue that invalidating the entire statute is contrary to the traditional applications of severability doctrine.¹⁹⁷ Generally, courts presume validity and are obligated to take objective measures to “maintain the act in so far as it is valid.”¹⁹⁸ If a court does not attempt to preserve as much of the statute as possible, it is arguably using its remedial powers to sidestep legislative intent.¹⁹⁹ With the balance of a statute presumed valid, courts should carefully scrutinize the remainder of the law and look for “clear evidence” in assessing whether it can stand as fully operative as law, or if it is too closely connected to the invalid provision that the rest also must be struck.²⁰⁰ Advocates of PPACA’s severability also contend that eliminating the individual mandate would not have the disastrous effects on the insurance market that many fear.²⁰¹ Some policy analysts project that premiums in the individual market would indeed rise if no mandate were

194. *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1304.

195. *Id.*

196. *Id.* at 1304–05.

197. See Brief of Nat’l Indian Health Bd. et al. as Amicus Curiae Supporting Appellants at 22, *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 603, *cert. granted*, 132 S. Ct. 604, *cert. granted in part*, 132 S. Ct. 604 (2011) (Nos. 11-11021, 11-11067), 2011 WL 1461594, at *22.

198. *Id.* (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652–53 (1984)).

199. See *Florida ex rel. Att’y Gen.*, 648 F.3d at 1322 (acknowledging the judiciary’s duty to exercise restraint in invalidating statutory provisions where it is uncertain whether such provisions are in accordance with congressional intent).

200. Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 89, at 8. (“[T]he Court should have clear evidence that Congress, faced with the unconstitutionality of one part of a statute, would have wanted some or all of the remaining parts stuck down as well.”); see Brief of Nat’l Indian Health Bd. et al. as Amicus Curiae Supporting Appellants, *supra* note 197, at 24 (“If careful analysis is required to determine that a particular provision of a statute is unconstitutional, it stands to reason that the remaining portions of the statute, presumed valid, should also be scrutinized carefully before determining if they are independent ‘fully operative’ provisions of law and therefore remain valid, or if they bear such close connection to the unconstitutional provision that they too must be invalidated.”).

201. See, e.g., Sheils & Haight, *supra* note 154, at 7.

implemented, but estimate that approximately twenty-one to twenty-four million additional people would be insured.²⁰² Additional provisions in the law, such as subsidies and restricted open enrollment periods, would mitigate the feared effects of rising premiums and decreasing enrollment.²⁰³ Thus, while the individual mandate would achieve lower premiums and higher overall levels of coverage, it is not necessarily essential to achieving the Act's goals.²⁰⁴

In *Florida ex rel. Attorney General v. U.S. Department of Health and Human Services*,²⁰⁵ the Eleventh Circuit reversed the district court on this point. Although the court affirmed that the minimum coverage provision was unconstitutional, it held that the mandate was severable from the remaining provisions.²⁰⁶

The Eleventh Circuit found that the district court—the sole court to hold that the mandate is non-severable—misapplied severability doctrine and failed to adequately scrutinize the remainder of the law before making a determination as to its validity.²⁰⁷ The lower court had explicitly stated that it had no intention of reviewing the entire law because of the “considerable time and extensive briefing” needed to parse through such a lengthy and complex statute.²⁰⁸ However, by failing to do so, the Eleventh Circuit held that the lower court misconstrued severability doctrine and erred by not maintaining the act insofar as it was valid.²⁰⁹ The Eleventh Circuit went on to note that a more thorough review of PPACA indicates that the majority of its “myriad provisions” are wholly unrelated to private insurance, much less directly linked to the individual mandate; thus, its excision does not preclude the Act from remaining “fully operative as a law.”²¹⁰

In reversing, the Eleventh Circuit asserted that the lower court had unduly relied on the lack of an explicit severability clause in PPACA in finding that the entire 975-page law should be invalidated, with a heavy

202. *Id.*

203. *Id.* (“The primary reason for [lesser-than-expected effects on premium and coverage projections] is that two-thirds of all people with nongroup coverage under the act are eligible for premium subsidies and would be protected against much or even all of the premium increase. This would reduce the coverage loss from lifting the mandate and restrain premium increases in the nongroup market.”). The restricted open enrollment periods mitigate adverse selection among individuals who would choose to forego obtaining insurance coverage until they actually need it. These individuals would be forced to bear the risk of any unforeseen insurance needs that arise prior to the next enrollment period; thus, the open enrollment periods substantially raise the stakes for individuals who would delay in obtaining coverage. See Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 89, at 36.

204. See Sheils & Haught, *supra* note 154, at 7.

205. 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 603, *cert. granted*, 132 S. Ct. 604, *cert. granted in part*, 132 S. Ct. 604 (2011).

206. *Id.* at 1328.

207. See *id.* at 1323.

208. *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1304 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *aff'd in part, rev'd in part sub nom. Florida ex rel. Att'y Gen.*, 648 F.3d 1235.

209. See *supra* notes 171–96, 200 and accompanying text.

210. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1322.

emphasis on a prior version of PPACA containing such a clause.²¹¹ The district court had concluded that the removal of a severability clause during the bill's revision process operated as strong evidence that Congress believed the law could not operate as intended without the mandate; in light of established precedent regarding the weight to be accorded to the absence of a severability clause,²¹² the circuit court held that such an inference went too far.²¹³

The court pointed out that the drafting manuals for both houses of Congress indicate that severability clauses are unnecessary unless they are stipulating that certain provisions are non-severable; therefore, the initial inclusion and subsequent removal of a severability clause should not function as indicia of congressional intent against severability.²¹⁴ As such, the circuit court held that insufficient evidence had been presented to rebut the general presumption of severability, and, accordingly, that the district court had erred in wholesale invalidation of the Act.²¹⁵

The Eleventh Circuit went on to address whether invalidation of the minimum coverage provision also mandated severance of the guaranteed issue and preexisting condition provisions.²¹⁶ The court framed the inquiry as whether Congress would have enacted either of these two reforms had the individual mandate not also been included.²¹⁷ It concluded that an Act containing those two reforms was still in full accordance with Congress's intent to "make health insurance coverage accessible and thereby to reduce the number of uninsured persons."²¹⁸ The court also indicated that none of the related insurance provisions contained any cross-reference to the individual mandate provision, or stipulated their dependence on it.²¹⁹ Further buttressing the independence of the provisions, the court noted that the preexisting condition provision had already come into limited effect, four years prior to the effective date of the individual mandate.²²⁰ A legislative scheme containing both a guaranteed issue and a preexisting condition provision "hew[s] more closely to Congress's likely intent" than a scheme that does not.²²¹

The court further emphasized that the question of severability is markedly different from constitutional analysis, and that evidence in the legislative history concerning the individual mandate was not strong enough to overcome the presumption of severability.²²² The legislative history

211. *Id.* at 1322–23.

212. *See supra* notes 43–44 and accompanying text.

213. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1322.

214. *Id.* at 1322–23.

215. *Id.* at 1323.

216. *Id.*

217. *Id.* at 1324.

218. *Id.* at 1324–25.

219. *Id.* at 1324 (citing *United States v. Booker*, 543 U.S. 220, 260 (2005) (asserting that where a statutory provision "contains critical cross-references" to an excised provision, that provision must also be severed for similar reasons)).

220. *Id.*

221. *Id.* at 1325.

222. *Id.* at 1327–28.

indicated that the individual mandate increases the effectiveness of the other insurance reforms, but simply because the absence of the mandate “render[s] these provisions *less desirable*” did not lead the court to the conclusion that Congress would have preferred that they not be enacted.²²³ Accordingly, the court found insufficient evidence to conclude that Congress would not have enacted the two reforms without an individual mandate; thus, the court held that the mandate was severable, and stipulated that any alterations to a subsequent legislative scheme should be made by Congress.²²⁴

In *Virginia ex rel. Cuccinelli v. Sebelius*,²²⁵ the U.S. District Court for the Eastern District of Virginia also found the individual mandate to be unconstitutional, and held that it was severable from PPACA. The court recognized the plaintiff’s repeated contentions that the mandate was the “linchpin” of the health care reforms, but concluded that a finding of non-severability was inappropriate, as the law’s scope extended far beyond that provision.²²⁶

In coming to its conclusion, the court focused on traditional principles of judicial restraint, institutional competence, and legislative preservation.²²⁷ PPACA had been hastily rushed to the congressional floor on Christmas Eve for a final vote, and the court felt it impracticable to conduct the required inquiry into legislative intent under these circumstances.²²⁸ Based on the insufficient legislative history and inadequate record before it, the court stated that it could not ascertain whether Congress would have passed the bill had the mandate not been included because such a determination would have been impermissibly speculative.²²⁹ Accordingly, the court elected to “hew closely to the time-honored rule to sever with circumspection,” severing only the offensive provision and any directly dependent provisions that make specific reference to it.²³⁰

2. The Mandate Is Severable, but Requires Excising Additional Insurance Reforms

As an alternative to their principal arguments, both opponents and proponents of PPACA take a middle-ground stance regarding the individual mandate’s severability. Opponents argue foremost that the provision is unconstitutional and non-severable, and should therefore cause the entire statute to fall; alternatively, they contend that if the Court is disinclined to find the mandate non-severable, it should still strike additional insurance

223. *Id.* at 1327.

224. *Id.* at 1327–28.

225. 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011).

226. *Id.* at 789.

227. *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006); *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d at 789 (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)); *supra* Part I.A.

228. *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d at 789.

229. *Id.*

230. *Id.* at 790.

reforms that are related to the individual mandate.²³¹ Some proponents principally contend that the provision is constitutional, but pose an identical alternative argument regarding severance of the mandate and related reforms.²³² This approach relies on similar arguments to those of non-severability, but stops short of counseling invalidation of the entire statute. Opponents and proponents alike argue that the individual mandate is the “linchpin” of PPACA because it “ensures the cash flow into the insurance market necessary to offset the resulting costs” of guaranteed issue and community rating.²³³ They assert that Congress would not have enacted other insurance reforms that would “deplet[e] the market of funds” without the primary revenue-generator for the market.²³⁴ This argument primarily rests on assertions that (1) the legislative history of PPACA indicates that the provisions are non-severable, and (2) that, practically speaking, an insurance market that employs guaranteed issue and community rating policies without an individual mandate will suffer from adverse selection and a premium “death spiral.”²³⁵ Therefore, if the individual mandate is found unconstitutional and severable from PPACA, closely related provisions must be removed as well.²³⁶

The Middle District of Pennsylvania adopted this middle-ground position in *Goudy-Bachman v. U.S. Department of Health and Human Services*.²³⁷ The court struck down the individual mandate as beyond Congress’s enumerated powers under the Constitution, and found that the provision was severable from PPACA; however, the court ruled that the mandate was inextricably linked to the guaranteed issue,²³⁸ community rating,²³⁹ and preexisting condition²⁴⁰ provisions of the law, such that all three needed to be invalidated along with the mandate.²⁴¹ The court primarily based this decision on the fact that the minimum coverage provision functioned as a partial funding mechanism for both the guaranteed issue and preexisting

231. See Brief of Amicus Curiae Family Research Council, *supra* note 44, at 29 (“[I]f this Court invalidates Section 1501 but declines to invalidate [PPACA] entirely, this Court should instead invalidate all the provisions of the Act that impact the cost of healthcare premiums.”).

232. See Consolidated Brief for Respondents, *supra* note 2, at 10, 31 (“For the reasons stated in its certiorari petition, the federal government believes Congress had Article I authority to enact the minimum coverage provision. . . . In the event this Court disagrees, however, the federal government believes it would be appropriate for the Court to consider certain issues concerning whether additional provisions of the Act should be held inseverable in this case. . . . The court of appeals did err . . . in holding that the guaranteed-issue and community-rating provisions that will take effect in 2014 can be severed from the minimum coverage provision.”).

233. See Brief of Amicus Curiae Family Research Council, *supra* note 44, at 29; Siegel, *supra* note 116.

234. *Id.*

235. Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 89, at 24–25.

236. Brief of Amicus Curiae Family Research Council, *supra* note 44, at 29.

237. 811 F. Supp. 2d 1086, 1110–11 (M.D. Pa. 2011).

238. See *supra* note 123 and accompanying text.

239. See *supra* notes 136–39 and accompanying text.

240. See *supra* note 124 and accompanying text.

241. *Goudy-Bachman*, 811 F. Supp. 2d at 1110–11.

condition provisions.²⁴² Additionally, the government itself conceded at oral argument that the preexisting conditions and guaranteed issues provisions “[were] absolutely intertwined” with the individual mandate.²⁴³ Thus, the court found that a finding of unconstitutionality required that those three additional components be removed from PPACA.²⁴⁴

III. LIMITING THE SOLUTION TO THE PROBLEM: THE MINIMUM COVERAGE PROVISION IS SEVERABLE

Part III of this Comment asserts that the individual mandate is severable, and that if the Supreme Court finds it unconstitutional, it should exercise restraint and leave the remainder of PPACA in force.

Invalidation of PPACA in its entirety is not an appropriate remedy for finding the mandate unconstitutional. The mere prospect that the Act’s other insurance-related provisions may function less effectively in the absence of an individual mandate is not an invitation for the judiciary to infer that the ultimate success of the whole Act depends on one provision out of several hundred.²⁴⁵ The ambiguity of severability doctrine may encourage analysis that supports one’s predetermined political view of reform,²⁴⁶ and the Court should be hesitant to employ such a drastic remedy on a highly contentious and partisan platform.

Further, advocates of non-severability place undue weight on the Act’s lack of a severability clause.²⁴⁷ Congress could have easily included an inseverability clause, particularly if removal of the severability clause was indeed intended to rebut a presumption of severability.²⁴⁸ The legislative history of PPACA offers no indication of why certain prior versions of the bill contained severability clauses, and “speculation based on nothing more than [unexplained] congressional silence is properly regarded as treacherous.”²⁴⁹ This approach to congressional silence is particularly salient in these circumstances, since both House and Senate drafting

242. *Id.*

243. Transcript of Oral Argument at 56, *Goudy-Bachman*, 811 F. Supp. 2d 1086 (No. 1:10-CV-763).

244. *Goudy-Bachman*, 811 F. Supp. 2d at 1111.

245. *See supra* note 210 and accompanying text.

246. *See Hunter, supra* note 95, at 1973 (“In the subtext to those arguments [against the individual mandate] are the radically different visions of the meaning of the social obligations of citizenship that are fueling popular understandings and debates over the social meaning of the new law.”); Pershing, *supra* note 9 (“Democrats say the constitutionality argument [against the individual mandate] is a stalking-horse for . . . broader opposition to reform.”).

247. *See supra* notes 211–13 and accompanying text.

248. *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1324 (11th Cir.), *cert. granted*, 132 S. Ct. 603, *cert. granted*, 132 S. Ct. 604, *cert. granted in part*, 132 S. Ct. 604 (2011).

249. Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 89, at 30. It is also worth nothing that the prior versions of the bill that did contain severability clauses were not the bills that would ultimately become the final version of PPACA. *Id.*

manuals instruct lawmakers that severability clauses are not necessary in proposed legislation.²⁵⁰

Others contend that the individual mandate is integral to the related insurance reforms of PPACA, and speculate that Congress would not have passed these provisions had a mandate not been present.²⁵¹ This position is not so summarily dismissed, but ultimately fails as well. Under contemporary severability doctrine, the Court is bound by notions of judicial restraint, and a particularized inquiry into the workability of specialized insurance reforms is best undertaken in a subsequent endeavor by the legislature.²⁵²

Much empirical evidence exists to suggest that the functionality and effectiveness of PPACA's insurance market reforms depend upon the presence of an individual mandate,²⁵³ but countervailing evidence exists as well.²⁵⁴ The arguments for non-severability largely rest on empirical evidence suggesting that insurance reforms will not only be ineffective, but potentially catastrophic, if no individual mandate is included. This should certainly give the Court pause; however, it is not for the judiciary to analyze data and weigh probabilities regarding which scenario is more likely to occur if the mandate is struck, or to comb through hundreds of provisions determining which pass some unknown threshold of interdependence.²⁵⁵ This is the task of the legislature, and not one for the courts to take up retroactively on the legislature's behalf.²⁵⁶ Although PPACA's insurance reforms were designed to work in concert, and may in fact operate less effectively without an individual mandate, it does not follow that Congress would prefer a statutory scheme that reinstates an insurance market where large numbers of individuals with preexisting conditions are excluded.²⁵⁷ There is also a significant body of evidence suggesting that excising the individual mandate from PPACA's reforms will not actually cause "death

250. *Id.*; see *supra* notes 214–15 and accompanying text.

251. See *supra* Part II.B.2.

252. See *supra* note 86 and accompanying text.

253. See *supra* notes 159–63 and accompanying text.

254. See *supra* notes 202–04 and accompanying text.

255. See Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 89, at 34 (“[T]his kind of predictive factfinding about the interplay of complex economic forces falls more naturally within the scope of legislative, rather than judicial, competence.”).

256. Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 89 at 34.

257. See *id.* at 28–29 (noting that even if no general presumption of severability was observed, “it would still seem appropriate for the Court to insist upon a clear indication of Congress’s intent before concluding that the severability result most consistent with congressional policy would be to deny coverage to many people that Congress indisputably meant to help”). In support of the claim that the other insurance reforms are still capable of achieving Congress’s objectives, the Department of Health and Human Services released an annual report indicating that the Pre-existing Condition Insurance Plan (PCIP) saw a 400 percent increase in enrollment between November 2010 and November 2011. CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, U.S. DEP’T OF HEALTH & HUMAN SERVS., COVERING PEOPLE WITH PRE-EXISTING CONDITIONS: REPORT ON THE IMPLEMENTATION AND OPERATION OF THE PRE-EXISTING CONDITION INSURANCE PLAN PROGRAM (Feb. 23, 2012), available at <http://www.cciio.cms.gov/resources/files/Files2/02242012/pcip-annual-report.pdf>.

spiral” activity.²⁵⁸ The role of the judiciary in a severability analysis is limited to an examination of congressional intent, guided by an active effort to maintain as much of the pertinent legislation as possible.²⁵⁹ Where such a specific determination of legislative intent proves impossible or too speculative, as here, the judiciary would overstep its own constitutional authority by interposing its judgment for that of Congress.

The Eleventh Circuit’s respect and sensitivity to both the limited role of the courts in invalidating legislation and the judiciary’s longstanding preference for severability led to a proper application of the doctrine to PPACA.²⁶⁰ The court recognized that ascertaining legislative intent is a speculative and largely evasive endeavor, particularly without the limited helpfulness of a severability or non-severability clause.²⁶¹ These guiding principles, as well as the difficulty inherent in determining congressional intent with respect to a 975-page law, correctly directed the court to reject wholesale invalidation of PPACA. The Supreme Court should reach the same conclusion.

CONCLUSION

This Comment endeavors to provide guidance in navigating the murky waters of severability doctrine, and how the doctrine should be applied to PPACA. It does not advocate modification of current severability principles—although the doctrine is certainly in need of clarification—but it does encourage the Court to closely adhere to its articulated preferences for presumptions of severability and principles of judicial restraint. Deviating from these central premises, particularly in such a contentious and highly consequential context, would amount to a drastic encroachment into the realm of the legislature.

Because of severability doctrine’s malleability, it is especially susceptible to interpretations that are based, intentionally or not, on the ideology of the Justices. The Court should be especially wary of overreaching. In the event that the Court finds that Congress exceeded its constitutional boundaries in enacting the individual mandate, it should find the provision severable and leave the remainder of the Act untouched. This result comports with governing principles of severability doctrine as currently

258. See Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 89, at 38–41. Much of the evidence put forth in support of non-severability relied on the experiences of several states who enacted guarantee issue and community rating policies without an individual mandate, and subsequently experienced cost spiral activity. See *supra* notes 159–63 and accompanying text. These states, however, did not include an extensive program of subsidization and limited enrollment, such as the one provided for by PPACA, and thus cannot serve as a reliable model for simulating or comparing results. See Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability), *supra* note 89, at 42.

259. See *supra* notes 85–86 and accompanying text.

260. See *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1320–21 (11th Cir.), *cert. granted*, 132 S. Ct. 603, *cert. granted*, 132 S. Ct. 604, *cert. granted in part*, 132 S. Ct. 604 (2011).

261. *Id.*

articulated, and shifts the burden of any required additional reworking of PPACA's provisions back to the appropriate government actor: Congress.