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Statutory Interdependence in Severability Analysis

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NOTE

STATUTORY INTERDEPENDENCE IN SEVERABILITY ANALYSIS

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According to conventional wisdom, when a court rules a statutory provision unconstitutional, it must sever that provision or strike down the entire statute. This understanding is incomplete. In practice, courts may engage in compound severance: invalidating additional, otherwise constitutional provisions of the statute without striking down the entire statute. They reason that the degree of interrelation between those provisions is so significant that severance of one compels severance of the other. As a result, a subset of the statute remains law. The power to craft such subsets raises constitutional concerns, and yet the jurisprudence concerning statutory interdependence is inconsistent and unclear.

Courts analyze provisions for interdependence in three distinct ways: by divining congressional purpose, speculating the terms of the legislative bargain, and searching for textual evidence of congressional intent. Greater predictability in this area would alleviate constitutional concerns and better ensure democratic accountability. This Note argues for adoption of a "qualified clear statement rule" in which courts only find related provisions interdependent either when Congress has provided a clear statement to that effect or when allowing a related provision to have effect would result in an objectively irrational law. It then applies this rule to resolve a circuit split concerning severability of the Food and Drug Modernization Act. The qualified clear statement rule not only is consistent with the Court's severability test but also would provide better guidance to courts evaluating provisions for statutory interdependence as well as limit instances of judicial overreach.

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INTRODUCTION

When a court rules a statutory provision in a complex piece of legislation unconstitutional, it must decide whether to retain or invalidate the remaining provisions of the statute. Severability doctrine governs this determination.[1] While severability of statutes is often discussed as an all-or-nothing proposition, with commentators focusing on whether statutory remainders should be saved or struck in their entirety,[2] there are, in fact, three possible outcomes. First, a court can sever only the unconstitutional provision, which I call "simple severance." Second, it can sever the unconstitutional provision along with some constitutional provisions but without striking down the entire statute, which I call "compound severance." In each of these two outcomes, a court allows some statutory remainder to have legal effect. Finally, it can strike down the entire statute, which I call "total invalidation."[3] The Supreme Court's test presumes that provisions are severable, meaning that normally a court should simply excise the unconstitutional provision and leave the rest of the statute intact.[4] This presumption of simple severability can be rebutted by a finding of statutory interdependence—that is, a finding that the relationship between two or

1. *See infra* Part II. For comprehensive overviews on the severability of statutes, see John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993), and Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

2. *See, e.g.*, Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 73 (1995) ("Where the statute remained silent on the question [of severability], the court would . . . sever the unconstitutional provision and enforce the remainder of the statute.").

3. *See, e.g.*, Velazquez v. Legal Servs. Corp., 164 F.3d 757, 772 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001) ("The next question is which part of the statute should be found invalid as a result of the unconstitutionality of the viewpoint-based proviso to the suit-for-benefits exception. The four most likely candidates for invalidation are (1) the entire Act; (2) the entire subsection (a)(16) relating to welfare reform; (3) the entire suit-for-benefits exception; and (4) the proviso to the effect that an attorney suing for a client's benefits may not challenge existing law.").

4. *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam)).

more statutory provisions is so significant that severance of one provision compels severance of the other.[5]

The Court has indicated that statutory interdependence exists in two circumstances. The first is when Congress intended certain provisions to be inseverable from each other.[6] The second is when certain provisions are legally inoperable without the unconstitutional provision.[7] Assuming that Congress would not have intended to enact a legally inoperable statute, the two circumstances necessarily overlap.[8] Partly for this reason, the Court has stated that congressional intent is the primary focus of severability and statutory-interdependence analysis.[9]

Lower courts, however, have struggled in applying the congressional-intent inquiry to statutory interdependence. Despite the considerable inconsistency in this area, three basic approaches among lower courts have emerged. Some adopt a purpose-centered approach that asks, "What might Congress have wanted?" Some focus on the legislative bargain and ask, "What could Congress have passed?" And others follow something akin to a textual approach that asks, "What textual evidence did Congress provide about the topic?" Because the answers to these questions do not always point in the same direction, the current congressional-intent inquiry produces divergent results.[10]

The confusion surrounding statutory interdependence is particularly problematic because of the constitutional anxieties that stem from compound severance. Unlike total invalidation, when a court engages in simple or compound severance, a court is preserving a subset of a law that arguably did not satisfy Article I's bicameralism and presentment requirement.[11] Because some subsets can function quite differently than the original statute, this practice can be akin to creating a new law.[12] But unlike simple severance, when a court engages in compound severance, it goes beyond merely obeying the demands of the Constitution to usurp constitutionally infirm provisions,[13] and instead nullifies provisions that are themselves

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5. *See infra* Part II.

6. *See, e.g.*, David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 646 (2008) ("Unless the legislature would prefer the statute's total invalidation, the court severs the unconstitutional provisions or applications, eliminating the offending parts and establishing a new governing regime.").

7. *See infra* Part II.

8. For a discussion on imputing reasonableness to legislative intent, see WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 750–51 (4th ed. 2007).

9. *See Alaska Airlines*, 480 U.S. at 685.

10. *See infra* Section II.B.

11. *See* Gans, *supra* note 6, at 663 ("The [severability] doctrine gives courts a wide-ranging power to rewrite statutes, and this regularly enmeshes the judiciary in making policy choices that are better left to the legislature.").

12. Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1501–02 (2011); Gans, *supra* note 6, at 641–43.

13. This is because, with simple severance, all provisions are given effect except for unconstitutional provisions, which are superseded by the Constitution itself. *See* Nagle, *supra*

constitutional. With compound severance, a different authority empowers a court to nullify the additional provisions. Vesting in courts this sort of law-making power to craft what law remains raises serious separation-of-powers concerns.[14]

One justification for courts' power to engage in compound severance is that doing so is often necessary to fulfill the wishes of the legislature.[15] This sort of agency argument deserves consideration, but in practice its utility is undermined by the confusion surrounding the severability test's congressional-intent inquiry.[16] While some areas of the law benefit from the added flexibility that attends ambiguous legal tests, this Note contends that statutory interdependence does not. In this area, a clear statement rule would encourage legislators to expressly communicate their intent with respect to the interdependence of statutory provisions. This, in turn, would allow courts to rely on legislators' express intention when making determinations of statutory interdependence.[17]

This Note argues that courts should only invalidate constitutional provisions of a statute—whether by compound severance or total invalidation—in two relatively narrow circumstances. The first is when legislators insert a clear statement declaring statutory interdependence. The second is when no rational legislator would have wanted to retain the provision without the unconstitutional provision. This approach would substantially strengthen the existing presumption favoring simple severance and would result in fewer instances of compound severance and total invalidation. I call this approach to severability analysis the "qualified clear statement rule."

This Note proceeds in three parts. Part I briefly reviews the test for severability and statutory interdependence. Part II explains the difficulties in applying the test and identifies the inconsistent results that have followed from courts' discordant approaches to statutory interdependence. Part III contends that a qualified clear statement rule would benefit courts and legislators, alleviate constitutional concerns, and preserve democratic accountability.

I. THE TEST FOR STATUTORY INTERDEPENDENCE

To determine whether simple severance, compound severance, or total invalidation is appropriate, courts engage in severability analysis. The Su-

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note 1, at 228–29 ("[After severance], the statute still exists as it was enacted, although the unconstitutional provision will never be given effect. Accordingly, the statute that is given effect in subsequent cases is the same statute enacted by Congress and presented to the President, except that the unconstitutional provision is never applied."). But with compound severance, a smaller subset than what simple severance would have retained is given effect.

14. Movsesian, *supra* note 2, at 57–58.

15. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 284–85 (1989).

16. *See infra* Section II.B; *see also* Nagle, *supra* note 1, at 245 ("[L]egislators display conflicting understandings of what a severability clause means.").

17. *See infra* Section III.A.

preme Court set forth its modern severability framework in *Alaska Airlines, Inc. v. Brock*.[18] *Alaska Airlines* instructs courts to presume that unconstitutional provisions are severable from statutes, so this framework is akin to a presumption of simple severability.[19] This presumption can be rebutted by a finding of statutory interdependence. Statutory interdependence exists between two or more provisions when their relationship is so significant that severance of one compels severance of the other.

Alaska Airlines provides lower courts with a two-prong test for statutory interdependence.[20] The first prong is an inquiry into congressional intent.[21] A court must determine whether Congress would have enacted the other provisions in the statute without the unconstitutional provision.[22] Because of the presumption of simple severability, a court should not invalidate other provisions without some sort of evidence. Sources of evidence could include an inseverability clause, an inference from the structure of the statute, or legislative history.[23] If statutory interdependence exists between only some provisions, compound severance will result.[24] If statutory interdependence exists between all provisions, total invalidation will result.[25]

The second prong is an inquiry into legal operability. Even if a court determines that Congress intended to keep the other provisions without the unconstitutional provision, a court must still consider whether the remaining provisions can "fully operat[e] as a law."[26] If they cannot, then they too should be struck, resulting in either compound severance or total invalidation.[27] Because *Alaska Airlines* notes that "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress,"[28] remaining provisions that are struck on grounds of legal inoperability could also be described as having been struck because Congress would not have enacted them without the unconstitutional provision. Thus, the Court's explanation conflates the two prongs to some degree, making the congressional-intent prong the focus.[29]

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18. 480 U.S. 678 (1987). Occasionally, the Court does not cite *Alaska Airlines* when making severability determinations, but in those situations the Court almost always cites cases that cited *Alaska Airlines* themselves. *See, e.g.*, United States v. Booker, 543 U.S. 220, 246, 259 (2005) (citing *Alaska Airlines*, 480 U.S. at 684), *quoted in* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607–08 (2012) (plurality opinion).

19. *See Alaska Airlines*, 480 U.S. at 684.

20. *See id.* at 684–85. Severability analysis is, in essence, analysis for statutory interdependence.

21. *See id.* at 684 (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam)).

22. *Id.*

23. *See, e.g.*, United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1299–300 (9th Cir. 1998).

24. *See Alaska Airlines*, 480 U.S. at 684.

25. *See id.*

26. *Id.*

27. *See id.*

28. *Id.* at 685.

29. *See id.*

The presumption of simple severability, the two-prong test, and the fact that complex statutes can include both related and unrelated provisions combine to create ambiguous cases of statutory interdependence. There are many examples that aptly illustrate how statutory-interdependence determinations can be challenging.[30] One such case is *Immigration & Naturalization Service v. Chadha*, where the Court ruled § 244(c)(2) of the Immigration and Nationality Act, a provision providing legislative veto power over deportation actions taken by the Attorney General, unconstitutional.[31] The Act contained a severability clause, which indicated that Congress considered each provision severable from the other provisions in the event that a court ruled a provision unconstitutional.[32] Put differently, the severability clause stated that, should a court excise any provision in the Act, the other provisions should remain in effect.

On first glance, the statutory-interdependence inquiry seemed straightforward: per Congress's severability clause, there were no interdependent provisions in the Act, so the Court did not need to invalidate any additional provisions.[33] But members of the Court disagreed over whether this was so. In particular, some justices felt that the provision that empowered the Attorney General to suspend deportation proceedings was interdependent with the provision providing for a legislative veto over the same proceedings.[34] On the one hand, the provisions could be viewed as interdependent because Congress probably intended them to work together—this authority was precisely what the legislative veto was designed to check.[35] On the other, the presence of the severability clause evidenced that Congress intended the provisions to be severable.[36] Ultimately, a majority of the Court accepted the

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30. *See, e.g.*, Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (plurality opinion); Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1320–28 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (plurality opinion); Velazquez v. Legal Servs. Corp., 164 F.3d 757, 772 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

31. 462 U.S. 919, 959 (1983).

32. Immigration and Nationality Act § 406, note following 8 U.S.C. § 1101 (2006).

33. *Chadha*, 462 U.S. at 932. The Court decided *Chadha* a few years before *Alaska Airlines*, but because *Alaska Airlines* did not substantially alter severability analysis, it is unlikely that the Court would have decided the statutory-interdependence question differently. *See Alaska Airlines*, 480 U.S. at 684–86.

34. *Chadha*, 462 U.S. at 1014 (Rehnquist, J., dissenting) ("By severing § 244(c)(2), the Court permits suspension of deportation in a class of cases where Congress never stated that suspension was appropriate. I do not believe we should expand the statute in this way without some clear indication that Congress intended such an expansion.").

35. *See id.*

36. *Id.* at 932 (majority opinion) ("Here, however, we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability in § 406 of the Immigration and Nationality Act, which provides: 'If *any* particular provision of this Act, or the application thereof to *any* person or circumstance, is held invalid, *the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby*.' " (citation omitted)). The Court also cited legislative history in support of its conclusion. *See id.* at 932–34.

latter argument and allowed the suspension provision to remain effective, essentially ruling that the provisions were not interdependent.[37] Multiple commentators criticized the Court's severability approach as unclear or poorly reasoned,[38] but most of the disapproval likely stems from the commentators' lack of understanding of what constitutes statutory interdependence.

II. CHALLENGES IN APPLYING THE TEST

Courts that must determine whether two or more statutory provisions are interdependent face several challenges in applying the *Alaska Airlines* test. The ambiguities in severability doctrine began early in the doctrine's history, as the Court provided little explanation on the power to sever. This lack of guidance—particularly on how to determine congressional intent regarding statutory interdependence—has persisted in the Court's modern jurisprudence. These ambiguities have affected lower courts, which employ different approaches when analyzing provisions for statutory interdependence. Section II.A discusses the minimal guidance provided to courts determining congressional intent. Section II.B studies how federal courts of appeals have approached the determination of congressional intent when analyzing statutory provisions for interdependence.

A. *Guidance on Congressional Intent*

The ability of courts to sever at all developed fortuitously, yet it was almost always focused on the goal of honoring congressional intent. Notably, during the development of severability doctrine, the Court never expressly stated that a court could sever otherwise constitutional provisions. Based on the Court's focus on imaginative reconstruction of congressional intent, which enables courts to act as the legislature would have wanted, however, we can infer the Court's power to engage in compound severance or total invalidation.[39] Still, the lack of guidance on how to make this determination leaves many statutory-interdependence questions unanswered. Section II.A.1 discusses imaginative reconstruction of congressional intent. Section II.A.2 lists unanswered questions concerning this practice.

1. Imaginative Reconstruction

The Court has always assumed the power of simple severance—that is, to sever unconstitutional provisions from statutes and leave the remaining provisions in effect.[40] Chief Justice Marshall engaged in simple severance in

37. *Id.* at 935.

38. *See, e.g.*, Nagle, *supra* note 1, at 205.

39. *See infra* text accompanying notes 42–43, 51–54.

40. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803) (ruling Section 13 of the Judiciary Act of 1789 unconstitutional but giving effect to the statutory remainder);

Marbury v. Madison but did not discuss the origin or contours of the Court's severance power.[41] When the Court eventually addressed the issue of severability, it announced a presumption of simple severability but remained silent on the issue of statutory interdependence.[42] Instead, the Court's early jurisprudence was influenced by state courts, which occasionally severed provisions related to unlawful provisions on the grounds that the provisions that remained postseverance functioned in an absurd manner or not at all.[43]

The first state court to invalidate an entire statute on the basis of an unconstitutional provision was the Massachusetts Supreme Judicial Court in *Warren v. Mayor of Charlestown*.[44] At issue in *Warren* was an Act making Charlestown a part of Boston for all meaningful purposes but purporting to keep Charlestown separate for purposes of electing federal representatives.[45] In so doing, the Act effectively disenfranchised the voters of Charlestown.[46] Writing for the court, Chief Justice Shaw ruled the statutory provisions discounting the Charlestown voters for federal election purposes unconstitutional.[47] He noted that all the other provisions in the Act outlined procedures to take subsequent to the unconstitutional annexation—such as when and where to hold town hall meetings specific to the annexation.[48] The provisions were thus interdependent on the unconstitutional provision.[49] As a result, the court struck down the entire statute.[50]

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 250 (1994); Stern, *supra* note 1, at 79.

41. *Marbury*, 5 U.S. at 173; *see also* Nagle, *supra* note 1, at 212 ("[*Marbury*] gave no indication that the unconstitutionality of one provision—or its application—would render an entire statute invalid.").

42. Bank of Hamilton v. Lessee of Dudley, 27 U.S. (2 Pet.) 492, 526 (1829) ("If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States . . . ."); *see also* Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 232 (2004).

43. *See, e.g.*, Exch. Bank of Columbus v. Hines, 3 Ohio St. 1, 34 (1853) ("Strike out this section, and the balance of the statute is perfect as an enactment . . . ."); *id.* at 48 (Thurman, J., concurring) ("May that section be treated as void without affecting the validity of the remainder of the act? . . . The bad may be rejected, and the good left."). In his article *Severability*, Professor Nagle notes several of these state court cases. Nagle, *supra* note 1, at 212 nn.48–49.

44. 68 Mass. (2 Gray) 84 (1854).

45. *Warren*, 68 Mass. at 86–87 ("It is provided in its first section that all the territory within the limits of the said city of Charlestown, in the county of Middlesex, with all the inhabitants and estates therein, shall be annexed to and become a part of the city of Boston in the county of Suffolk, becoming in all respects as the said city of Boston; excepting that, for the purpose of electing senators to the general court, said territory shall continue to be and remain a part of the district of Middlesex; and for the purpose of electing representatives, it shall remain a distinct representative district."); *see also* Nagle, *supra* note 1, at 213.

46. Nagle, *supra* note 1, at 213; Shumsky, *supra* note 42, at 233.

47. *Warren*, 68 Mass. at 105–07.

48. *Id.* at 100.

49. *See id.*

50. *Id.* at 107.

In addition to being the first court to engage in total invalidation, the *Warren* court was also the first to frame the question of statutory interdependence in terms of legislative intent: if the state legislature would not have enacted the additional provisions but for the unconstitutional annexation provision, then the additional statutory provisions were interdependent and should be invalidated.[51] While some inquiries into legislative intent are notoriously difficult because of the need to reconcile conflicting positions among legislators, severability inquiries often involve the additional challenge of answering a question—"What provisions of the statute should remain?"—that the legislators may not have considered at all. The method employed by the *Warren* court to address such a highly speculative question, which the legislature may never have even considered, is today called imaginative reconstruction, a technique whereby judges attempt to place themselves in the shoes of legislators and consider "how [the enacting legislators] would have wanted the statute applied to the case at bar."[52] With respect to severability of federal laws, the imaginative-reconstruction approach to determining congressional intent could be described as "evaluating a counterfactual: What would have happened if Congress had known that the provision . . . was invalid?"[53] The *Warren* case proved influential, and the Supreme Court eventually adopted its approach.[54]

2. Unanswered Questions

The two-prong *Alaska Airlines* test echoes the *Warren* approach in that it emphasizes congressional intent in making determinations of statutory interdependence.[55] A court may address the congressional-intent prong by

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51. *See id.* at 84 ("When the parts of a statute are so mutually connected and dependent, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, if some parts are unconstitutional and void, all the provisions, which are thus dependent, conditional or connected, must fall with them."); Nagle, *supra* note 1, at 213 ("*Warren* was the first case to consider legislative intent—along with the ability of the remaining provisions of the statute to function—in deciding severability.").

52. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

53. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1300 n.3 (9th Cir. 1998). While this approach has its critics, *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 349–51 (2012), it is relied on by judges across the ideological spectrum, *see* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348–50, 405 (2005) (discussing the differences and similarities between intentionalists and textualists).

54. *See* Allen v. Louisiana, 103 U.S. 80, 84 (1880) ("The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.").

55. *See supra* Part I. Precisely how much emphasis to afford congressional intent has in the past generated some debate, notably between Justices White and Brennan in *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (plurality opinion). Justice White described the analysis of severability (and by extension, statutory interdependence) as "largely" one of congressional

looking to the presence of a severability or inseverability clause. When the statute contains neither, however, the court relies on imaginative reconstruction.[56] The legal-operability prong can be defined in terms of congressional intent, and thus also involves imaginative reconstruction.[57] Yet, there are many challenges associated with relying upon imaginative reconstruction as a technique to determine statutory interdependence. These challenges include at least three confusing areas of the severability doctrine.

First, it is unclear how strong the presumption of simple severability is or what rebuts that presumption.[58] Arguably an inseverability clause would rebut such a presumption, but it remains uncertain how much weight a court should give to its assessment of a statute's structure or design, let alone comments found in a statute's legislative history, relative to the text of the statute.[59] Moreover, because *Alaska Airlines* adopted a presumption of severability, and the absence of a severability clause does not affect that presumption, it is unclear what work, if any, the insertion of a severability clause in a statute does.[60] It is similarly unclear what reverses the presumption of simple severability when the statute contains a severability clause and if the threshold for reversal is more stringent in this case.[61] It might be permissible to dismiss a severability clause if Congress actually intended a result contrary to the clause's direction, as the dissenters believed in *Chadha*.[62] But such an approach would involve overlooking the plain meaning of the text.[63]

Second, it is unclear whether the congressional-intent and legal-operability prongs work in tandem or are instead distinct steps of the analysis.[64] The question here is whether a court should make the final determination about which provisions to sever irrespective of the legislature's stated or imagined intention.[65] For example, compound severance or total invalidation of a statute might be permissible if a court determined that the remainder, despite satisfying the congressional-intent prong, was legally inoperable. The Court has invalidated remainders on these grounds in the

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intent, *id.* at 653, whereas Justice Brennan described the same analysis as "exclusively" one of congressional intent, *id.* at 664 n.2 (Brennan, J., concurring in part and dissenting in part).

56. *See supra* Section II.A.1. Inseverability clauses communicate whether Congress considers a statute severable (or provisions interdependent), and thus reduce the degree of guesswork by a court in determining congressional intent. *See* Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 904–06 (1997) (discussing severability clauses).

57. *See supra* notes 26–29 and accompanying text.

58. *See* Movsesian, *supra* note 2, at 59–60.

59. *See* Movsesian, *supra* note 2, at 73–74; Friedman, *supra* note 56, at 904.

60. *See supra* Part I; *see also* Movsesian, *supra* note 2, at 59–60.

61. *See* Movsesian, *supra* note 2, at 73–74; Friedman, *supra* note 56, at 904.

62. *See supra* note 34 and accompanying text.

63. Friedman, *supra* note 56, at 905–06.

64. *See supra* Part I.

65. *See supra* note 55 (discussing whether severability analysis is "exclusively" or "largely" a question of congressional intent).

past, although these decisions preceded the Court's more recent emphasis on congressional intent.[66]

Recent decisions cast doubt on whether a court should ever declare provisions interdependent when Congress unambiguously declares that they are not, which Congress can do by inserting an inseverability clause. For example, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, the Court described the *Alaska Airlines* inquiry as "essentially an inquiry into legislative intent."[67] In *Ayotte v. Planned Parenthood of Northern New England*, the Court declared that "the touchstone for any decision about [severability] is legislative intent."[68] Moreover, several of the most recent cases involving determinations of severability refined the *Alaska Airlines* test, indicating that a court "must," as opposed to "may," retain a statutory provision if it determines that Congress would have preferred that course of action.[69] This refinement of the test suggests that evidence of congressional intent, either demonstrated by a severability clause or divined through imaginative reconstruction, is all a court needs to conduct its severability analysis. Yet, the Court still discussed the analysis as a two-prong test.[70]

Finally, the Court has not provided guidance on how to conduct the imaginative-reconstruction analysis in cases where Congress failed to insert either a severability or inseverability clause.[71] Courts can construe the question of what Congress "would have done" in different ways, including what some members of Congress might have wanted done or what Congress might have been capable of passing. Moreover, the Court has not offered clear guidance on what types of sources—legislative history, severability and inseverability clauses, statutory structure and design—are most

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66. *See, e.g.*, Hill v. Wallace, 259 U.S. 44, 70 (1922) (totally invalidating a statute despite the presence of a severability clause); *see also supra* note 55 (discussing the role congressional intent plays in severability analysis).

67. 526 U.S. 172, 191 (1999).

68. 546 U.S. 320, 330 (2006). The Court went on to warn against "substitut[ing] the judicial for the legislative department of the government." *Ayotte*, 546 U.S. at 330 (quoting United States v. Reese, 92 U.S. 214, 221 (1876)) (internal quotation marks omitted).

69. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) ("We therefore *must* sustain [the statute's] remaining provisions '[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid].'" (second and third alterations in original) (emphasis added) (quoting New York v. United States, 505 U.S. 144, 186 (1992))). In his dissenting opinion in *Legal Services Corp. v. Velazquez*, Justice Scalia described the test in a similar fashion: "If Congress 'would not have enacted those provisions which are within its power, independently of that which is not,' then courts *must* strike the provisions as a piece." 531 U.S. 533, 560 (2001) (Scalia, J., dissenting) (emphasis added) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)). Because the Court still invokes the legal operability step of the *Alaska Airlines* test, it is doubtful that the Court—at least in *Free Enterprise Fund*—intended this wording as a departure from the *Alaska Airlines* framework. *See Free Enter. Fund*, 130 S. Ct. at 3161–62 (quoting this step of the *Alaska Airlines* test).

70. *See Free Enter. Fund*, 130 S. Ct. at 3161.

71. *See id.*

instructive in making this determination, which makes finding an already-elusive answer even more difficult.[72]

Recent decisions have focused on the desire to invalidate as few related provisions as possible.[73] Thus, it seems that courts should hesitate to find provisions interdependent absent some type of clear statement from Congress, although this is not evident from the wording of the *Alaska Airlines* test itself.[74] Despite the fact that courts uniformly apply the *Alaska Airlines* test when addressing issues of severability, the Court's lack of guidance as to the specifics has made application of the test challenging.

B. *Application in the Lower Courts*

Studying the application of the *Alaska Airlines* test provides insight on how courts employ imaginative reconstruction to ascertain congressional intent regarding statutory interdependence. Courts all seek to determine whether Congress would have wanted to retain certain provisions, but they reach divergent conclusions in part because they approach the question differently. This Section examines approximately sixty federal court of appeals decisions[75] from 1987 to 2012 that cited *Alaska Airlines* and discussed sev-

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72. *See supra* note 53 and accompanying text.

73. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2642 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[W]hen a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislature's dominant objective."); United States v. Booker, 543 U.S. 220, 258 (2005) ("Although . . . we believe that Congress would have preferred the total invalidation of the statute to the dissenters' remedial approach, we nevertheless do not believe that the entire statute must be invalidated. Most of the statute is perfectly valid. And we must 'refrain from invalidating more of the statute than is necessary.' " (citations omitted) (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy.").

74. The Court has not invalidated an entire statute in which a severability clause is present since *Hill v. Wallace*, 259 U.S. 44 (1922), although arguably a court could do this and still be within the parameters of the *Alaska Airlines* test. *See supra* notes 66–69 and accompanying text.

75. Statutory-interdependence inquiries are often fact specific, and over this wide range of cases, many different statutes are examined. While it is possible that some of the discrepancies arise because the courts are interpreting different statutes, this difference likely does not account for most of the variation, as courts reading the same statute and applying the same test still frequently reach divergent conclusions. The decisions that made severability determinations with respect to the Affordable Care Act are instructive. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2668–77 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (finding all provisions interdependent); Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1320–28 (11th Cir. 2011) (finding no provisions interdependent), *rev'd sub nom. Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (plurality opinion); Goudy-Bachman v. U.S. Dep't. of Health & Human Servs., 811 F. Supp. 2d 1086, 1109–11 (M.D. Pa. 2011) (finding two provisions interdependent on another provision); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 789–90 (E.D. Va. 2010) (finding "directly-dependent" provisions dependent without specifying which provisions), *vacated*, 656 F.3d 253 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012).

erability.[76] While the ways in which the courts ascertain congressional intent differ, some themes emerge and can be summarized as representing three approaches to imaginative reconstruction of congressional intent.[77] Section II.B.1 describes the purpose approach. Section II.B.2 describes the bargain approach. Section II.B.3 describes the textual approach. Section II.B.4 compares and contrasts the three approaches.

1. The Purpose Approach

Many courts adopt an analysis defined here as the purpose approach. This approach focuses on what version of a statutory remainder would best effectuate what a court understands as Congress's central purpose in passing the statute.[78] Thus, the court would consider provisions interdependent if it could ascertain that Congress designed them as complementary elements intended to "operate together or not at all."[79] The court could rely on a severability clause as evidence, but the existence of the clause would not necessarily be dispositive.[80] That is, the court could overlook a severability clause and rule provisions interdependent by drawing an inference from the

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76. It is likely that there are at least a few court of appeals severability cases that do not discuss *Alaska Airlines*, but there are probably not many since *Alaska Airlines* is widely considered the Court's leading contemporary opinion on severability analysis. Moreover, because none of these cases are routinely cited in other court of appeals opinions for their approaches to severability, it is unlikely that any of these decisions carry particular import, at least with respect to statutory interdependence.

77. *See supra* Section II.A. Professor Nagle's article provides useful background to different ways of thinking about legislative intent. *See* Nagle, *supra* note 1, at 229–32.

78. *See, e.g.*, *Florida ex rel. Att'y Gen.*, 648 F.3d at 1327 ("Just because the invalidation of the [unconstitutional provision] may render these [other] provisions *less desirable*, it does not ineluctably follow that Congress would find the [other provisions] *so* undesirable without the [unconstitutional provision] as to prefer not enacting them at all. The fact that one provision may have an impact on another provision is not enough to warrant the inference that the provisions are inseverable."); Med. Ctr. Pharmacy v. Mukasey, 536 F.3d 383, 403 (5th Cir. 2008) ("Severing the [unconstitutional provision] would leave those other considerable requirements intact, and they would continue to effect Congress's purpose."); ACLU v. Reno, 217 F.3d 162, 178–79 (3d Cir. 2000) ("As a result, if it is possible for a court to identify a particular part of a statute that is unconstitutional, and by striking *only* that *language* the court could leave the remainder of the statute intact and within the intent of Congress, courts should do so."), *vacated sub nom.* Ashcroft v. ACLU, 535 U.S. 564 (2002); Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 705 (4th Cir. 2000) ("[T]he invalidation of [this] provision . . . will not frustrate the purpose of these other provisions."); United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1299 (9th Cir. 1998) ("[W]e must still strike down other portions of the statute if we find strong evidence that Congress did not mean for them to remain in effect without the invalid section.").

79. Reyes v. U.S. Dep't of Immigration & Naturalization (*In re* Reyes), 910 F.2d 611, 613 (9th Cir. 1990) (quoting Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1267 (9th Cir. 1988), *vacated sub nom.* United States v. Chavez-Sanchez, 488 U.S. 1036 (1989)) (internal quotation marks omitted). The Supreme Court has suggested a high bar in reaching this type of determination, explaining that the removal of mere incentives to effectuate a certain purpose generally does not frustrate Congress's intent. *See* New York v. United States, 505 U.S. 144, 186 (1992).

80. *Spokane Tribe*, 139 F.3d at 1299.

statute's structure or possibly by consulting legislative history.[81] The purpose approach is common.[82] One of many examples is *Petersburg Cellular Partnership v. Board of Supervisors*, where the Court of Appeals for the Fourth Circuit ruled that a statute contained no interdependent provisions because the unconstitutional provision was just one element of a "large and complicated statutory scheme" that did not "interfere in a substantial way" with the other statutory provisions, and its invalidation did not "frustrate [Congress's] purpose" in enacting the statute.[83]

However, the purpose approach has some shortcomings. While some statutory schemes are relatively straightforward, other statutes are highly complex, contain many provisions, and achieve several objectives.[84] Moreover, several courts have lamented the difficulty in "[f]iguring out why Congress passed a piece of legislation."[85] Legislators can be motivated by multiple interests, and these motivations might not be easy to identify.[86] Finally, even if a court were successful in deducing these motivations, such motivations might still not suggest a straightforward answer to the question of interdependence.[87]

2. The Bargain Approach

Other courts approach imaginative reconstruction of congressional intent by considering provisions as interdependent when they are essential to the legislative bargain or enacted as part of a quid pro quo.[88] Under this approach, provisions are interdependent if a court deems that a legislator—or, perhaps, enough legislators to make the difference between passage and

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81. *See id.* at 1299–300; Nagle, *supra* note 1, at 246. Professor Nelson, *supra* note 53, at 362, has noted the differing opinions on whether consulting legislative history is appropriate in this context. *Compare* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001), *with id.* at 549 (Scalia, J., dissenting).

82. For general criticism of this approach, see Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983).

83. 205 F.3d at 705.

84. *See Petersburg Cellular*, 205 F.3d at 706 (noting that statutory text, structure, and legislative history do not always provide answers to severability questions).

85. *Spokane Tribe*, 139 F.3d at 1299; *see also* Scheinberg v. Smith, 659 F.2d 476, 482 (5th Cir. Unit B Oct. 1981) (describing severability process as "wholly speculative, and insupportable"). The *Spokane Tribe* court noted that it might not be best situated to solve the problems caused by the statute and suggested in the alternative that "Congress could return to the statute and come up with a new scheme that is both equitable and constitutional." 139 F.3d at 1302.

86. *See infra* Part III.

87. *See* Nagle, *supra* note 1, at 206 (discussing "unanswerable question[s]"); *id.* at 248 ("There is the difficult matter of determining the 'purpose' of a collective body.").

88. An example of this type of analysis from the Supreme Court might include the dissenting opinion in *Legal Services Corp. v. Velazquez*, which considered two provisions interdependent in part because the two may have been " 'conditions, considerations [and] compensations for each other' that [could not] be severed" from the unconstitutional provision. *See* 531 U.S. 533, 560 (2001) (Scalia, J., dissenting) (quoting Warren v. Mayor of Charlestown, 68 Mass. (2 Gray) 84, 99 (1854)).

not—voted for the unconstitutional provision only after successfully bargaining for another provision.[89] For example, in *Eubanks v. Wilkinson*, the Court of Appeals for the Sixth Circuit reviewed a statute restricting access to abortions.[90] After ruling a provision requiring two-parent consent for minors unconstitutional, the court examined whether an additional provision relating to the minor's own consent was interdependent on the unconstitutional provision.[91] The majority reasoned that if it retained the minor consent provision without the unconstitutional provision, the statute would not operate in the manner intended by Congress.[92] But instead of resting its judgment on that finding, the court remanded the case, instructing the court below to determine whether the minor consent provision was enacted as an element of a legislative trade.[93]

The bargain approach also suffers from several shortcomings. Like the purpose approach, the question of which sources are appropriate to consult remains; the structure of a statute or legislative history may provide clues about such a trade, or perhaps even other secondary sources could evince some sort of bargaining.[94] These sources also may not point in the same

89. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2675 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) ("Often, a minor provision will be the price paid for support of a major provision. So, if the major provision were unconstitutional, Congress would not have passed the minor one."); Basardh v. Gates, 545 F.3d 1068, 1070 (D.C. Cir. 2008) (per curiam) ("It has long been the rule that if separate statutory provisions are so 'dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' " (quoting Allen v. Louisiana, 103 U.S. 80, 84 (1880))); Eubanks v. Wilkinson, 937 F.2d 1118, 1128 (6th Cir. 1991) ("Generally a court may sever an invalid provision of a statute, leaving the rest to operate, if the 'invalid portion can be shown not to have been the inducement for the passage of the act,' and if there is no evidence that 'the valid and invalid parts of the act' were 'conditions, considerations, or compensations for each other.' " (quoting 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 44.06 (4th ed. 1986))).

90. *Eubanks*, 937 F.2d at 1128–29.

91. *Id.*

92. *Id.* at 1129.

93. *See id.* ("The record does not address the question whether the Kentucky legislature would have enacted this consent provision, specific to minors, whether or not it enacted the provision requiring two-parent consent. We therefore remand to the District Court for a hearing to determine whether the provision requiring the minor's consent should be left intact or whether the entire statute should be declared invalid since the portions of the statute which appear to carry out the statute's dominant purpose have been stricken."). Since the court focused on three factors—congressional purpose, legal operability, and compensatory provisions—and reached conclusions on the first two, it can be inferred that the remaining consideration on remand was the need to determine whether the provisions were inducements for each other. *See id.* at 1128–29.

94. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2675–76 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). For example, with respect to the passage of the Affordable Care Act, at least one senator was criticized in the press for perceived quid pro quo behavior. *See, e.g.*, *'Cornhusker' out, More Deals in: Health Care Bill Gives Special Treatment*, Fox

direction, especially given that some compromises are intentionally left unrecorded, making them very difficult to detect.[95] Similarly, different agendas motivate different legislators.[96] The bargain approach may suffer from an additional limitation in that public choice theory, a framework for examining how individual preferences aggregate into a collective decision, suggests that this approach is not an effective way to assess congressional intent.[97] Public choice theory posits that each element of a legislative bargain carries import by virtue of its presence in the bill.[98] Put differently, each provision on its own could be viewed as an essential element of a "carefully-crafted scheme" that was designed to strike a balance between two or more interest groups.[99] Based on this theory, it would be difficult for a court to discern which terms were essential absent some type of textual evidence.[100]

3. The Textual Approach

Finally, some courts require a clear statement that Congress did not intend for a statutory remainder to continue to operate in order to find statutory interdependence.[101] Courts that follow this approach interpret the presumption of simple severability robustly and require unambiguous evidence, such as an inseverability clause, to rebut the presumption.[102] The textual approach thus relies less on legislative history to ascertain congres-

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NEWS (Mar. 19, 2010), http://www.foxnews.com/politics/2010/03/18/cornhusker-kickback-gets-boot-health/#ixzz24sKUwIy6.

95. *See* Movsesian, *supra* note 2, at 71 ("[A] 'legislative bargain' involves hundreds . . . who vote for the bill . . . . The vast majority of these 'parties' remain silent during the bill's consideration.").

96. Friedman, *supra* note 56, at 918–20; *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276–77 (1988) (discussing why the contours of the legislative bargain can be difficult to ascertain).

97. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 30–33 (2009); Friedman, *supra* note 56, at 918–20.

98. *See* CROSS, *supra* note 97, at 30–33; Friedman, *supra* note 56, at 918–20.

99. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1300–01 (9th Cir. 1998).

100. *See* Nagle, *supra* note 1, at 231; Friedman, *supra* note 56, at 918–20.

101. *See, e.g.*, Pittston Co. v. United States, 368 F.3d 385, 401 (4th Cir. 2004) ("Pittston's assertion that the Coal Act is 'incapable of functioning independently' is belied by the fact that the Coal Act continues to function without [the infirm provision applying to a certain class of operators]." (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987))); Ala. Power Co. v. U.S. Dep't of Energy, 307 F.3d 1300, 1307–08 (11th Cir. 2002) ("The statutory scheme will continue to function if that singular [unconstitutional] clause . . . is struck down."); Nat'l Adver. Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988) ("Since the ordinance can function effectively if so limited, we invalidate it only as to [the constitutionally infirm provisions]."); Scheinberg v. Smith, 659 F.2d 476, 482 (5th Cir. Unit B Oct. 1981) (describing legislative-intent inquiry as "wholly speculative, and insupportable").

102. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2642 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (discussing the need to conserve as much of the remaining statute as possible).

sional intent.[103] A statute's structure or design could inform a court's decision about congressional intent, but probably to a lesser degree than the purpose or bargain approach.[104] Courts often invoke the textual approach in conjunction with the maxim that a court's duty is to save, and not to destroy, statutory remainders. Courts also rely on the idea that rulings of statutory interdependence involve an "editorial freedom . . . [that] belongs to the Legislature, not the Judiciary."[105] The dissenting opinion in *Eubanks*, rejecting the majority's reliance on the bargain approach to determine congressional intent,[106] followed the textual approach.[107] Instead of remanding the case, the dissent would have excised the unconstitutional consent provision and retained the remaining provisions in the statute.[108] The dissent noted that the remainder of the statute functioned in a coherent manner, and it emphasized the lack of evidence—essentially, the absence of statutory text—rebutting the presumption of simple severability.[109]

The textual approach, while more predictable than the purpose and bargain approaches, is not without its faults. It might be considered harsh medicine for a court not to find statutory interdependence and to instead leave all other provisions in effect based on what could be mere legislative oversight to include an inseverability clause. While the legislature could reconvene and remedy the problem, the transaction costs of doing so—particularly in the case of a clear and incontrovertible error—suggest that

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103. *See, e.g.*, Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't, 460 F.3d 717, 721 (6th Cir. 2006) ("[T]he zoning and construction provisions operate independently from the licensing provision. There is no reason why Plaintiffs cannot operate their establishments in the proper part of town and in the proper type of building without an adult entertainment license from the Louisville/Jefferson County Metro Council."); Chesapeake B & M, Inc. v. Harford Cnty., 58 F.3d 1005, 1012–13 (4th Cir. 1995) (en banc) (describing remaining provisions as categorically unrelated to the unconstitutional provision).

104. *See supra* Sections II.B.1–2.

105. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 (2010) (discussing whether to "blue-pencil" related provisions). The Court noted that "Congress of course remains free to pursue any of these options going forward." *Id.*

106. *See supra* Section II.B.2.

107. Eubanks v. Wilkinson, 937 F.2d 1118, 1130 (6th Cir. 1991) (DeMascio, J., dissenting) (noting the presence of a severability clause); *see also* Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006) ("We know of no evidence that Congress would not have applied the RFRA to the federal government unless it could also be applied to state and local governments."); Nat'l Treasury Emps. Union v. United States, 990 F.2d 1271, 1277–78 (D.C. Cir. 1993) (emphasizing the strong presumption of severability), *aff'd in part, rev'd in part*, 513 U.S. 454 (1995); Ackerley Commc'ns of Mass., Inc. v. City of Somerville, 878 F.2d 513, 522 (1st Cir. 1989) (ending analysis after noting the presence of a severability clause).

108. *Eubanks*, 937 F.2d at 1130 (DeMascio, J., dissenting) ("The contention that the notarization requirement, the mandatory two-parent consent provision, and the 'if available' language are integral to the meaning of the statute is untenable. The balance of the statute functions independently of these provisions. Severance of these clauses does not render the remainder of the statute inoperable."). The dissent argued that its approach also furthered legislative intent due to the presence of a severability clause in the statute and thus disagreed with the majority's determination of congressional purpose. *See id.*

109. *See id.*

this approach could be inefficient. Because it requires textual evidence to find interdependence, the textual approach also provides courts with less flexibility to respond to situations that the legislature may not have foreseen.

4. The Three Approaches Compared

The three approaches to imaginative reconstruction regarding statutory interdependence overlap to some degree, but they still have defined boundaries and can lead to different results.[110] An example should help illustrate how the three approaches can intersect and diverge. Consider a controversial bill introduced in the U.S. Senate. The bill originally consists of two provisions: first, a controversial tax-cut provision, and second, a review provision providing that senators will meet annually to discuss whether the tax rate affected by the tax-cut provision should be raised or lowered. Suppose that, after initial discussions, only fifty senators express support for the two-provision bill. To guarantee passage, the senators add a third provision that provides funds for the construction of an art museum in the home state of a fifty-first senator. Now assume that a court finds the controversial tax-cut provision unconstitutional, requiring it to address whether the review and museum-funding provisions are interdependent on the unconstitutional tax-cut provision.

With respect to distinguishing between the purpose and bargain approaches, one of two scenarios is possible for the museum-funding provision once the court severs the tax-cut provision. First, the majority of legislators might dislike art museums and have agreed to the museum-funding provision only to ensure passage of the tax cut. Had they known that the tax-cut provision would be ruled unconstitutional, they would have wanted the museum-funding provision to be severed as well. In this scenario, the court should find the museum-funding provision interdependent with the tax-cut provision under both the purpose and bargain approaches. Under the purpose approach, the provisions would be interdependent because the senators would have wanted the museum-funding provision to fail; under the bargain approach, the provision would be interdependent because the museum-funding provision was enacted as part of a quid pro quo.[111]

But there is another possible scenario. Fifty legislators could have been indifferent to the museum-funding provision, or they could have secretly wanted the museum-funding provision to pass and would have been happy to pass the provision independently. These legislators might have included the museum-funding provision in the bill either out of convenience or as part of a strategic ploy to secure another vote for the tax-cut provision. The motivation for securing the vote could include an array of opportunistic behavior, such as using the vote against a legislator during an election or obtaining bragging rights that a bill enjoyed bipartisan support. In this sce-

110. *See* Nelson, *supra* note 53, at 348–50 (discussing the differences and similarities between intentionalists and textualists).

111. *See supra* Sections II.B.1–2.

nario, a court would not find the museum-funding provision interdependent under the purpose approach, but it would find the provision interdependent under the bargain approach. Under the purpose approach, the museum-funding provision would remain in effect because a majority of senators would have wanted the museum-funding provision to remain absent the tax-cut provision.[112] Under the bargain approach, the museum-funding provision would be interdependent and severed because it was part of a quid pro quo for the (now unconstitutional) tax-cut provision.[113]

The textual approach overlaps with the purpose and bargain approaches but remains largely distinct. In this hypothetical, the bill lacks a severability clause, but it contains the usual presumption of simple severability. The presumption is not rebutted because the bill does not contain an inseverability clause. Some courts might check the statute's design for suggestions of legal inoperability, but here, the tax-cut provision does not affect the legal operability of the museum-funding provision. Thus, under the textual approach, there would be no interdependence between the provisions, and the museum-funding provision would remain law.[114]

But what of the review provision, which provides that the senators must meet annually to discuss the extent of the (now unconstitutional) tax-cut provision? Surely the degree of relation between the review provision and the tax-cut provision is more significant than was the relationship between the museum-funding and the tax-cut provisions, but does this greater degree of relation warrant a finding of interdependence? The answer depends on which approach a court utilizes. Under the purpose approach, the tax-cut and review provisions would be interdependent, as they were designed to work together to further a goal.[115] Under the bargain approach, the answer would turn on whether legislators supported the meetings as a condition or in consideration of the tax cut.[116] Under the textual approach, the review provision would almost certainly not be interdependent and would not be struck along with the tax-cut provision.[117] This is for two reasons: first, the lack of textual evidence to rebut the presumption of simple severability,[118] and second, the legal operability of the review provision on its own.

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112. *See supra* Section II.B.1.

113. *See supra* Section II.B.2.

114. *See supra* Section II.B.3. This could depend on whether a court utilized legislative history and whether there were statements in the legislative history that clearly contradicted the idea that Congress considered the provisions severable.

115. *See supra* Section II.B.1. The seemingly obvious cooperation of the two provisions makes this an easy case given the structure of the statute; in all likelihood, evidence from legislative history would support this as well.

116. *See supra* Section II.B.2.

117. *See supra* Section II.B.3. What constitutes concrete evidence may be open to interpretation. A severability or inseverability clause would certainly qualify. Statutory language describing the relationship between two provisions as one that is "essential" might also count. *See* Movsesian, *supra* note 2, at 48–49.

118. *See* Friedman, *supra* note 56, at 904–07 (discussing the presumption of severability).

Congress could certainly enact a law providing for legislators to meet annually to discuss a nonexistent provision, which would be capable of operation insofar as the legislators could gather for this purpose. Such a law would not be inoperable but merely irrational, and thus would fall short of rebutting the robust simple-severability presumption of the textual approach.

III. Defining Statutory Interdependence

The *Alaska Airlines* test focuses on congressional intent for purposes of determining statutory interdependence.[119] The technique of imaginative reconstruction, whereby courts look for clues and try to divine whether Congress would have retained a statutory provision, serves to help in cases where the text is silent or unhelpful.[120] The purpose, bargain, and textual approaches to statutory interdependence are, respectively, ways of determining what Congress might have wanted, could have passed, or tried to demonstrate with respect to interdependence among provisions in a particular statute.[121] The *Alaska Airlines* test, however, provides courts with little guidance on which approach is best.[122] This is particularly problematic because the approaches can result in different outcomes.[123] Adopting a clearer rule is essential to establish proper ex ante incentives for legislators to express their preferences and to promote judicial decisions that honor those preferences. Section III.A introduces and encourages adoption of a qualified clear statement rule. Section III.B discusses how the rule would work in practice by comparing it to other severability decisions and applying it to a recent circuit split concerning the severability of the Food and Drug Modernization Act. Section III.C addresses potential counterarguments to the qualified clear statement rule and explains why adoption of the rule is preferable to the status quo.

A. *A Qualified Clear Statement Rule*

This Section proposes a qualified clear statement rule to resolve the statutory-interdependence ambiguities related to *Alaska Airlines*. According to the qualified clear statement rule, a court should only deem provisions interdependent in either one of two circumstances: first, where Congress has clearly stated that the provisions are interdependent, such as by inserting an inseverability clause, or second, where the court has objectively determined that no rational legislator could have wanted to retain a provision in the absence of a related provision.[124] The rule strengthens the presumption of

119. *See supra* Part I.

120. *See supra* Section II.A.1.

121. *See supra* Section II.B.

122. *See supra* Section II.A.2.

123. *See supra* Section II.B.

124. An inseverability clause can be complete—invalidating all provisions if any one provision is found unconstitutional—or partial—invalidating some provisions if a certain provision is found unconstitutional. *See, e.g.*, Nagle, *supra* note 1, at 243–44.

simple severability by requiring that courts neither engage in compound severance nor totally invalidate a statute absent the presence of clear textual evidence, such as an inseverability clause, unless doing otherwise would produce a wholly irrational result. Section III.A.1 discusses the clear statement requirement, which maps onto the *Alaska Airlines* congressional-intent prong. Section III.A.2 discusses the narrow qualification to this requirement, which maps onto the *Alaska Airlines* legal-operability prong.

1. Clear Statement Requirement

The first prong of the *Alaska Airlines* test directs courts to determine statutory interdependence in a manner consistent with congressional intent.[125] This type of inquiry is highly elusive, and it has led courts to develop three different methods of using imaginative reconstruction to determine congressional intent: the purpose approach, the bargain approach, and the textual approach.[126] This Section encourages adopting the textual approach to the congressional-intent prong of *Alaska Airlines*, which is embodied in the "clear statement" requirement of the qualified clear statement rule.

The qualified clear statement rule is a modified version of the textual approach and is designed to place the burden of finding provisions interdependent on the legislature while allowing for a small degree of judicial leeway in cases of clear error or oversight. According to the qualified clear statement rule, a court should only deem provisions interdependent if Congress has clearly stated its intention that the provisions are interdependent—such as by inserting an inseverability clause—or if no rational legislator would wish to retain a provision in the absence of a related provision.[127]

The clear statement requirement provides courts with a bright-line rule in an area of the law that would greatly benefit from added predictability. This is because the *Alaska Airlines* test, presumptions, and severability clauses together establish something of a dialogue between the legislature and courts, in which the legislature conveys its intent in some form and a court responds by giving effect to that intent, while signaling—in the form of presumptions—how it will act in ambiguous cases.[128] Without a clear directive from Congress, courts are faced with the mammoth task of navigating what can amount to hundreds of statutory provisions, even before determining whether they should consult other sources of evidence, such as secondary sources or legislative history.[129] Absent a clear understanding of

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125. *See supra* Part I.

126. *See supra* Section II.B.

127. *See supra* Section II.B.3 (discussing a similar approach).

128. *See* Gans, *supra* note 6, at 669–70.

129. *See* Nagle, *supra* note 1, at 249 ("[I]t is a poor cause that cannot find some plausible support in the legislative history . . . ." (quoting Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948)) (internal quotation marks omitted)).

the judiciary's role in evaluating interdependence, legislators might agree to vote for a bill containing a controversial provision in exchange for another provision under the false impression that a court would consider the provisions interdependent should one provision be severed.[130] Even worse, the legislator might not understand why a court ruled as it did, in which case she might attribute the court's decision to judicial activism and not legislate differently in the future—all while the court believes that it gave effect to the wishes of Congress.[131] Confusing or inconsistently applied statutory-interdependence standards thus do a disservice to both courts and legislators.

The rule this Note proposes also provides the proper ex ante incentives to a legislator considering whether to vote for a particular law. If the legislator insists on a certain addition or modification of a provision as consideration for a favorable vote, she can be reasonably certain that a court will not preserve the terms of the bargain without a clear statement of statutory interdependence.[132] The legislator thus would need to raise that issue and insist on an inseverability clause in exchange for supporting the bill.[133] Otherwise, legislators who later see the linchpin of their bargain unravel would have no one to blame but themselves and would presumably have a more difficult time convincing the electorate otherwise.[134] Because legislators are best positioned to determine which provisions are truly interdependent—either because of congressional purpose or the terms of the legislative bargain—the clear statement rule provides the proper ex ante incentives.[135]

The problem with leaving the decision to the judiciary as to which legislative goals to prioritize or what permutation of a bill best reflects the legislative bargain is that this approach does not place enough responsibility on the legislature, the policymaking body, to make these decisions. It is true that a strong presumption of simple severability could result in the retention of an undesired provision, and that, in some cases, a legislator would want a court to fix an oversight made in the drafting process. But the need for polit-

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130. *See supra* Sections II.B.1–2.

131. *See supra* Section II.B; *see also* Nagle, *supra* note 1, at 245 ("[L]egislators display conflicting understandings of what a severability clause means.").

132. Requiring a clear statement rule would decrease the likelihood that a court would ever construe a statutory remainder as absurd or inconsistent with congressional intent. *See* SCALIA & GARNER, *supra* note 53, at 239 (describing absurdity as encompassing only unintended results).

133. For an example of a legislator engaging in this practice, see Nagle, *supra* note 1, at 241.

134. *See generally* SCALIA & GARNER, *supra* note 53, at 239 (noting the narrow scope of the absurdity exception).

135. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2438–39 (2003) (applying the same logic to the absurdity doctrine). *But see* Gans, *supra* note 6, at 644, 675. Some commentators have encouraged the legislature to adopt a clear statement rule with respect to severability, which would also provide ex ante incentives to this effect. *See* Nagle, *supra* note 1, at 233; Friedman, *supra* note 56, at 920–21.

ical accountability, as well as basic separation-of-powers principles, counsels in favor of allowing the undesired remainder to stand.[136] Courts should not insulate the public from the effects of poor or sloppy legislation; doing so in most cases does no favor for those who elect officials.[137]

2. Qualification for Objectively Irrational Results

The second prong of the *Alaska Airlines* test instructs courts engaging in severability analysis to find provisions interdependent when doing otherwise would result in a legally inoperative remainder.[138] The Court's most recent jurisprudence has tended in the direction of telling courts that they "must" uphold whatever remainder Congress intended, which makes the role of this prong relative to the congressional-intent prong unclear.[139] This Section proposes understanding the legal-operability prong as an instruction to courts to find provisions interdependent when doing otherwise would result in an objectively irrational law. This approach is embodied in the "qualification" element of the qualified clear statement rule.

Legal operability would only seem to apply in two cases. First, a court might feel compelled to invalidate a statutory provision on grounds of interdependence when Congress wants it to remain, but the remainder operates poorly. This could include cases in which the remainder results in what a court believes is a bad law and could be explained by legislators pursuing unwise policies.[140] Second, a court might feel compelled to invalidate a provision on legal operability grounds when Congress has made an error—for example, if Congress accidentally failed to include an inseverability clause.[141] In the first of these situations, allowing a statutory remainder to stand could result in a poorly designed law. In the second, allowing a statutory remainder to stand could result in a law so foolish that no rational legislator would ever support it.

The qualification element of the qualified clear statement rule would not avoid poorly designed laws but would guard against unthinkably foolish laws. Courts in general do not save Congress from pursuing poorly designed policies, reasoning that such behavior damages notions of political accountability and separation of powers.[142] However, in some cases, engaging only in simple severance could do more harm than good, even at the expense of political accountability.[143] Some of these cases could involve

136. *See* Nagle, *supra* note 1, at 226.

137. *See* Manning, *supra* note 135, at 2433, 2437 (arguing that Article I of the Constitution counsels in favor of requiring legislators to compromise and then protecting that compromise).

138. *See supra* Part I.

139. *See* Nagle, *supra* note 1, at 221.

140. *See* CROSS, *supra* note 97, at 160–62.

141. *See* ESKRIDGE ET AL., *supra* note 8, at 727; SCALIA & GARNER, *supra* note 53, at 234–39. *But see* Nagle, *supra* note 1, at 238–39.

142. *See* Movsesian, *supra* note 2, at 57–58.

143. *See* SCALIA & GARNER, *supra* note 53, at 234–39.

scriveners' errors, such as a clear typographical error, or an honest congressional oversight.[144] In other cases, changed circumstances could render a statutory remainder so incoherent or absurd that no rational legislator would ever support it.[145] In these cases, allowing the judiciary to invalidate additional provisions—whether by compound severance or total invalidation—is more efficient from a transaction-costs standpoint, and also provides a small degree of flexibility to courts in extraordinary circumstances.

The main benefit of the qualification is that it provides courts with flexibility in cases where potential consequences are costly, particularly when the lack of an inseverability clause is a result of a congressional oversight. Because the qualified clear statement rule permits compound severance and total invalidation absent textual evidence when no rational legislator would prefer otherwise, the rule's use would avoid most significant consequences of retaining poorly designed statutory remainders. As to legislative oversights that do not result in objectively irrational results, Congress would have the option to reconvene, modify the law as it stands, and determine the appropriate remedy. Although reconvening would be difficult in some circumstances, it would be increasingly likely that Congress would reconvene in instances where electoral consequences are great. In other words, the worse off the electorate is because of the statutory remainder (at least up to the point of triggering the qualification), the lower the transaction costs are for Congress to revisit the legislation.[146]

Courts would have less flexibility under the qualified clear statement rule than the status quo, but the benefits of better democratic accountability and more predictability would offset this cost. In some cases, the statutory remainder might not reflect the intended purpose or the bargain between members of the legislature, and yet it would stand. Those members of Congress, either because of their misunderstanding or poor drafting, might be deeply unsatisfied with the resulting statute. The people who elected them might feel similarly. But the best long-term arrangement is not for courts to "blue-pencil" the statute for those representatives,[147] but rather to allow citi-

144. *Id.* at 234–37.

145. Professor Manning's article, *The Absurdity Doctrine*, highlights some of the inconsistencies that inhere in absurdity jurisprudence. Manning, *supra* note 135, at 2398 n.32. For purposes of this Note, a rational legislator would not rule a statutory provision interdependent because not doing so would contradict commonly held social values. *See id.* By contrast, a reasonable legislator would rule a statutory provision interdependent if not doing so would result in a truly irrational result. *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 474 (1989) (Kennedy, J., concurring in the judgment) ("I should think the potential of [the absurdity] doctrine to allow judges to substitute their personal predilections for the will of the Congress is . . . self-evident . . . .").

146. *See* Nagle, *supra* note 1, at 227.

147. For more discussion on why courts should not "blue-pencil" to save the legislature, see *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138, 3161–62 (2010).

zens to judge the merits of the legislation by choosing whether to reelect their representatives.[148]

B. *The Rule Applied*

Under the qualified clear statement rule, the outcomes of many severability cases would remain the same. This could be explained by the fact that a court adopted a similar methodology during its analysis or by mere coincidence. In other cases, however, the qualified clear statement rule would lead a court to a different result. This Section explores both types of cases.

Under the qualified clear statement rule, the result would be the same as the one reached in several severability-focused cases, including *Immigration & Naturalization Service v. Chadha*[149] and *Warren v. Mayor of Charlestown*.[150] At issue in *Chadha* was an Act with provisions providing the Attorney General with authority over deportation proceedings and providing for a legislative veto to check that power.[151] A court applying the qualified clear statement rule in *Chadha* would note that the Act's severability clause serves as textual evidence of congressional intent, rendering additional imaginative-reconstruction analysis—either on purpose- or bargain-focused grounds—unnecessary.[152] Put differently, the severability clause would trump the fact that several legislators likely believed that the two provisions should work together.[153] The narrow exception for wholly irrational results—which would permit a court to find statutory interdependence absent, or in spite of, a clear statement of congressional intent—would not save the Attorney General provision. This is because a hypothetical rational legislator could conceivably believe that the Attorney General's authority over deportation proceedings would be worthwhile even absent the legislative veto provision.[154]

Adopting this rule would also generate the same result in *Warren*, but for different reasons. At issue in *Warren* was an Act involving the annexation of the City of Charlestown in an effort to disenfranchise the city's voters—an annexation that the Massachusetts court ruled unconstitutional.[155] The court found that the other provisions, which related to events that would occur subsequent to annexation, such as the time and place for town meetings, were interdependent on the unconstitutional provision.[156] The Act contained

148. *See* Friedman, *supra* note 56, at 922–23 (observing that allowing "harsh results" to stand can have worthwhile effects).

149. 462 U.S. 919 (1983); *see also supra* text accompanying notes 31–38.

150. 68 Mass. (2 Gray) 84 (1854); *see also supra* text accompanying notes 44–54.

151. *Chadha*, 462 U.S. at 923; *see also supra* text accompanying note 31.

152. *See supra* text accompanying note 36.

153. *See supra* text accompanying note 35.

154. *See supra* Section III.A.2.

155. *Warren*, 68 Mass. at 86–87, 105–07; *see also supra* notes 45–47 and accompanying text.

156. *See supra* text accompanying note 48.

no clear statement of legislative intent regarding interdependence and so, at first blush, the presumption of simple severability would control.[157] But this case would fall into the irrational-results exception, and so a court under the qualified clear statement rule would still find the provisions interdependent. Because no rational legislator would establish a law requiring a town meeting for a town that did not exist, a court would reach the same result—a finding of statutory interdependence and hence invalidation—under this rule.[158]

By contrast, there are some cases in which application of the qualified clear statement rule would result in a different outcome. One example involves a recent split among the federal courts of appeals. In *Western States Medical Center v. Shalala*, the Court of Appeals for the Ninth Circuit reviewed the provisions of the Food & Drug Administration Modernization Act ("FDAMA") for interdependence.[159] Under the Act, pharmacists that comply with several specific requirements qualify for an exception from an otherwise complex and time-consuming new drug approval process.[160] When the Ninth Circuit ruled one of the requirements unconstitutional, it had occasion to determine whether the exception itself was dependent on the unconstitutional requirement, which would require striking down the entire Act.[161] Despite the presence of a severability clause in the statute, the Ninth Circuit invalidated the entire Act.[162] The court reasoned that the Act was "designed to strike a balance between competing interests," and that it "believe[d] that Congress would not have passed [the Act] absent the [unconstitutional provision]"[163]—statements that echo both the purpose approach and the bargain approach to statutory interdependence.

The Court of Appeals for the Fifth Circuit, facing the same question of whether to invalidate the entire Act, approached the statutory-

157. *See supra* note 51 and accompanying text.

158. For another example, see *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 151 (2d Cir. 1991), where the court explained, "Were we convinced that the remaining structure was capable of being administered in a . . . coherent . . . manner, we would do so. We are not so convinced. . . . [W]e conclude that severance of the invalid sections would create a statute that is confusing and unworkable." Unlike the act at issue in *Warren*, the statute in *Town of Niagara*—a sign ordinance—contained a severability clause. *See id.* at 147. The analysis is the same regardless of whether the statute contains a severability clause. *See supra* Section III.A.

159. 238 F.3d 1090, 1096–98 (9th Cir. 2001), *aff'd sub nom.* Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002). The Supreme Court did not address the court's statutory-interdependence analysis. Thompson v. W. States Med. Ctr., 535 U.S. 357, 360 (2002).

160. Food and Drug Administration Modernization Act, Pub L. No. 105-115, § 503A, 111 Stat. 2328, 2328 (1997).

161. *See Shalala*, 238 F.3d at 1096–98.

162. *Id.* at 1097–98. More precisely, Congress enacted the FDAMA as an amendment to a law that included a severability clause itself. *See* Med. Ctr. Pharmacy v. Mukasey, 536 F.3d 383, 402 (5th Cir. 2008) ("[W]e can only assume that Congress was fully aware . . . and that Congress intended the severability provision to apply . . . ." (quoting Koog v. United States, 79 F.3d 452, 463 (5th Cir. 1996))).

163. *Shalala*, 238 F.3d at 1096–97.

interdependence analysis differently, in a manner resembling the textual approach.[164] The court described the severability clause, a clear statement of congressional intent, as "crucial" to the interdependence inquiry.[165] The court also observed that the Act imposed six requirements besides the unconstitutional requirement on pharmacists seeking the exception,[166] and it reasoned that several members of Congress might have been satisfied with an exception containing only these remaining requirements.[167] In other words, in addition to the persuasive effect of the clear statement on severability, it was entirely conceivable that a rational legislator would believe that providing an exception to pharmacists was still worthwhile, even without one of the original seven requirements. The court engaged in simple severance to invalidate only the unconstitutional provision.[168]

The Fifth Circuit's result is the same as that which would be obtained by applying the qualified clear statement rule. A court examining the Act under the qualified clear statement rule would note the absence of any clear statement in the statute to rebut the presumption of simple severability. Thus, consistent with honoring congressional intent under the *Alaska Airlines* test, it would excise only the unconstitutional provision. It would also find that the exception to the complex drug approval process, even with one fewer requirement, was not objectively irrational, and thus was legally operable under *Alaska Airlines*. Reliance on the qualified clear statement rule would have given legislators considering the FDAMA an incentive to insist on the inclusion of an inseverability clause in exchange for their vote if they felt strongly that the exception contained all the requirements. By contrast, if most legislators would have voted in favor of the exception even absent some of the requirements, then the law could have been passed without an inseverability clause. Either way, the responsibility to make the difficult policy decision—"Is an exception to the new drug approval process with fewer requirements consistent with the wishes of Congress?"—would fall where it should: on the legislature.[169]

C. *Addressing Counterarguments*

This Section addresses potential counterarguments to adopting the qualified clear statement rule. The first is that a court could adopt a presumption of inseverability rather than a presumption of simple severability, thus eliminating the need to speculate about interdependence.[170] By adopting this presumption, the court would simply invalidate an entire statute on the basis

164. *Mukasey*, 536 F.3d at 401–05.

165. *Id.* at 401.

166. *Id.* at 402–03.

167. *Id.* at 403.

168. *Id.* at 405.

169. *See supra* Section III.A.1.

170. *See, e.g.*, Gans, *supra* note 6, at 688, 697 (arguing for a presumption of inseverability).

of an unconstitutional provision.[171] This suggestion is unwise.[172] It is true that a rule of inseverability might be slightly more straightforward than a qualified clear statement rule, and in cases where a court cannot determine legislative intent, ease of judicial administration may be the best metric for adopting a rule.[173] Adopting this presumption of inseverability, however, runs counter to the vast majority of the Court's jurisprudence on severability, which emphasizes congressional intent.[174] Additionally, because legislators often include severability clauses in statutes,[175] it is more likely that Congress generally wishes for courts "to save and not to destroy" the remainder of their statutes.[176] Thus, a presumption of inseverability would run counter to the well-accepted notion that, when interpreting statutes, the court acts as an agent of the legislature and aims to fulfill the legislature's wishes.[177]

Another potential counterargument is that rather than apply a qualified clear statement rule, courts should retain or excise whichever remaining provisions result in the best policy instead of allowing a poorly functioning remainder to stay in effect.[178] This is a similarly unwise and potentially dangerous approach, since reasonable people can disagree as to which policy is best. This method would thus not have the same advantages of predictability as the qualified clear statement rule. It would also not resolve the separation-of-powers concerns posed by issues relating to statutory interdependence.[179] Moreover, it would insulate inept legislators from political accountability.[180]

Critics of the qualified clear statement rule could also argue that a purpose- or bargain-focused approach to imaginative reconstruction would better determine congressional intent than would a qualified clear statement rule, which is largely premised on the textual approach.[181] The argument goes that examining legislative history or statutory design can be quite effective as a means of learning a statute's purpose or deciphering a statute's

171. *See id.* at 697.

172. Several commentators share this view. *See, e.g.*, Movsesian, *supra* note 2, at 79–80 (advocating for a presumption of severability); Nagle, *supra* note 1, at 227–29 (countering arguments in favor of a general rule of inseverability); *id.* at 250 (arguing for a general presumption of severability).

173. *See* Posner, *supra* note 52, at 820.

174. *See supra* Part I.

175. Under such a rule, it is likely that a severability clause would truly become a boilerplate term.

176. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."); Nagle, *supra* note 1, at 251; Friedman, *supra* note 56, at 910–11.

177. *See* Farber, *supra* note 15, at 283–84.

178. *See* CROSS, *supra* note 97, at 102–05.

179. *See id.* at 112–19.

180. *See supra* Section III.A.1.

181. *See supra* Section III.A.

underlying legislative bargain.[182] But these arguments are ultimately unpersuasive. Assuming for the sake of argument that a single legislative purpose or bargain exists,[183] efficiency considerations counsel against adopting a purpose- or bargain-focused rule. Even if a statute reflects a single congressional purpose or legislative bargain, it can be difficult and time-consuming for a court to ascertain what this purpose or bargain is, particularly with respect to complex statutes. Courts would also occasionally make good faith errors. When a single congressional purpose or legislative bargain does exist, legislators will always be better positioned than courts to identify what that purpose or bargain is—they, after all, sat through hearings and participated in negotiations.[184] A rule that provides an incentive for the legislature to state its purpose or reveal the terms of its bargain ex ante will save courts time and reduce the opportunity for error.[185]

A textual-focused approach like the qualified clear statement rule is also preferable to a purpose- or bargain-focused approach because a rule that cabins a court's tendency to "blue-pencil" provisions best comports with constitutional principles of bicameralism and presentment.[186] The judicially constructed statutory remainder that results from simple or compound severance places a version of a law into effect that did not pass both houses of Congress.[187] One justification for allowing statutory remainders to have legal effect is that these constitutional concerns are abated if one considers the severed statute the same as that which was enacted, with the unconstitutional provisions still existing in a metaphysical sense but simply never given effect.[188] Put differently, a provision is never truly severed from an act; it is merely trumped by the Constitution and rendered legally meaningless.[189]

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182. *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 438 (2005) ("[P]erhaps the most important premise of classical intentionalism . . . [is] the idea that behind most legislation lies some sort of policy judgment that is meaningfully identifiable, shared by a legislative majority, and yet imprecisely expressed in the public meaning of the text that has made its way through Congress's many filters.").

183. *See* SCALIA & GARNER, *supra* note 53, at 349–51 (describing the use of legislative history as "philosophically indefensible as violating the separation of powers").

184. This is a variant on a cheapest cost-avoider argument. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

185. *See supra* Section III.A.

186. *See supra* Section II.B.3.

187. *See* Campbell, *supra* note 12, at 1501–03; Nagle, *supra* note 1, at 228; Shumsky, supra note 42, at 247–48. This would only apply to statutes without a severability clause given that the presence of the clause is a manifestation of assent to all possible combinations of the statute.

188. Nagle, *supra* note 1, at 228–29 ("Rather, the statute still exists as it was enacted, although the unconstitutional provision will never be given effect. Accordingly, the statute that is given effect in subsequent cases is the same statute enacted by Congress and presented to the President, except that the unconstitutional provision is never applied.").

189. *See id.*

This justification might quell constitutional concerns relating to simple severance, but it does not explain why compound severance—when a court severs an unconstitutional provision along with some constitutional provisions—or total invalidation is constitutionally permissible. When otherwise constitutional provisions are severed from an act, no provision of the Constitution supplants their place in the law. Moreover, unlike total invalidation, compound severance allows a statutory remainder to have legal effect despite the fact that this subset would not seem to meet Article I's bicameralism and presentment requirement. Adopting the qualified clear statement rule limits instances of compound severance because it robustly strengthens the presumption of simple severability and thus greatly limits outcomes besides simple severance.[190] The rule permits other outcomes, but only in cases where it appears that Congress has made a mistake—that is, when no rational legislator would prefer an alternative course of action.[191] Thus, the qualified clear statement rule greatly limits situations in which compound severance allows a subset of a law to remain in effect.

A final counterargument against the qualified clear statement rule is that courts will invoke the qualification exception to the rule too often and thus read more flexibility into the rule than is appropriate. This potential for abuse is certainly possible,[192] but even if judicial activism limited the benefits of the qualified clear statement rule, it would still occasion an improvement from the status quo. Moreover, it is worth noting that any court inclined to stretch the rule would do so whenever convenient, irrespective of which rule is adopted.[193] So long as at least a few courts follow the qualified clear statement rule in good faith, adopting it will result in better communication between courts and legislators and thus more consistent severability decisions among courts.[194]

CONCLUSION

The current test for statutory interdependence is vaguely defined and results in courts applying inconsistent approaches to determine congressional intent. The qualified clear statement rule would strengthen the presumption of simple severability and in almost all cases require a clear statement to rebut the presumption. Statutory interdependence would not exist without a clear congressional statement unless the remaining provisions would function so incoherently that no rational legislator would want them to have effect. Adopting a qualified clear statement rule instead of the other imaginative-reconstruction approaches would provide legislators with an ex

190. *See supra* Section III.A.

191. *See supra* Section III.A.1.

192. *See, e.g.*, CROSS, *supra* note 97, at 160–61; Farber, *supra* note 15, at 285–86 ("[O]ne does not have to be a legal realist to know that . . . [a] judicial interpretation often arises out of the court's view of public policy as much as any attempt to fathom the statutory text.").

193. *See, e.g.*, CROSS, *supra* note 97, at 91–101.

194. *See* Farber, *supra* note 15, at 287.

ante incentive to communicate their preference to courts and increase the likelihood that courts would correctly honor that intent. This rule also best aligns with core constitutional principles and would provide a consistent framework for courts addressing questions of statutory interdependence in severability analysis.