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REMARKS

SENSE AND SEVERABILITY

Tobias A. Dorsey *

I. INTRODUCTION

When I was asked to speak about severability at the 2011 Allen Chair Symposium, I wasn't sure I should, or even that I could. But the more I thought about it the more I realized I might be a good person for the task.

First of all, I am not a scholar. I am a practitioner. I spent ten years working for Congress in the nonpartisan Office of Legislative Counsel of the House of Representatives. That means I spent a lot of time working with policymakers in Congress, helping them think through their policies and turn them into written proposals. I have advised clients about severability hundreds of times.

Now I do similar work at a federal agency that has a rather special relationship with severability—the United States Sentencing Commission. In 2005, in *United States v. Booker*, the Supreme Court found a constitutional problem with the Federal Sentencing Guidelines (the “Guidelines”) and decided to strike

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The views expressed here are those of the author alone and do not necessarily reflect the views of the United States Sentencing Commission or the Office of the Legislative Counsel of the U.S. House of Representatives.

part of a sentencing statute.¹ The decision added one small step to the sentencing process but made one giant leap in sentencing policy, because it turned a mandatory guidelines system into an effectively advisory one.²

The views I share with you today are my own personal views. I don't speak for the Office of Legislative Counsel of the House of Representatives and I don't speak for the Sentencing Commission. But my views have been informed by my experience in these two places.

II. BACKGROUND

Before I go any further, let me tell you where I am going with all this. I suggest to you that severability is a bit of a backwater. If you try to follow what the Supreme Court has said you will be following a poorly marked, zigzag trail. The Court has swung over the years from being for severability to being somewhat against it to being generally for it again.³ Their opinions on severability don't give much guidance on exactly what legal principles are being applied or why. And what the Court says it is supposed to do in severability cases is not what the Court actually does in severability cases. Don't get me wrong—the Court has generally gotten to approximately the right place in its severability cases, but it has followed a dubious map.

1. 543 U.S. 220, 245 (5-4 decision) (citing 18 U.S.C. §§ 3553(b)(1), 3742(e) (Supp. 2004)) (Justice Stevens delivered the opinion of the Court in part, concluding that the Sixth Amendment applies to the Guidelines and Justice Breyer delivered the opinion of the Court in part, concluding that § 3553(b)(1) of the Guidelines is incompatible with the Sixth Amendment and therefore must be severed). Actually, the Court found two provisions unconstitutional and struck them both—a sentencing court provision at § 3553(b) and an appellate review provision at § 3742(e). See *Pepper v. United States*, 562 U.S. ___, ___, 131 S. Ct. 1229, 1236 (2011) (citing *Booker*, 543 U.S. 220). Several years later, the Court decided that another appellate review provision at § 3742(g)(2) should also be stricken. *Id.* at ___, 131 S. Ct. at 1236.

2. Even so, there are certain other statutes, not affected by *Booker*, under which the Commission's Guidelines and policy statements are still treated as mandatory. See, e.g., *Dillon v. United States*, 560 U.S. ___, ___, 130 S. Ct. 2683, 2693 (2010) (holding that, while *Booker* blue penciled the provision in § 3553(b) that made the Guidelines mandatory at an original sentencing, *Booker* did not affect the provision in § 3582(c)(2) that made the Commission's policy statements mandatory at a sentence modification proceeding, rendering the Commission's policy statements binding under such circumstances).

3. See, e.g., John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 218–21 (1993); Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 232–40 (2004).

There is not a lot of scholarship on severability, and if you try to be guided by scholarship you will pass through some weird places. Most scholars seem to have this idea that statutes are based on legislative bargains and that the Court should simply identify the legislative bargain and the severability decision will flow logically from that. As someone who spent ten years on the Hill working for more than five hundred different clients, I am willing to stipulate that statutes exist. I am also willing to stipulate that legislative bargains exist. I am even willing to stipulate that statutes, plural, are the product of legislative bargains, plural. But that statement cannot be reduced to the singular.

A statute is not the result of a legislative bargain. A statute is the product of a convergence of microbargains, between and among 100 senators, 435 representatives, and the White House. Tradeoffs are made within a single legislative provision, sure, but tradeoffs are also made across the various legislative provisions in a single bill. And tradeoffs are also made between this legislative provision and that funding provision, between this provision and that decision to do something or to refrain from doing something else, between this bill and that bill, between this bill and that hearing, and between this bill and that nomination. There are people who feel confident they can pore over the statute or the legislative history and identify the legislative bargain. They may also be confident they can pore over a sonar image from the depths of Loch Ness and identify the plesiosaur. I agree there are dark shapes in the water but that's as far as I will go.

Severability should make sense. I suggest to you that when it comes to severability the wrong questions are being asked and the wrong reasons are being given. Even so, I happily admit that reasonably good results are generally being achieved—yet we can and should do better, because the way severability is being conducted these days, there is an extraordinarily high degree of legal risk. The legal fight over the Affordable Care Act is only the most recent example. Congress passed a huge health care reform law and one page of it—one single sentence of it, actually—may have a constitutional problem and, in the current legal, political, and judicial environment, there is a nonzero possibility that the entire health care reform law, the entire thing, hundreds and hundreds of pages, may be thrown out. Some of the parties have made that

argument and one federal judge, Judge Vinson in Florida, has bought that argument.⁴ If the Supreme Court decides to take its own test for severability literally, there just might be enough Justices to throw out the entire thing. More on that later.

I know there are many of you who really care one way or the other about the health care reform law. Some of you may think it's wonderful policy and some of you may think it's terrible policy. Good for you, all of you. I am not one of you. I really don't care about health care policy, and that is part of the reason why, when I was first asked to speak about this, my instinct was to turn it down. The work that is done in the House and Senate Legislative Counsel Offices is best done by someone who cares little about policy and a lot about rule of law. You work with a wide range of people with a wide range of policy views and your role is to help everyone. People on the Hill have a lot of ideas, but as a legislative counsel, what I cared about was not whether your idea was good or bad, but whether your idea had been fully formed.⁵ If you say you want a chicken in every pot, fine, but how is this going to work? What kind of chicken? What kind of pot? Is it really one chicken per pot, or is it per person or per adult citizen or per household or what? Who is going to deliver them, and when, and how, and where is the money going to come from? Are we going to do this every year, or just this once? And by the way, have you thought about whether this is based on the Commerce Clause or the Spending Clause or what?

I don't care about chicken policy and I don't care about health care policy. But what I do care about is the rule of law. In the severability context, that means letting the policymaking branches do their work, letting the judicial branch do its work, and letting the rest of us go about our business and make our plans with as little legal uncertainty as possible.

The severability environment we have now is nothing like that. The Supreme Court decides what needs to be stricken for constitutional reasons, and then asks what else should be stricken for

4. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1305 (N.D. Fla. 2011) (concluding that the individual mandate cannot be severed, and finding that the individual mandate and the whole Act are "inextricably bound together in purpose and must stand or fall as a single unit").

5. See generally TOBIAS A. DORSEY, *THE LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE* §§ 4.00–4.61 (2006) (discussing the process of thinking through policy).

political reasons. The ordinary rule is that judges do not decide political questions,⁶ and for good reason—judges as individuals are not qualified to do it, and the judicial branch as an institution is not empowered to do it.⁷ But in the severability context this is exactly what judges do. Because they aren't good at it and they shouldn't be doing it, none of us can be certain how they will rule on it. Because of that, no matter what the Court decides, we have already lost. The legal uncertainty has already caused widespread damage, and the Court's reliance on politics is the proximate cause.

What we need to do is bring sense to severability. Let me explain what I have in mind.

As background to all of this, let me tell you the story of Public Law 98-473. On September 17, 1984, the House Appropriations Committee reported out a joint resolution making continuing appropriations for fiscal year 1985.⁸ It provided funding for several federal departments—Agriculture, Interior, Defense, Transportation, Education, Energy, and Health and Human Services—and many other federal agencies.⁹ On September 25, it passed the House, but only after a comprehensive crime bill was tacked onto it.¹⁰ It moved to the Senate, where it was lit up like a Christmas tree, with dozens of amendments that changed the spending, changed the crime package, and added an entirely new title on emergency food assistance programs.¹¹ On October 4, the Senate passed it and sent it back to the House, but the House rejected it.¹² A week later, after a compromise was hammered out by House and Senate negotiators, it passed Congress on October 11 and was signed by the President on October 12.¹³

6. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying six factors to be considered in determining which political questions are nonjusticiable); see also *Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (emphasizing “the need for workable standards and sound judicial and legislative administration” and the need to avoid directing the judiciary “to make predictions or adopt premises that . . . could not [be] assess[ed] with certainty”).

7. See, e.g., *Baker*, 369 U.S. at 210.

8. H.R. REP. NO. 98-1030, at 1 (1984).

9. *Id.* at 2–3.

10. 130 CONG. REC. 26,718, 26,727, 26,731–33 (1984).

11. S. REP. NO. 98-634, at 2–3 (1984).

12. 130 CONG. REC. 29,730, 30,292 (1984).

13. See Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984); see also H.R. CONF. REP. NO. 98-1159, at 1 (1984).

During this time, the government was being funded by a series of continuing resolutions. A continuing resolution funded the government until six o'clock p.m. on October 5.¹⁴ A second continuing resolution, enacted on October 5, funded the government until October 9.¹⁵ The government then went into shutdown overnight. A third continuing resolution enacted the following morning, October 10, funded the government until October 11.¹⁶ The government again went into shutdown. If the President had not signed the final compromise on October 12, the government would have continued in shutdown.

As printed in the *Statutes at Large*, this final compromise takes up 362 pages.¹⁷ Bear in mind that the entire output of the 98th Congress was about 3400 pages, and this was 362. A Congress lasts for two years and this bill, by itself, on a per-page basis, is more than 10% of what it did over those two years. And really this bill contained a larger share of the congressional output than that, because it also enacted another one hundred or more pages of provisions that were not printed in the *Statutes at Large* because they were enacted by reference.¹⁸ All told, the public law enacted perhaps 450 pages of statutory text, representing about 12% or 13% of that Congress's entire two-year output—or about 25% of that Congress's work for that one year, 1984.

The funding part of the Act did many things. It funded most of the government for most of a fiscal year. It funded national parks,

14. A Joint Resolution Making Further Continuing Appropriations for Fiscal Year 1985, H.R.J. Res. 656, 98th Cong., <http://thomas.loc.gov> (follow "Public Laws" hyperlink; then follow "View 100-93" hyperlink; then follow "98" hyperlink; then select "98-451-98-600;" then select H.J.RES.656; then select "CRS Summary" hyperlink).

15. A Joint Resolution Making Further Continuing Appropriations for Fiscal Year 1985, H.R.J. Res. 659, 98th Cong., <http://thomas.loc.gov> (follow "Public Laws" hyperlink; then follow "View 100-93" hyperlink; then follow "98" hyperlink; then select "98-451-98-600;" then select H.J.RES.659; then select "CRS Summary" hyperlink).

16. A Joint Resolution Making Further Continuing Appropriations for Fiscal Year 1985, H.R.J. Res. 659, 98th Cong., <http://thomas.loc.gov> (follow "Public Laws" hyperlink; then follow "View 100-93" hyperlink; then follow "98" hyperlink; then select "98-451-98-600;" then select H.J.RES.663; then select "CRS Summary" hyperlink).

17. See Act of Oct. 12 §§ 101-409, 98 Stat. at 1837-2199.

18. See DORSEY, *supra* note 5, at § 6.19 ("Enactment by reference occurs when a law refers to a document and declares that the document is enacted into law."). For example, all of the agriculture appropriations provisions were contained in a separate bill filed in the House. See Act of Oct. 12 § 101(a), 98 Stat. at 1837. The public law contains a single sentence providing that all of the provisions of that separate bill take effect "as if [that separate bill] had been enacted into law." *Id.* Four of the other appropriations bills were also enacted by reference in this manner. *Id.* §§ 101, 327, 98 Stat. at 1837, 1876. These five appropriations bills are dozens of pages long.

farm programs, health programs, education programs, military construction projects, foreign assistance programs, the District of Columbia, and the entire U.S. military.¹⁹ It also changed a variety of laws to authorize or require various federal agencies to do things they could not or would not otherwise do. For example, the Act made it possible for federal agencies to contract with state and local governments for firefighting services,²⁰ and it required the federal office that keeps statistics on metropolitan areas to stop dividing greater St. Louis into three different areas for statistical purposes and instead combine them into a single metropolitan statistical area.²¹

The crime package in the Act also did many things. It changed bail procedures, changed sentencing procedures, and eliminated parole.²² It made it easier for the government to seize profits from illegal activities.²³ It made it harder to establish an insanity defense, raised penalties for a variety of crimes such as labor racketeering and drug trafficking, and provided more grants to strengthen state and local law enforcement.²⁴

All of this came to pass because of a convergence of interests. Democrats controlled the House but Republicans held the Senate and the White House. The crime package that became law was essentially the Senate's version, which was essentially the President's version.²⁵ The House had a different crime package in mind, but more or less went along with the Senate's crime package because the Senate and the President more or less went along with other provisions the House wanted, and everyone added new spending.²⁶

19. See *id.* § 101, 98 Stat. at 1837, 1844, 1867–77, 1884, 1904.

20. See *id.* § 313, 98 Stat. at 1872–73.

21. *Id.* § 119a, 98 Stat. at 1968.

22. *Id.* §§ 203, 211–12, 229–35, 98 Stat. at 1976, 1987–88, 2031–32.

23. See *id.* § 1963, 98 Stat. at 2040.

24. See *id.* §§ 402, 504, 609M, 801–03, 98 Stat. at 2057, 2070, 2013, 2131–34.

25. See, e.g., Cliff Haas, *U.S. Agencies Temporarily Closed Down: Congress OKs Short-Term Extension After the Flow of Funding Runs Out*, LEXINGTON HERALD-LEADER (Ky.), Oct. 5, 1984, at A1 (“The crime package was approved at 7:30 a.m. Agreement over the bipartisan measure was smoothed after sponsors agreed to add Democratic proposals to Reagan’s anti-crime package, ending a year of partisan debate that was often joined by the president.”).

26. See, e.g., Dan Walters, *Political Games Over Legislation*, SACRAMENTO BEE, Oct. 9, 1984, at A3 (“The Republicans attached long-sought anti-crime legislation, the Democrats sought anti-sex discrimination provisions and legislators of both parties plastered on pork-barrel projects designed to endear them to local voters.”).

The twist in this story is that part of Public Law 98-473 turns out to be unconstitutional. One hundred and fifty-three pages into the Act, deep in the crime package, is a provision that requires a sentencing court to impose a sentence within the Guideline range established by the Sentencing Commission “unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”²⁷ The constitutional problem, in simple terms, is that under the Supreme Court’s Sixth Amendment jurisprudence, the right to a jury trial includes the right to have the jury—not the judge—find any fact that raises the legally authorized penalty. That case was *United States v. Booker*, which was decided in 2005.²⁸ No one was alert to this constitutional defect in 1984, and no one could have been, because the line of cases that developed the Sixth Amendment reasoning that led to *Booker* didn’t really begin until 2000, when the Supreme Court decided *Apprendi v. New Jersey*.²⁹

There were, however, different constitutional arguments being made as early as 1984, and they were focused on the unusual structure and composition of the Sentencing Commission (“Commission”). Among other things, the law required the Commission to include no more than three judges, and the argument was made that judges were constitutionally precluded from serving in such a role.³⁰ In 1989, the Supreme Court rejected these structural challenges in *Mistretta v. United States*.³¹ I’ll end my story there for now, but more on this later.

III. THE “HOUSE OF LORDS VETO”

I want to turn now to the scholarship on severability, and in particular to a very recent article by Dean Tom Campbell in the

27. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1990 (codified at 18 U.S.C. § 3553(b) (2006)).

28. See 543 U.S. 220, 232–37 (2005).

29. See 530 U.S. 466, 476–79, 490 (2000) (Stevens, J., concurring) (finding it “unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed” (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999))) (internal quotation marks omitted).

30. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017 (codified as amended at 28 U.S.C. § 991(a) (2006)).

31. 488 U.S. 361, 397 (1989) (finding that Congress’ decision to have “three federal judges to serve on the Commission and to require those judges to share their authority with nonjudges” does not undermine the federal judiciary).

Hastings Law Journal in July of this year. Dean Campbell calls for the entire abolition of the severability process.³² He argues that whenever a reviewing court holds a provision of an act unconstitutional, it must—always and invariably—strike down the entire act.³³ Striking only part of an act is flawed, he says, for the same reason that the legislative veto and the line-item veto were flawed and held unconstitutional in *Immigration and Naturalization Service v. Chadha* and *Clinton v. City of New York*, respectively.³⁴ When judges take a blue pencil to part of an act, Dean Campbell claims, they create a result that does not comply with the Article I, Section 7 requirement that every act must be passed by the House and Senate and presented to the President.³⁵

I said earlier that the scholarship would take us to some weird places and, respectfully, this is one of them. The issues of the legislative veto in *Chadha* and the line-item veto in *Clinton* are nothing like the judiciary's power to strike part of an act. The problem in those cases was that the political branches agreed in a statute to reimagine their Article I, Section 7 relationship and re-allocate their Article I, Section 7 lawmaking roles, allowing them to bypass the Presentment Clause. The Court held in *Chadha* that a statute cannot transfer lawmaking power to Congress alone, or to a single chamber or committee of Congress alone, because that violates the Presentment Clause.³⁶ Similarly, the Court held in *Clinton* that a statute cannot transfer lawmaking power to the President alone because that, too, violates the Presentment Clause.³⁷ In short, the legislature and the executive cannot collude to aggrandize one at the expense of the oth-

32. Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1497 (2011).

33. *Id.* at 1496–97.

34. *Id.* at 1498–99 524 U.S. 417, 420–21 (1998)); (citing 462 U.S. 919, 959 (1983)).

35. Campbell, *supra* note 32, at 1498–1500 & n.7 (citing *Clinton*, 524 U.S. at 448–49).

36. 462 U.S. at 954–55. The Court stated:

[T]he carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentation to the President The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority.

Id. at 958 & n.23.

37. 524 U.S. at 445–46 (“Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.”).

er. These cases are about the legislative and executive branches and how the Article I, Section 7 powers are allocated between them. They say nothing about the judicial branch and how the judiciary's Article III powers operate on statutes that were enacted in full compliance with the Presentment Clause.

Dean Campbell says we should reject the judicial blue pencil because it looks suspiciously like a line-item veto.³⁸ But with all due respect, what he proposes—that the judiciary always strike down the entire act whenever it finds any flaw in any part of it—looks a lot like the presidential veto power. If five Justices don't like a particular act, they can just cite some flaw—real or imagined, facial or as-applied—and strike the whole big thing. Five Justices don't like health care reform? Bazinga.

But Dean Campbell's judicial veto is a lot better than the executive's version. First, the President has to use his veto power within ten days,³⁹ but Dean Campbell's judicial veto can be exercised whenever the judges get around to it. They can do it this Term, next Term, next presidential administration, next century, any time you have an adequate number of like-minded judges. There are a lot of sleeper statutes out there that have a possible flaw somewhere within them. I am pretty sure the Sentencing Reform Act has at least one other constitutional flaw in it that has never yet been raised, and probably won't ever be raised—but it's there, like one of those springing executory interests in property law, waiting to bring down all of Public Law 98-473.⁴⁰

Second, the President's power can be overridden by a supermajority in Congress,⁴¹ but Dean Campbell's judicial veto would be absolute—infallible because it is final.⁴²

If a judiciary held this sort of power, it would not be a Supreme Court; it would be a House of Lords. Surely this is not what the Framers had in mind. When Chief Justice Marshall wrote *Mar-*

38. Campbell, *supra* note 32, at 1498–99.

39. U.S. CONST. art. I, § 7, cl. 2.

40. Sentencing Reform Act of 1984 § 211, 98 Stat. at 1987 (codified as amended at 18 U.S.C. § 3551 (2006)).

41. U.S. CONST. art. I, § 7, cl. 2.

42. "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1952) (Jackson, J., concurring).

bury v. Madison, he struck only one section of the Judiciary Act of 1789.⁴³

And then there are the practical issues with this “House of Lords veto.” Let’s imagine what would have happened if there were a House of Lords veto in 1984 and challenges to the Sentencing Reform Act were upheld on a fast track, in the spring of 1985. Poof! Public Law 98-473, all of it, falls by judicial veto. All the appropriations are invalid; the government must immediately shut down. Parole is resurrected. Criminal penalties are lowered. Assets seized must be returned. Contracts for firefighting services are void. For statistical purposes St. Louis, like Gaul, is divided into three parts.

Now let’s forget 1984 and fast-forward to 2005, when *Booker* was decided. Again, poof! The entire 1984 law is stricken by a House of Lords veto. All those 1984 appropriations that kept the government running—unconstitutional. What is the effect now of all those illegal 1984 appropriations? I don’t think anyone knows. Every bail decision, every sentence, every denial of parole, every seizure of assets for the previous twenty-one years—illegal. All those firefighting contracts, twenty-one years’ worth—invalid.

We also have to keep in mind that many of those 1984 provisions have been amended and re-amended over the years, some by very small, narrow acts, and some by very large omnibus ones. What happens to all the hundreds or thousands of pages of all of those laws that came after? It would seem as though all of Congress’s attempts to amend the 1984 provisions must fail, because in retrospect they cannot be executed properly—there is no 1984 text to amend, not anymore. So if a bail statute was created in 1984 and amended in 2002 and then falls in *Booker* to a House of Lords veto in 2005, not only does the entire 1984 law fall, but the 2002 bail amendment also falls.⁴⁴

43. See 5 U.S. (1 Cranch) 137, 176 (1803) (“The authority . . . given to the [S]upreme [C]ourt, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the [C]onstitution . . .”).

44. And what about the rest of the big 2002 law that contained the 2002 bail amendment as one tiny piece? We have a chain reaction. Remember, the logic behind the House of Lords veto is that if the Court strikes only part of a statute, it is leaving something in place that doesn’t comply with Article I, Section 7. So, if a piece of the 1984 law must be stricken, the entire 1984 law must be stricken. But by the very same logic, if striking the entire 1984 law has the effect of voiding a piece of a 2002 law, mustn’t we strike the entire

This is not an imaginary problem. In 2005, when the Court decided *Booker*, it was ruling on a provision, § 3553(b), with a complicated pedigree. Section 3553(b) was created in 1984 when Congress inserted its text into the 1948 criminal code.⁴⁵ The language of § 3553(b) was then amended twice more, first in 1987,⁴⁶ and again in 2003.⁴⁷ The provision that *Booker* held unconstitutional was a splicing of words from 1984, 1987, and 2003. It was a sentence placed into a 1948 act, as amended by acts in 1984, 1987, and 2003.⁴⁸ All four of these acts were big acts covering lots of things. If *Booker* holds that sentence is unconstitutional and the House of Lords veto is the law of the land, don't all four of these acts fall, in their entirety? Or at least the last three?

What does the President do in a world with the House of Lords veto? If the President believes there is a constitutional problem with one sentence in a hundred-page law, does he ignore the whole act? It's actually not that hard to find a real or at least arguable constitutional problem in a big act. Presidents flag constitutional issues in acts all the time. In recent years there has been a lot of attention paid to presidential signing statements, which Presidents use to signal their constitutional objections to parts of a bill.⁴⁹

I mentioned earlier that I can think of another defect in the Sentencing Reform Act, one that has never yet been raised. But to give a concrete example, one issue that Presidents like to raise is the Recommendations Clause.⁵⁰ Article II, Section 3 of the Consti-

2002 law also? Once you begin ripping pages out of the statute book the logic is going to make you keep on ripping and ripping.

45. Sentencing Reform Act of 1984 §§ 211–12, 98 Stat. at 1984–90 (codified as amended at 18 U.S.C. § 3553 (2006)).

46. Sentencing Act of 1987, Pub. L. No. 100-182, §§ 3(1)–(3), 16(a), 101 Stat. 1266, 1266, 1269 (codified as amended at 18 U.S.C. § 3553(b) (2006)).

47. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(a), 117 Stat. 650, 667–68 (codified as amended at 18 U.S.C. § 3553(b) (2006 & Supp. IV 2010)).

48. See *United States v. Booker*, 543 U.S. 220, 243–46 (2005); see also *supra* notes 44–45 and accompanying text.

49. See, e.g., Todd Garvey, *Presidential Signing Statements: Constitutional and Institutional Implications*, CONG. RESEARCH SERV. (Jan. 4, 2012); Laura McDonald, *The Interpretive Worth of Presidential Signing Statements: A New Form of Legislative History*, 38 FLA. ST. U. L. REV. 179 (2010).

50. *Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 18 (2007) (prepared statement of John P. Ellwood, Deputy Assistant Att'y

tution says that the President shall, from time to time, recommend to Congress “such Measures as he shall judge necessary and expedient.”⁵¹ According to many White Houses over the years, the best reading of the Recommendations Clause is not that it creates a presidential duty, but rather that it creates an exclusive presidential prerogative.⁵² Under this reading, no one else in the executive branch can be required to give Congress a legislative proposal. Even so, Congress sometimes passes laws that require a federal official to make a legislative proposal to Congress.⁵³ Whenever they do, the White House takes notice and typically issues a signing statement pointing out that the law doesn’t comply with the White House’s view of the Recommendations Clause.⁵⁴ But in a world with a House of Lords veto, if the President identified what he thought was a Recommendations Clause problem in one part of an act, it would seem the President would be obligated to ignore the entire act.

And apart from the President, what do the rest of us do in a world with a House of Lords veto? If it’s 2011 and my assets are being seized under the 1984 law, I suppose I should be able to challenge that by attacking any provision of the 1984 law that seems vulnerable. You want to seize my assets? Nice try, I will argue, the asset seizure provision on page 565 is invalid because this other provision on page 232 requires the Secretary of the Interior to make a legislative proposal.

None of this makes any sense. I did warn you that the scholarship would take us to weird places. The House of Lords veto is a weird place. Let’s not go there.

IV. WHAT THE JUDICIARY’S “BLUE-PENCIL” POWER IS, AND IS NOT

At the root of the problems with the cases and scholarship is that there are a variety of rather curious views about what the

Gen., Office of Legal Counsel, United States Department of Justice) [hereinafter *Hearing on Presidential Signing Statements*].

51. U.S. CONST. art. II, § 3.

52. *Hearing on Presidential Signing Statements*, *supra* note 50, at 18 (citing U.S. CONST. art. II, § 3).

53. *See, e.g., id.* at 19 (citing *Statement on Signing the Balanced Budget Act of 1997*, 2 PUB. PAPERS OF WILLIAM J. CLINTON 1053, 1054 (1997)).

54. *Id.* at 18 (stating that President Bush raised a Recommendations Clause concern in 67 of his 126 signing statements and his statements on this point “are indistinguishable from President Clinton’s”).

judiciary's "blue-pencil" power is like. This is a bit like the blind men trying to decide whether the elephant is more like a tree trunk or more like a rope. Dean Campbell argues that the severability power is like a statute that creates a legislative veto and thus should be entirely disallowed.⁵⁵ Others have argued that severability analysis is like statutory construction and thus should be based on legislative intent.⁵⁶ Still others have argued that severability in statutes is like severability in contracts and thus should give effect to the underlying bargain struck by the parties involved.⁵⁷ None of this makes any sense. Severability is not like a committee rejecting a regulation, it is not like reading the words of a statute, and it is not like a contractual dispute. The elephant in the room here is not any of these mundane things. We are not talking about political science class here, or about statutory interpretation or about contracts. We are talking about constitutional law. We are talking about Article III judicial power.

Whatever the rule on the judiciary's blue-pencil power should be, it should be broadly consistent with our other rules on other aspects of judicial power. Judicial power is what severability analysis is "like." The blue-pencil power is like jurisdiction and standing and the case and controversy requirement and the political question doctrine and notions of judicial restraint. The House of Lords veto is not "like" any of these things. Unfortunately, the Court's existing rules about severability are not "like" any of these things either.

Strict scrutiny is not a test we usually use for inter-branch relations, but it is a familiar test and it may be useful and sensible to try applying it here. As every law student knows, strict scrutiny is applied when a law or policy infringes on a fundamental constitutional right.⁵⁸ To pass strict scrutiny, the law or policy must satisfy three tests. First, it must be justified by a "compel-

55. Campbell, *supra* note 32, at 1496–97.

56. See, e.g., David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 642 & n.15 (2008) (providing articles and cases arguing that severability is a question of statutory interpretation).

57. See, e.g., Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 58–71 (1995).

58. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155–56 (1973) (citing *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

ling [government] interest.”⁵⁹ Second, it must be narrowly tailored to achieve the compelling government interest.⁶⁰ And third, it must be the least restrictive means of achieving that interest.⁶¹

As for the first step, while the political branches have a fundamental right to make statutes, *Marbury v. Madison* more or less established that there is a compelling government interest in having judicial remedies for the situation in which a statute violates the Constitution.⁶² So, we move to steps two and three and the issue becomes: What judicial remedy is narrowly tailored to achieve that interest and is also the least restrictive means of achieving that interest?

I suggest that a policy favoring severability is narrowly tailored, especially when the Court resorts to the blue pencil only as a last resort, after it is unable to find a reading that avoids the constitutional problem. In fact, I would argue that the most narrowly tailored policy is when severability is not just presumed, but is always the rule. The measure of what to do when there is a problem with a statute should never be so open-ended as “we’ll get rid of the problem and then we’ll also get rid of whatever else we think may have been politically linked to this.” That way leads to chaos. I say get rid of the problem and stop there. That way leads to law.

The rule I am proposing here is the polar opposite of the House of Lords veto. Dean Campbell argued that severability is never appropriate,⁶³ and I argue that severability is always appropriate. To be sure, there are other positions in the middle ground. For example, some have argued for a presumption of severability, and

59. *Id.* at 155 (quoting *Kramer*, 395 U.S. at 627; *Shapiro*, 394 U.S. at 634; *Sherbert*, 374 U.S. at 406).

60. *Id.* at 155–56 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 463–64 (1971)); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Sec’y of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307–08 (1940) (White, J., concurring).

61. *Id.* (citing 381 U.S. at 485; 378 U.S. at 508; 310 U.S. at 307–08; 405 U.S. at 463–64 (White, J., concurring)).

62. See 5 U.S. (1 Cranch) 137, 178 (1803). Chief Justice Marshall opines:

So if a law be in opposition to the [C]onstitution; if both the law and the constitution apply to a particular case, so that the [C]ourt must either decide that case conformably to the law, disregarding the [C]onstitution; or conformably to the [C]onstitution, disregarding the law; the [C]ourt must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id.

63. Campbell, *supra* note 32.

others have argued for a presumption of nonseverability. A presumption in one direction or the other is not a narrowly tailored policy. It is an invitation to bring in all sorts of factors that are not directly relevant to the separation-of-powers issue, which is how to cleanly draw the line separating the right of the political branches to make statutes from the duty of the judicial branch to call foul.

In particular, the various middle-ground positions all require the Court to somehow determine the legislative intent or the political bargain. I have serious doubts as to whether it is even feasible, much less proper, for courts to analyze the politics of the day (or the politics of an earlier generation). But setting those doubts aside, the question still arises: Why should the politics of the day or the politics of an earlier generation have any bearing on how the Court carries out its constitutional obligations? A statute was enacted or it wasn't. A provision is constitutional or it isn't. The Constitution requires that it be stricken or it doesn't. These are constitutional judgments. They should not depend on how the political winds are blowing now; or how they were blowing in 1984; or how they were blowing in 1948, plus 1984, plus 1987, plus 2003.

As for severability clauses, or nonseverability clauses, this is where Dean Campbell's analogy actually makes very good sense to me. A statute cannot create a legislative veto or a line-item veto, so I don't see how a statutory provision—for example, a provision providing that if one part of this act is unconstitutional, the entire act must fall—can create a House of Lords veto. Therefore, a nonseverability clause is a nullity that cannot be enforced.⁶⁴ And conversely, a severability clause is a redundancy.

64. That is not to say that Congress cannot tie the fate of several provisions together, but the other provisions must be handed their fate by Congress, rather than by the Court. The distinction I am trying to draw is between what I would call a sunset clause (e.g., stating that "if provision *A* is held unconstitutional, then provisions *B* and *C* shall have no further force or effect") and a nonseverability clause (e.g., stating that "if provision *A* is held unconstitutional, then provisions *B* and *C* shall be deemed inseverable"). The sunset clause is a legitimate exercise of legislative power, while the nonseverability clause is, in my view, an unconstitutional legislative attempt to direct judicial power. This may seem to be a distinction without a practical difference, and the term "nonseverability clause" has certainly been applied to sunset clauses. But one practical difference is that the sunset clause stops *B* and *C* from operating in the future, while the nonseverability clause purports to render *B* and *C* retrospectively void.

As for honoring the underlying legislative bargain, nonsense. Lawmakers have access to counsel. They can determine where the legal risks are, and bargain accordingly. If they bargain for a provision that turns out to be unconstitutional, so be it; they assumed the risk. And that holds true not only for the individual lawmaker but also for the lawmaking institutions. If the political branches bargain with each other to create a legal regime that has a constitutional defect, equity is not on their side. The idea that the Court should play at politics and honor the underlying political bargain is nonsense. The Court's job is to preserve what it can of the law, not to preserve what it can of the political bargain.

The purpose of Congress is not to serve as a colosseum for cultural war or ideological sport. There's nothing wrong with taking sides and sparring or cheering. But that is not the purpose. The purpose of Congress is to establish national laws and policies that respond to the issues of the day. The political dramas and personal intrigues are just a side effect, which you can relish or tolerate according to your taste. What matters is what was written, presented, and signed, not all the sound and fury before. When our judiciary believes the sound and fury is not only relevant to, but the guiding reason for, how it exercises its Article III powers, we have followed the zigzag trail to a weird place. Yet here we are.

There are people who object to legislative history, and I am one of them. But this takes legislative history to another level. It's one thing to *consider information* about what lawmakers *intended* when deciding how to *read* a provision that is fully constitutional, and quite another to *rely on speculation* about what lawmakers *would have intended* when deciding whether to *strike* a provision that is fully constitutional. I am happy to speculate about how the House and Senate would have voted on a bill if provision Y were not part of it. But I am happy to speculate about many things.⁶⁵ Political speculation is well tailored for a parlor

65. For example, I am also happy to speculate about what would have happened in Middle-Earth if destroying the One Ring—the receptacle of much of the Dark Lord's power—didn't actually destroy the Dark Lord, but simply returned its power to the Dark Lord, making him even stronger. See J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* 280–83 (2d ed. 1965); J.R.R. TOLKIEN, *THE RETURN OF THE KING* 276 (2d ed. 1965). Unfortunately for the Dark Lord, his power turned out to be nonseverable.

game or an Internet chat room. It is poorly tailored for constitutional decisions.

This brings me to the third test, for least restrictive means. In the context of severability, I suggest that the least restrictive means of dealing with a constitutional problem is to identify, with great care, the precise clause that brings about the problem and then blue pencil that precise clause, leaving the rest of the law intact. When there is more than one way to do this, the Court should choose the approach that does the least damage to the institutions and activities contemplated by the law. This is a purely functional test that aims to preserve as much of the law's practical functionality as possible. Leaving the institutions and activities as intact as possible is the approach that least restricts the ability of the political branches to choose whether and how to follow up. Broadening the blue pencil—striking any other parts of the law beyond the minimum necessary to remedy the constitutional problem—restricts the ability of the political branches to set their own agendas. It foists problems back onto them, possibly in a catastrophic manner, and forces them to spend time and resources on issues already solved. The solution may no longer be optimal, from a political or policy point of view, but the judiciary is not the branch to make that choice.

Leaving the institutions and activities as intact as possible gives the political branches the greatest freedom in deciding whether a follow-up is necessary and what form a follow-up should take. The political branches have many ways to control or influence institutions and activities. Making further changes to the law is the most formal means, but there are plenty of other means. The President can decline to nominate; the Senate can decline to confirm. Appropriations can be reduced or zeroed out or can simply be left unspent. And, of course, there is a full range of informal, back-channel influence.⁶⁶

66. See generally *Immigration & Naturalization Servs. v. Chadha*, 462 U.S. 919, 955 n.19 (1983). The Court noted that

[t]he Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power.

Id.

To be sure, once the Court has done the deed of striking the constitutionally flawed provision, there may be some housekeeping yet to do. But once the original constitutional problem has been stricken, we are no longer in the realm of that original constitutional doctrine, but in the realm of rational basis. There may yet be some ancillary provisions that are no longer rationally related to the purposes of the surviving act. In many cases, those ancillary provisions simply will not operate by their own terms and can be ignored, but in other cases they may need to be stricken to keep them from operating in wholly irrational or absurd ways. The housekeeping can be done as part of the main “blue-pencil” decision, as the Supreme Court did in *Booker*, but these ancillary issues ordinarily should be left for later.⁶⁷

But in any case, the test should be whether they can still serve a rational purpose in the absence of the stricken provision. The test should not be whether they were part of some underlying political deal. Nor should the test be what alternative policy the legislature would have preferred.

Having said all that, it should always be kept in mind that, for all this talk about blue-pencil power, the Court does not actually strike anything. The talk is colorful, but it is not true. The statute books are not changed. To say that a provision is stricken is a legal fiction, a euphemism for saying that the provision is unenforceable. I point this out because the talk of blue-pencil power carries with it some unfortunate baggage. For one thing, it contributes to perceptions like Dean Campbell’s—that judicial striking is like the legislative veto or the line-item veto.

But more important, it prevents us from seeing the full range of options that the Court can consider. For example, there seems to be an assumption that the Court must strike an entire provision, such as § 43(f)(3) or § 3553(b), rather than a single sentence

67. For example, when the Supreme Court, in *United States v. Booker*, held that § 3553(b) was unconstitutional, it additionally held that an appellate review provision at § 3742(e) also needed to be stricken because it “depends upon the Guidelines’ mandatory nature.” 546 U.S. 220, 245–46 (2005). The Court has since done further housekeeping to clarify which other provisions might also need to be excised in light of *Booker*. For example, the Court held in *Dillon* that a mandatory provision in § 3582(c)(2) did not need to be excised in light of *Booker*, but held in *Pepper* that a different provision at § 3742(g)(2) did need to be excised in light of *Booker*. *Pepper v. United States*, 562 U.S. ___, ___, 131 S. Ct. 1229, 1244 (2011); *Dillon v. United States*, 560 U.S. ___, ___, 130 S. Ct. 2683, 2694 (2010). Note that in these cases the Court applied a purely functional test, not any sort of political preference test.

within a group of sentences. And there may also be an assumption that the Court must strike an entire sentence and cannot, for example, strike a sentence fragment or a single word. Striking a sentence fragment may not seem intellectually honest.

When we remember that the Court is not actually striking anything, but rather is holding something unenforceable, this issue disappears. Congress frequently combines several legal rules into a single sentence or combines several sentences into a single designated provision. There is no legal or practical reason why the Court, in exercising its Article III powers, should be rendered powerless to rule with precision simply because Congress wrote a compound sentence rather than two simple ones, or placed several sentences in a single provision.⁶⁸ The Court should be able to target its ruling as narrowly as possible, and should take care to describe its ruling accordingly.

V. RECENT SEVERABILITY DECISIONS

A thorough history of severability doctrine is beyond the scope of these remarks. Let it suffice to say that the general rule at the Supreme Court has almost always been that the unconstitutional parts of a statute are ordinarily severable from the constitutional ones. There was a short period at the Court when there was a

68. I am not suggesting that the Court should engage in grammatically dishonest practices, such as striking the word “not” in a statute to reverse its meaning, or striking the end of one sentence and the beginning of another to create a Frankenstein’s monster of a provision. I am simply pointing out that when a sentence can logically be divided into separate policy pieces, the fact that Congress did not officially designate the metes and bounds of each piece should not make a constitutional difference. To put it another way, if there were a constitutional problem with saying “health insurance” in a sentence like, “Whoever buys car insurance, health insurance, or life insurance shall pay a penalty,” the sentence is functionally equivalent to, “Whoever buys (1) car insurance, (2) health insurance, or (3) life insurance shall pay a penalty,” and striking clause (2) would be narrower than striking the entire sentence. Holding part of a sentence constitutional and the remainder unconstitutional is an option that Justices have considered in other circumstances. For example, several Justices have expressed the view that a sentence fragment in § 924(e)(2)(B)(ii)—defining “violent felony” to mean, among other things, any crime that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another”—is unconstitutionally vague. *See, e.g.,* *Derby v. United States*, ___ U.S. ___, ___, 131 S. Ct. 2858, 2860 (2011) (Scalia, J., dissenting) (“I would grant certiorari [and] declare ACCA’s residual provision [§ 924(e)(2)(B)(ii)] to be unconstitutionally vague. . . .”); *James v. United States*, 550 U.S. 192, 196, 230–31 (2007) (Scalia, J., dissenting) (quoting Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii) (2006)).

presumption against severability, but that presumption had a short career.⁶⁹

The modern Court uses a presumption of severability.⁷⁰ What this means in practical terms is that the Court strikes the language that is problematic and then uses a political preference test (i.e., political speculation) to decide what else to strike.

A. *Alaska Airlines, Inc. v. Brock*

This modern rule was articulated in *Alaska Airlines, Inc. v. Brock*, although it had its origins in earlier cases.⁷¹ The Court's decision was unanimous and held that "[t]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."⁷² To do this, the Court must decide "whether the statute will function in a *manner* consistent with the intent of Congress" and must "evaluate the importance of the [provision] in the original legislative bargain."⁷³

The *Alaska Airlines* case involved a legislative veto. Ultimately, the Court found that the legislative veto provision was severable because there was "abundant indication of a clear congressional intent of severability both in the language and structure of the Act and in its legislative history."⁷⁴

It should be noted that the public law at issue in *Alaska Airlines* was Public Law 95-504, the Airline Deregulation Act of 1978, which contained many provisions.⁷⁵ The Court held that § 43(f)(3) was unconstitutional, and the question considered by the Court was whether the rest of § 43 could survive.⁷⁶ No one involved in the case—no party, no Justice—entertained the idea

69. See Campbell, *supra* note 32, at 1510 (stating that the Court endorsed presumption against severability from 1936 to 1968); see also *United States v. Jackson*, 390 U.S. 570, 585 & n.27 (1968) (ending the presumption against severability); *R.C. Tway Coal Co. v. Glenn*, 298 U.S. 238, 312 (1936) (adopting a presumption against severability).

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

71. See, e.g., *id.* at 684–85.

72. *Id.* at 685.

73. *Id.* at 685.

74. *Id.* at 687.

75. *Id.* at 680 (citing Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705–54 (codified as amended at 49 U.S.C. § 1301 (2006))).

76. *Id.* at 683–85.

that the defect in § 43(f)(3) would cause *the entire 1978 Act* to fall. There seems to have been a universal assumption that the rest of the Act would survive.

I suggest that everyone involved was implicitly applying a functional test here. Everyone understood that the institutions and activities contemplated by the Act would be left as intact as possible, so everything outside of § 43 was automatically left intact, and the focus was on § 43 alone. In short, the severability question first was silently decided on an Act-wide basis by employing a functional test, and then was openly litigated within a single provision based on a political preference test. Having two different tests makes no sense, but that seems to be what a unanimous Court did.

What the Court ultimately did in *Alaska Airlines* was to sever only the legislative veto because it determined that Congress would have intended that result.⁷⁷ It did this by looking specifically at the evidence of legislative intent behind § 43, and the extent to which the legislative veto was part of the political bargain behind § 43.⁷⁸ Setting aside the other challenges that apply when a court engages in political analysis, the Court's assumption that § 43 was a legal and political island—a full-fledged act in miniature, with its very own legislative intent and political bargain—is simply not the way sausages are made. So while I have no quarrel with the outcome, I reject the political preference test. It would have been better if the Court had simply used the functional test not only on the big scale but also on the small scale. It should not have forayed into politics to defend its decision to strike narrowly.

B. *United States v. Booker*

Now let's turn to *Booker*.⁷⁹ We went over the story of Public Law 98-473 earlier.⁸⁰ In 1984, one page of this 362-page Act created § 3553(b). That provision required a sentencing court to impose a sentence within the guideline range “unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Com-

77. *Id.* at 697.

78. *Id.* at 685–87.

79. *United States v. Booker*, 543 U.S. 220 (2005).

80. *See supra* text accompanying notes 9–16.

mission in formulating the guidelines.”⁸¹ A 1987 Act tinkered with this wording,⁸² and a 2003 Act further revised this wording, making it even more difficult for a court to impose a sentence outside the Guideline range.⁸³

The *Booker* Court was divided, with one 5-4 majority finding § 3553(b) unconstitutional (the “merits opinion”) and a separate 5-4 majority deciding that it was severable (the “remedial opinion”).⁸⁴ Justice Breyer wrote the remedial opinion. Applying the *Alaska Airlines* test, he looked to legislative intent, sought to determine what Congress would have intended, and ultimately concluded that “some severance and excision are necessary.”⁸⁵

As in *Alaska Airlines*, no one involved in the case—no party, no Justice—entertained the idea that the defect in § 3553(b) would cause *the entire 1984 public law* to fall. There seems to have been a universal assumption that the rest of the public law—all the other parts of the crime package, all of the appropriations, all the other provisions like the firefighting contracts and the single unified St. Louis—would survive. Even within the sentencing reform part of the Act, there seems to have been a universal assumption that all or nearly all of those provisions would survive.

Once again, I suggest that everyone was implicitly applying a functional test here. Everyone understood that the institutions and activities contemplated by the 1984 Act—all of the appropriations, all of the crime package—should be left as intact as possible. Not even the dissenters argued that more of the statute should be severed. They argued instead that the solution most faithful to the legislative bargaining in 1984 was not to strike § 3553(b) at all, but instead to read into it the word “jury” wherever it said “court.”⁸⁶

So as in *Alaska Airlines*, the decision about what to strike was first silently decided on an Act-wide basis based on a functional

81. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1987, 1990 (codified as amended at 18 U.S.C. § 3553(b) (2006)).

82. Sentencing Act of 1987, Pub. L. No. 100-182, §§ 3, 16(a), 17, 101 Stat. 1266, 1266, 1269-70 (codified as amended at 18 U.S.C. § 3553(b) (2006)).

83. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667-73 (codified as amended at 28 U.S.C. § 994 (2006)).

84. See 543 U.S. at 244-46.

85. *Id.* at 246, 48.

86. *Id.* at 286-87 (Stevens, J., dissenting).

test and then analyzed more narrowly based on a political preference test. The Court split 5-4 over how to apply the political preference test, but no one took issue with the implicit functional test.⁸⁷

Both the remedial opinion and the dissenters discuss the sentencing provisions as if they were a legal and political island. No mention is made of the fact that the sentencing provisions were bundled into the crime package or that the crime package was further tied to the appropriations needed to keep the government running. And, bearing in mind that § 3553(b) was enacted in 1984, amended in 1987, and amended again in 2003, the 1987 Act is completely ignored. As for the 2003 Act, the remedial opinion readily conceded that “the reasons for these revisions . . . [were] to make Guidelines sentencing even more mandatory than it had been” but summarily dismissed them as having “ceased to be relevant.”⁸⁸ If political preference is to be used, why the politics of 1984 rather than the politics of 1987 or 2003? No answer is given. If a political preference test is to be used, much more should have been said about the 1984 political environment and the 2003 legislative preference, and I’m not at all sure the political preference test should have come out the way it did.

And if a political preference test is to be used, *Alaska Airlines* by its terms required the Court to decide whether Congress would have enacted Public Law 98-473 *as a whole* if it knew § 3553(b) was unenforceable—whether “the statute created in its absence is legislation that Congress would not have enacted.”⁸⁹ Given the story I related earlier, I think the answer is unknowable, and the Court did not attempt to give an answer. Instead, what the Court chose to decide was an artificially narrow question—whether Congress would have enacted the Sentencing Reform Act, standing alone, if it knew § 3553(b) was unenforceable.⁹⁰ The Court split 5-4 on this question.⁹¹ The answer to this one is also unknowable, and even seeking an answer to this is absurd, for two reasons.

87. See generally *id.* at 245–46 (majority opinion).

88. *Id.* at 261.

89. See 480 U.S. 678, 680, 684–85 (1987).

90. *Booker*, 543 U.S. at 245–46 (citing *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality opinion)).

91. *Id.* at 244–46, 272.

First, as a general matter, it is very difficult in any political environment to say exactly where the votes are when there are a variety of policy choices in play. No one knows how members of Congress will vote until they actually vote. That is why it is not all that uncommon for the leadership to bring an issue to a vote and yet unexpectedly lose. And any given vote may also involve a voting paradox, such as when a majority prefers policy *A* to policy *B*, and prefers policy *B* to policy *C*, but—paradoxically—prefers policy *C* to policy *A*, or when a majority prefers policy *A* to policy *B* when those are the only two options, but paradoxically prefers policy *B* to policy *A* when a third choice (policy *C*) is also available.⁹²

Second, generalities and voting paradoxes aside, if we can say nothing else with certainty about the Sentencing Reform Act, what we can say with certainty is that Congress would not have passed a *fully constitutional* Sentencing Reform Act, standing alone. We can say this with certainty because Congress was given exactly that choice and decided against it.⁹³ There simply weren't enough votes in the House to pass the Sentencing Reform Act, alone or as part of the Senate's crime package, until it was sweetened with spending the House wanted. This is fine; this is how laws are made.

But since it is clear that Congress preferred not to pass a *fully constitutional* Sentencing Reform Act by itself, and preferred not to pass a *fully constitutional* crime package by itself, how is it reasonable to frame the question as whether Congress would have preferred to pass a *blue penciled* Sentencing Reform Act, by

92. See generally LEO KATZ, *WHY THE LAW IS SO PERVERSE* (2011); Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259 (1999); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971 (1989)).

93. The Sentencing Reform Act, as a standalone bill, passed the Senate on February 2, 1984, as S. 668. S. Res. 668, 98th Cong., 130 CONG. REC. 1649 (1984). It went to the House and died. THE LIBRARY OF CONGRESS, BILL SUMMARY & STATUS, 98th Cong., S. Res. 668 (1984), <http://thomas.loc.gov/cgi-bin/LegislativeData.php> (select Congress "111" and enter search "Sentencing Reform Act;" select "S. Res. 668"). That same day, the Senate also sent the House another option, which was a bill that contained the Senate's crime package, with the Sentencing Reform Act included, as S. 1762. S. Res. 1762, 98th Cong., 130 CONG. REC. 1560 (1984). Both of these bills went to the House and died there. THE LIBRARY OF CONGRESS, BILL SUMMARY & STATUS, 98th Cong., S. Res. 1762 (1984), <http://thomas.loc.gov/cgi-bin/LegislativeData.php> (select Congress "111" and enter search "Sentencing Reform Act;" select "S. Res. 1762"). The House did not want either of these bills, standing alone. The House accepted them only when they were packaged with the appropriations bill. H.R.J. Res. 648, 98th Cong. (1984) (enacted).

itself—and conclude that Congress would have? Yet that it how all nine Justices—the majority and the dissent—framed the question.

Again, I reject the foray into analyzing political bargains and speculating about legislative preferences in a counterfactual environment. And I am not sure that *Booker* struck as narrowly as it could have. The Court didn't discuss how it narrowed the scope to just § 3553(b), but the thinking was likely along functionalist lines. The constitutional problem does not occur when the Guidelines are made by the Commission or when they are calculated and consulted by the sentencing court, but finally occurs when the court is required by § 3553(b) to apply the Guidelines, when facts in the guideline calculation were not found by the jury or admitted by the defendant. Severing § 3553(b) leaves all the institutions and activities contemplated by the Act in place, and simply requires the sentencing court in each sentencing to take one further step after calculating and consulting the guideline range.

In my view, the Court should have considered a different remedy than striking § 3553(b). The Court should have considered simply changing the force of § 3553(b)'s requirement that the sentencing court "shall impose" a guideline sentence unless an unusual factor was present. The word "shall" is usually mandatory, but there have been many cases where a statutory "shall" has been held to be directory or precatory or hortatory rather than mandatory.⁹⁴ The Court could have done that here. Essentially, the word "shall" is treated as if it had more or less the same meaning as "should." It becomes a congressional encouragement rather than a congressional command. This would have created a result very like what *Booker's* remedial opinion actually did, in that it would also have made the Guidelines advisory rather than mandatory, but it would have left the Guidelines with more weight—intangibly more weight, perhaps negligibly more weight,

94. See, e.g., *Rosado v. Wyman*, 397 U.S. 397, 413 (1970) ("Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions."). A precatory command is not legally binding or enforceable, but it does declare a moral or political standard. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 13, 18 (1981) (statement that federal and state governments "have an obligation" to act was precatory); *DORSEY*, *supra* note 5, at § 4.47 (discussing the differences among hortatory, precatory, and directory commands).

but more weight nonetheless.⁹⁵ And under this approach it may not have been necessary to strike the appellate review provision. This should have been an option on the table.

As it stands, the Court struck—or gave the appearance of striking—more of the statute than it needed to strike. Section 3553(b) contained many sentences, only one of which was constitutionally problematic, yet the Court seemed to indicate that it was striking all of § 3553(b).⁹⁶ This has put a cloud of uncertainty over other parts of § 3553(b).⁹⁷ The Court should have said with greater clarity precisely what was being stricken.

C. Free Enterprise Fund v. Public Company Accounting Oversight Board

The final case I'd like to discuss is the Court's recent opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.⁹⁸ This time the public law in question was the Sarbanes-Oxley Act of 2002, Public Law 107-204, another very big act with a great many provisions. The Court reached a 5-4 decision on the constitutional question, holding that the members of an executive branch board were protected from being removed by the President to such a degree that there was a separation-of-powers viola-

95. It would also be consistent with section 239 of the Sentencing Reform Act, which placed federal sentencing under a precatory regime for the two-year period before the Guidelines took effect. Section 239 declared that it was the "sense of the Senate" that federal judges, in determining the particular sentence to be imposed, consider three specified factors. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 239, 98 Stat. 2039, 2039-40 (codified at 18 U.S.C. § 3551 (2006)); see also *United States v. Glantz*, 884 F.2d 1483, 1488 (1st Cir. 1989) (holding that section 239 "is precatory in nature"); *Barr-Hairston v. United States*, No. 7:06CV00589, 2007 WL 1574525, at *2-5 (W.D. Va. May 29, 2007) (noting section 239 only indicates that the court "should" have considered the factors and that failure to consider factors was not error).

96. *Booker*, 543 U.S. 220, 245 (2005).

97. For example, another part of § 3553(b) refers to the Commission's official commentary, and the Supreme Court, prior to *Booker*, relied on this statutory reference to hold that the Commission's official commentary is authoritative in interpreting the Guidelines. See *Stinson v. United States*, 508 U.S. 36, 41 (1993). It has been argued that *Booker* struck all of § 3553(b), including this reference, and therefore the courts no longer need to consider the official commentary in interpreting the advisory Guidelines. See, e.g., AMY BARON-EVANS & JENNIFER NILES COFFIN, FED. PUB. & CMTY. DEFENDERS NAT'L SENTENCING RES. PROJECT, DECONSTRUCTING THE RELEVANT CONDUCT GUIDELINE: CHALLENGING THE USE OF UNCHARGED AND ACQUITTED OFFENSES IN SENTENCING 18 (2008). ("That reference has been excised, and judges need no longer consider what is now in effect unauthorized commentary.")

98. 561 U.S. ___, 130 S. Ct. 3138 (2010).

tion.⁹⁹ The board members were removable by the Securities and Exchange Commission only for cause, and the Commission members were removable by the President only for cause.¹⁰⁰ The Court held that only one layer of for-cause removal was allowed, and this provision had two layers.¹⁰¹

The Court very correctly observed that there were several possible ways to draw the severability line. The broadest option it mentioned was severing the entire oversight board.¹⁰² Another option was to “blue-pencil a sufficient number of the Board’s responsibilities so that its members would no longer be ‘Officers of the United States.’”¹⁰³ A third option was to “restrict the Board’s enforcement powers, so that it would be a purely recommendatory panel.”¹⁰⁴ But the final option, the one that the Court ultimately selected, was to sever the layer of for-cause removal between the board and the Commission, making the board members removable by the Commission at will.¹⁰⁵ The Court seemed to indicate that it was applying a functional test: “Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.”¹⁰⁶ The Court also explained that it was choosing the narrowest option because “such editorial freedom . . . belongs to the Legislature, not the Judiciary.”¹⁰⁷

All of this is well and good, exactly what a functionalist would want, but the Court wasn’t satisfied to stop there. It then invoked *Alaska Airlines* and applied the political preference test, stating that “nothing in the statute’s text or historical context makes it ‘evident’ that Congress . . . would have preferred no Board at all to a Board whose members are removable at will.”¹⁰⁸ This political preference test leaves the door wide open for the Court in future severability cases to strike far more broadly if the Court finds it is evident that Congress would have preferred that result.

99. *Id.* at ___, 130 S. Ct. at 3147.

100. *Id.* at ___, 130 S. Ct. at 3153–54.

101. *Id.* at ___, 130 S. Ct. at 3146–47.

102. *Id.* at ___, 130 S. Ct. at 3161–62.

103. *Id.* at ___, 130 S. Ct. at 3162.

104. *Id.*

105. *Id.* at ___, 130 S. Ct. at 3161.

106. *Id.* (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006)) (internal quotation marks omitted).

107. *Id.* at ___, 130 S. Ct. at 3162.

108. *Id.* (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

Once again, as in *Alaska Airlines* and *Booker*, no one involved in the case—no party, no Justice—entertained the idea that the defect in one provision would cause *the entire Sarbanes-Oxley Act* to fall. Once again, I suggest that everyone was implicitly applying a functional test to spare the bulk of the Sarbanes-Oxley Act and narrow the “what else should we strike” question to the provisions involving the board. Once again, severability was silently decided on an Act-wide basis by a functional test and then decided on a narrow basis using a political preference test.

By applying the political preference test not only to the removal provision itself, but also to the other provisions involving the board, the Court took a broader view of the political preference test than it did in *Alaska Airlines*. Remember, in *Alaska Airlines* the Court framed the choice as whether to strike § 43(f)(3) or all of § 43.¹⁰⁹ In *Booker*, the Court framed the choice as whether to make the Guidelines mandatory or require that aggravating factors be put to a jury.¹¹⁰ In *Free Enterprise Fund* the Court framed the choice as whether to make Board members removable at will or strike down the entire Board.¹¹¹ In each case the Court took the narrower choice, but in each case the Court expressly consulted the politics of the day and then framed the question in a very artificial way.

The result in *Free Enterprise Fund* was exactly right, from a functionalist perspective. There was nothing problematic about the board or its activities. The problem was a theoretical one—if the President wanted to exert influence over the board, there were too many layers of for-cause protection to overcome. One of them had to go.

D. Summary

In sum, seven of the nine Justices have been involved in severability decisions at the Supreme Court, and all of them seem to approach severability in the same way. Justices Sotomayor and Kagan have not been involved in any opinion on statutory severability. The Chief Justice and Justices Scalia, Kennedy, Thomas,

109. See 480 U.S. at 680.

110. See *United States v. Booker*, 543 U.S. 220, 246 (2005).

111. 561 U.S. at ___, 130 S. Ct. at 3162 (citing *Alaska Airlines*, 480 U.S. at 684).

and Alito were the majority in *Free Enterprise Fund*.¹¹² Justices Breyer and Ginsburg were in the majority in *Booker* on the question of severability.¹¹³

All seven of these Justices have signed on to opinions on severability involving large, comprehensive public laws. All seven of these Justices have silently applied a functional test to spare the bulk of the public law and narrow the issue to a small window of provisions. And then all seven of these Justices have ended up wielding the blue pencil in a rather narrow way. And yet all seven of these Justices have felt compelled to justify their choice as being what Congress would have wanted. In case after case, to ensure that the chosen outcome passes the political preference test, they have been moving the goal posts to artificially frame the relevant political choice in a particular way.

All of this leaves severability doctrine in a very unstable state. The Court very openly and consistently says it bases its decision on its reading of the underlying politics. The Court's forays into political analysis have sometimes sharply divided the Court. And while the political analysis has usually been laborious, it has always been strangely, artificially narrow. In the end, the Court reaches a nearly functionalist result, but gets there in a way that seems contrived.

What heartens me as a functionalist is that the most recent of these cases was clearly the most functionalist. The opinion by Chief Justice Roberts in *Free Enterprise Fund* spoke a great deal about the need to leave the Act as fully operable as possible and spent far less time speculating about what Congress would have preferred. It remains to be seen how that translates to the ACA, but we probably won't have to wait much longer.

VI. SEVERABILITY AND THE AFFORDABLE CARE ACT

This brings us to the Affordable Care Act ("ACA" or "Act"), by which we really mean two different public laws. The main law was the Patient Protection and Affordable Care Act, Public Law 111-148, which was enacted on March 23, 2010, and is more than

112. *Id.* at ___, 130 S. Ct. at 3146.

113. *See* 543 U.S. at 244-45.

nine hundred pages long.¹¹⁴ The other public law was a reconciliation act, Public Law 111-152, which was enacted a week later on March 30, 2010, and is another fifty-five pages long.¹¹⁵

The bill that became the ACA, H.R. 3590, originally passed the House in October 2009 by a vote of 416 to 0.¹¹⁶ At that point, however, it was not a health care reform bill—it was the Service Members Home Ownership Tax Act of 2009.¹¹⁷ The Senate took H.R. 3590, stripped out the service member provisions, put in health care reform, and passed it on December 24, 2009, by a vote of 60 to 39.¹¹⁸ The House was working on its own health care reform bill, but the Democrats in the Senate lost their filibuster-proof majority when Scott Brown, a Republican, unexpectedly won a special election to replace Ted Kennedy in the Senate.¹¹⁹ As a practical matter, that meant the Senate would not be able to pass any new House proposal, and the only way to pass comprehensive health care reform was for the House to agree to the Senate's bill without change. On March 21, 2010, by a vote of 219 to 212, the House did exactly that, and it was sent to the White House for signature.¹²⁰

The bill contains a staggering number of health care reforms. It made a vast number of amendments to major laws, such as the Internal Revenue Code, the Social Security Act, the Public Health Service Act, HIPAA, ERISA, the Fair Labor Standards Act, and the Deficit Reduction Act.¹²¹ It made many more amendments to

114. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119–1024 (2010) (codified at 42 U.S.C. § 18001 (Supp. IV 2010)).

115. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified at 42 U.S.C. § 1305 (Supp. IV 2010)).

116. THE LIBRARY OF CONGRESS, BILL SUMMARY & STATUS, 111th Cong., H.R. 3590 (2009), <http://thomas.loc.gov/home/LegislativeData.php> (select Congress “111” and enter search “Affordable Care Act;” select “H.R. 3590”).

117. H.R. 3590, 111th Cong. (2009).

118. *On Passage of the Bill (H.R. 3590 as Amended)*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00394 (last visited Feb. 24, 2012).

119. See Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 20, 2010, at A1.

120. THE LIBRARY OF CONGRESS, BILL SUMMARY & STATUS, 111th Cong., H.R. 3590 (2009), <http://thomas.loc.gov/home/LegislativeData.php> (select Congress “111” and enter search “Affordable Care Act;” select “H.R. 3590”).

121. *E.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1322(h)(1), 124 Stat. 187, 191 (2010) (codified at 42 U.S.C. § 18042 (Supp. IV 2010)) (amending the Internal Revenue Code); *id.* § 10501, 124 Stat. at 993 (codified at 42 U.S.C. § 294q (Supp. IV 2010)) (amending the Social Security and Public Health Service Acts); *id.*

many other laws, such as the Black Lung Benefits Act and the Children's Health Insurance Program Reauthorization Act of 2009.¹²²

Of most relevance to us here, the bill contains a provision commonly known as the individual mandate that imposes a penalty on people who do not maintain a certain level of health insurance. The individual mandate takes effect in 2014.¹²³ This provision is established by § 1501 of the bill and is modified by § 10106 of the bill.¹²⁴ It creates a new provision at § 5000A of the Internal Revenue Code.¹²⁵ The provision stretches for several pages, with various definitions and sub-rules, but the parts of it that are particularly problematic are subsection (a), which requires individuals to ensure each month that they have appropriate coverage for that month, and subsection (b)(1), which provides that if an individual fails to meet the requirement of subsection (a), a penalty is "hereby imposed" on that individual.¹²⁶ The claim has been made that these provisions are validly based on the taxing power or the commerce power, or both, and the claim to the contrary is that these provisions are not supported by any of those powers and thus are unconstitutional.¹²⁷

I have no view on the merits of these arguments. But if there is a holding on the merits that the individual mandate is unconstitutional, the Court will then consider severability, and I do have a view on that.

First, if it comes to severability, then I would guess that there was a decision on the merits written by the Chief Justice and with the votes of Justices Scalia, Kennedy, Thomas, and Alito. I would also guess that the Chief Justice would write the severabil-

§ 10601(d)(1), 124 Stat. at 1006 (codified at 28 U.S.C. § 994 (Supp. IV 2010)) (amending HIPAA); *id.* § 1562(e), 124 Stat. at 264, 270 (codified at 29 U.S.C. § 1185d (Supp. IV 2010)) (amending ERISA); *id.* § 1558, 124 Stat. at 261 (codified at 29 U.S.C. § 261 (Supp. IV 2010)) (amending the FLSA); *id.* § 3131(c), 124 Stat. at 428 (codified at 42 U.S.C. § 1395fff (Supp. IV 2010)) (amending the Deficit Reduction Act).

122. *Id.* § 1556(b), 124 Stat. at 260 (codified at 30 U.S.C. § 921 (Supp. IV 2010)); *id.* § 2102(a), 124 Stat. at 288 (codified at 42 U.S.C. § 1396b (Supp. IV 2010)).

123. *Id.* § 1501, 124 Stat. at 242, 244 (codified at 42 U.S.C. § 18091 (Supp. IV 2010)).

124. *Id.*; *see also id.* § 10106, 124 Stat. at 907–09 (codified at 42 U.S.C. § 18091 (Supp. IV 2010)).

125. *Id.* § 5000A, 124 Stat. at 119, 244 (codified at 26 U.S.C. § 5000A (Supp. IV 2010)).

126. 26 U.S.C. §§ 5000A(a), (b)(1) (Supp. IV 2010).

127. *E.g.*, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 771–73 (E.D. Va. 2010).

ity opinion and it would follow the decision he wrote in *Free Enterprise Fund*—it would be a decision that narrowly severed the individual mandate provisions and left the bulk of the ACA intact. The Chief Justice would emphasize that the Court uses a presumption of severability and strikes as little of a statute as possible.

The Chief Justice would then set up the political preference test by setting up an artificial alternative. Here, there are at least two different alternatives that have been raised. At least one of the parties in one of the petitions has asked the Court to strike down the entire ACA,¹²⁸ and the Solicitor General has taken the position that, if the individual mandate is unconstitutional, then two other provisions in the Act must also be stricken.¹²⁹ The Chief Justice would likely use the two provisions raised by the Solicitor General to frame the political preference test. His opinion would survey the statutory purposes and the historical context and probably find enough evidence that Congress would have chosen not to enact those provisions, had it known the individual mandate was unconstitutional.

It would, in other words, look a lot like the opinion of the Eleventh Circuit in *Florida ex rel. Attorney General v. Department of Health & Human Services*.¹³⁰ As I write this, that is the only circuit case to hold the individual mandate unconstitutional and, therefore, the only circuit case to address severability. However, the Eleventh Circuit ended up striking only the individual mandate itself.¹³¹ It declined to strike the two other provisions raised

128. See Petition for a Writ of Certiorari at 21, *Nat'l Fed. of Indep. Bus. v. Sebelius*, No. 11-393 (U.S. Sept. 28, 2011) (stating the ACA “cannot ‘function in a manner consistent with . . . the original legislative bargain’ . . . once the heart of that bargain has been ripped out”) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)).

129. See Consolidated Brief for Respondents at 31, *Nat'l Fed. of Indep. Bus. v. Sebelius*, No. 11-393 (U.S. Oct. 17, 2011) (stating that the court of appeals “erred in finding them severable” from the individual mandate). Those two other provisions have been called the “guaranteed-issue” provision and the “community-rating” provision. See *id.* They impose costs on insurance companies by requiring them to cover people who are more risky. The individual mandate, in contrast, provided a benefit to insurance companies by broadening their customer base. Thus, these two other provisions are related to the individual mandate and to some extent may have been part of the political bargaining underlying the Act. See *id.* at 31–32.

130. 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

131. *Id.* at 1241.

by the Solicitor General, finding it to be a close question, but not enough to overcome the presumption of severability.¹³²

The Eleventh Circuit found that the two other provisions did not “contain any cross-reference to the individual mandate or make their implementation dependent on the mandate’s continued existence.”¹³³ It also found that the Act also contains “many other provisions that help to accomplish some of the same objectives as the individual mandate.”¹³⁴ These reasons, the Eleventh Circuit stated, “weaken our ability to say that Congress considered the individual mandate’s existence to be a *sine qua non* for passage of these two reforms.”¹³⁵

Where the Supreme Court might differ from the Eleventh Circuit is over the political and policy linkages between the individual mandate and the other two reforms. There is no doubt that they have some policy relationship to each other, and the Solicitor General has argued that under the Court’s political preference test they must stand or fall together.¹³⁶ No one has pointed to any legislative history demonstrating a congressional preference, but the Act itself does include a set of statutory findings that support the individual mandate’s “[e]ffects on the national economy and interstate commerce.”¹³⁷ One of those findings, subparagraph (I), is relied on by the Solicitor General and was read with care by the Eleventh Circuit. Finding (I) states:

Under [§§] 2704 and 2705 of the Public Health Service Act (as added by [§] 1201 of this Act) [to be codified in 42 U.S.C. §§ 300gg3, 300gg4] if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. *The requirement is essential to creating effective health insurance markets in*

132. *Id.* at 1326 (“But in the end, they do not tip the scale away from the presumption of severability.”).

133. *Id.* at 1324 (citing *United States v. Booker*, 543 U.S. 220, 260 (2005)).

134. *Id.* at 1325; *see also* *New York v. United States*, 505 U.S. 144, 186 (1992) (“Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress’ overall intent to be frustrated.”).

135. *Florida ex rel. Attorney Gen.*, 648 F.3d at 1326.

136. *See supra* note 129 and accompanying text.

137. 42 U.S.C. § 18091(a)(2) (Supp. IV 2010).

*which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.*¹³⁸

The Eleventh Circuit stated that this finding was a finding made to support the use of its Commerce Clause power and, while relevant in that context, it “does not govern, and is not particularly relevant to, the different question of severability.”¹³⁹ However, the last sentence of the finding states, in no uncertain terms, that Congress considered the individual mandate to be “essential” to the operation of the two reforms (which require that health insurance be guaranteed issue and not exclude pre-existing conditions).¹⁴⁰ The Chief Justice was able to use the blue pencil narrowly in *Free Enterprise Fund* because “nothing in the statute’s text or historical context makes it ‘evident’ that Congress . . . would have preferred no Board at all to a Board whose members are removable at will.”¹⁴¹ In light of this congressional finding in the ACA, and the Solicitor General’s reliance upon it, the Court cannot make a comparable statement here. To the contrary, this sort of finding—not a committee report or a floor statement, but a specific congressional finding enacted into law—would seem to be exactly the sort of finding that makes it “evident” that Congress would have preferred to eliminate the other two provisions rather than have them remain. If this is not enough to make the congressional preference “evident,” it is hard to imagine what additional evidence would be needed.

The Court may also feel compelled to respond to the argument that the entire Act must be stricken. This is an argument that was accepted by Judge Vinson at the district court level.¹⁴² Judge Vinson relied almost entirely on the fact that the ACA did not contain a severability clause.¹⁴³ Judge Vinson emphasized that an earlier version of the health care reform bill did have a severability clause, and reasoned that Congress’ failure to include such a clause in the final bill “can be viewed as strong evidence that

138. *Id.* § 18091(a)(2)(I) (emphasis added).

139. *Florida ex rel. Attorney Gen.*, 648 F.3d at 1326.

140. 42 U.S.C. § 18091(a)(2)(J).

141. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. ___, ___, 130 S. Ct. 3138, 3162 (2010) (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

142. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1305 (N.D. Fla.), *aff’d sub nom. Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

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

Congress recognized the Act could not operate *as intended* without the individual mandate.¹⁴⁴

The Eleventh Circuit rejected this reasoning as contrary to case law on severability clauses¹⁴⁵ and contrary to congressional drafting practices: “[B]oth the Senate and House legislative drafting manuals state that, in light of Supreme Court precedent in favor of severability, severability clauses are unnecessary unless they specifically state that all or some portions of a statute should *not* be severed.”¹⁴⁶ In light of this, the Eleventh Circuit concluded that the lack of a severability clause “has no probative impact on the severability question.”¹⁴⁷

I would not expect the Chief Justice to follow Judge Vinson and strike the whole Act, but nor would I expect him to follow the Eleventh Circuit and strike only the individual mandate.¹⁴⁸ The

144. *Id.*

145. *See, e.g., Alaska Airlines*, 480 U.S. at 686 (“Congress’ silence is just that—silence—and does not raise a presumption against severability.” (citing *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion); *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968))).

146. *Florida ex rel. Attorney Gen.*, 648 F.3d at 1322 (citation omitted). The court cites Senate Legislative Counsel Manuals “providing that ‘a severability clause is unnecessary’ but distinguishing a ‘nonseverability clause,’ which ‘provides that if a specific portion of an Act is declared invalid, the whole Act or some portion of the Act shall be invalid.’” *Id.* (quoting OFFICE OF LEGISLATIVE COUNSEL, U.S. SENATE, LEGISLATIVE DRAFTING MANUAL § 137 (1997)). The court also looks at the House Legislative Counsel Manual which states that “a severability clause is unnecessary unless it provides in detail which related provisions are to fall, and which are not to fall, if a specified key provision is held invalid.” *Id.* (quoting OFFICE OF LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE § 328 (1995)). As a former attorney in the House Office of Legislative Counsel, I can attest that these manuals are commonly used and that this advice on severability and nonseverability clauses is frequently and consistently given.

147. *Id.* at 1323.

148. The Eleventh Circuit’s narrow approach was also the approach taken by Judge Hudson in *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011). Judge Hudson held the individual mandate unconstitutional and severable, requiring no other provisions to be stricken along with it. *Id.* at 789. He observed:

The final element of the analysis is difficult to apply in this case given the haste with which the final version of the 2,700 page bill was rushed to the floor for a Christmas Eve vote. It would be virtually impossible within the present record to determine whether Congress would have passed this bill, encompassing a wide variety of topics related and unrelated to health care, without Section 1501. Even then, the Court’s conclusions would be speculative at best. Moreover, without the benefit of extensive expert testimony and significant supplementation of the record, this Court cannot determine what, if any, portion of the bill would not be able to survive independently.

specific finding in paragraph (I) seems to be the sort of evidence that the Chief Justice would accept to strike the other two provisions.

The alignment of Justices behind the Chief Justice is an interesting question. I would guess it would include the more liberal Justices: Ginsburg, Breyer, Sotomayor, and Kagan. I would guess it would also include Kennedy. I am less confident about Scalia, Thomas, or Alito. Of these three, I would guess that Justice Thomas is most likely to draw the line as narrowly as the Eleventh Circuit did. I can imagine Justices Scalia and Alito joining him there, arguing for the narrow approach. At the same time, however, I think these are the two Justices most likely to buy the argument that a far larger part of the Act should be stricken, perhaps even all of it.

In short, if we get to severability, I see a two-way split much like the two-way split in *Booker*, with the Chief Justice and Justice Kennedy joining the three more conservative Justices in holding the mandate unconstitutional, and the Chief Justice and Justice Kennedy joining the four more liberal Justices in taking the Solicitor General's point of view.

As a functionalist, I do not see any need to strike the other two provisions. There is no doubt that they were packaged together with the individual mandate as a matter of politics and policy—the health insurance companies were involved in a tradeoff, being helped by the individual mandate while also being burdened by provisions like these. But as a functionalist, I do not care. Take away the individual mandate and these other provisions are still perfectly sensible under a rational basis test. If they leave the insurance companies out of equilibrium, that is something that can readily be addressed by the political branches in a variety of ways. Striking these provisions would restrict the political options and force Congress and the White House to throw more resources at the problem than they otherwise would. Congress can, and should, do its own statutory housekeeping. When the Court does Congress' statutory housekeeping, it is doing favors to indi-

Id. Judge Hudson did not, however, discuss the congressional finding in paragraph (I). See *id.*

vidual bargainers in Congress, but is doing no favors to Congress as an institution.¹⁴⁹

The Eleventh Circuit did a lot of hand-wringing over whether it needed to strike these two provisions, but ultimately decided it was not quite persuaded that it was “evident” Congress would not have enacted the provisions without the individual mandate. No hand-wringing should be necessary, because there is no doubt these provisions are constitutionally sound. But the Court will wring its hands as well, because that is how it has chosen to conduct itself in severability cases. And a majority of the Court will, in my view, agree with the Solicitor General that the other two provisions must also be stricken, along with the individual mandate. Simply put, if the Court is committed to its political preference test, then this is exactly the situation in which to use it. The finding in paragraph (I) seems to be exactly the sort of evidence the Court’s test requires. If paragraph (I) is not good enough, then the political preference test is even more pointless—and even more uncertain in application—than it seems to be.

VII. CONCLUSION

Severability should make sense. The ability to strike is an exercise of Article III judicial power, and should be treated like any other Article III judicial power—it should be used with restraint, in a narrowly tailored way, neither second-guessing the political branches nor kowtowing to them. We don’t have that now.

The Court should look seriously at how it has conducted itself in severability cases and how much legal uncertainty its political preference test creates. When the Court decides to strike part of a statute, it should strike as narrowly as possible. The Court shouldn’t strike a section when striking a sentence will do, and it shouldn’t strike a sentence when striking a sentence fragment

149. And that’s the rub—the Court’s political preference test is a test that assigns constitutional weight to individual political bargains. We shouldn’t confuse the institutional interests of the House, the Senate, and the President with the political interests of individual bargainers. Most people who work on legislation work for a particular bargainer, so it should come as no surprise that most people tend to absorb the idea that when political bargains are made, they should be given weight, such as in statutory construction or in severability analysis. But I suggest that people who work for Congress as an institution tend to absorb an institutional view—that political bargains may be politically binding, but statutes are legally binding. Political bargains belong to political science; statutes belong to law.

will do. And it shouldn't strike anything at all if there are other, narrower, options on the table. Whatever the Court strikes should be stricken solely because the Constitution requires it, not because of an artificially bounded parliamentary guessing game.

Thirty-five years ago, in *Tennessee Valley Authority v. Hill*, the Court held: "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto."¹⁵⁰ The Court should emphatically embrace this idea when it rules on the constitutionality of the individual mandate. If the individual mandate is unconstitutional, so be it—the Court should hold it unenforceable. But the judicial process should come to an end there. All the other parts of the Act should stand, unless they too are unconstitutional. Speculation about political preference should have no role.

The bottom line is that the Court's political preference test is a test that has not been applied consistently and cannot be applied with any certainty. It is unseemly and unreliable. It is also unwise, because the test, as formulated by the Court, is so open-ended—its consequences so potentially broad—that every case not only allows, but actually invites, an argument that the Court should strike down an entire act.

Just as federal sentencing was fraught with uncertainty pending the *Booker* decision, health care reform is fraught with uncertainty until the ACA issues are settled, and every other act is fraught with uncertainty, because the Court has left open the possibility in every case that it may strike far more broadly than the Constitution requires if there is a political justification for doing so. Unfortunately, we cannot have any confidence in how the Court will apply its political preference test in any case. So, while there will be winners and losers in the short run, when the ACA issues are settled, the biggest losers in the long run are public confidence in the Court and legal confidence in the validity of properly enacted laws.

I urge the Court to discard its political preference test. Then we will live in a world where severability made sense.

150. 437 U.S. 153, 194–95 (1978).
