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Severability in Statutes and Contracts

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SEVERABILITY IN STATUTES AND CONTRACTS

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I. INTRODUCTION

What happens when a court holds part of a statute, but only part, unconstitutional? Must the entire statute fall? Can a court excise, or "sever," an unconstitutional provision so that the remainder of the statute survives, or does an invalid part render the whole unenforceable?[1]

These seemingly straightforward questions have created a great deal of consternation. Indeed, established doctrine on the severability of unconstitutional statutory provisions has drawn criticism on almost every conceivable basis. Commentators have condemned severability doctrine as too malleable[2] and as too rigid;[3] as encour-

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[1] Courts also use the phrase "severability" in discussing the application of statutory language. In that context, courts ask whether, assuming a statute is unconstitutional as applied in certain circumstances, there exist other, constitutional, applications of the statute that can be "severed" and allowed. *See, e.g.*, United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1018-19 (1995); *id.* at 1023-24 (O'Connor, J., concurring in judgment in part and dissenting in part); Brockett v. Spokane Arcades, 472 U.S. 491, 504-07 (1985); *see also* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 82 (1937) (discussing "[t]he problem of separable applications").

To speak of "severing" a statute's applications seems awkward. A court would do better simply to ask whether it might properly limit the statute's scope. In any event, I limit myself here to "the problem of severable language": the question whether a provision, unconstitutional in all its applications, may be severed from the remainder of an otherwise constitutional statute. John C. Nagle, *Severability*, 72 N.C. L. REV. 203, 208 & n.24 (1993). For a recent discussion of the problem of "severable" applications, see Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

[2] *See, e.g.*, Eugene D. Cross, Comment, *Legislative Veto Provisions and Severability Analysis: A Reexamination*, 30 ST. LOUIS U. L.J. 537, 550-51 (1986); Steven W. Pelak, Note, *The Severability of Legislative Veto Provisions: An Examination of the Congressional Budget and Impoundment Control Act of 1974*, 17 U. MICH. J.L. REF. 743, 752-53 (1984); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1183 (1984) [hereinafter *Severability*].

[3] *See* Glenn C. Smith, *From Unnecessary Surgery to Plastic Surgery: A New Approach to the Legislative Veto Severability Cases*, 24 HARV. J. ON LEGIS. 397, 477 (1987).

aging judicial overreaching[4] and as encouraging judicial abdication.[5] They have criticized the doctrine's reliance on legislative intent[6] and its disregard of legislative intent;[7] its excessive attention to political concerns[8] and its inattention to political concerns;[9] its lack of any coherent explanation.[10] And while scholars have paid increasing attention to the question in recent times, criticism of severability doctrine is hardly new. Max Radin described its flaws in 1942,[11] and Robert Stern wrote an important critique almost sixty years ago.[12]

The reasons for this lingering controversy are easy to discern. One is purely pragmatic. "We live in an age of statutes."[13] Legislation provides our primary source of law in the late twentieth century,[14] and legislation of a certain type: lengthy, reticulated statutes comprising several titles addressing numerous, sometimes

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[4] *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 79-80 (1985); Dorf, *supra* note 1, at 292.

[5] *See* Smith, *supra* note 3, at 466.

[6] *See* Dorf, *supra* note 1, at 291; Nagle, *supra* note 1, at 206.

[7] *See* Smith, *supra* note 3, at 476.

[8] *See* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 433 (1993).

[9] *See* William A. Shirley, Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 COLUM. L. REV. 1808, 1821-22 (1985); Kent F. Wisner, Note, *The Aftermath of* Chadha*: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations*, 71 VA. L. REV. 1211, 1238 (1985); *cf.* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992) (stating that current approach to severability is "unrealistic" in light of "positive political theory").

[10] *See* A. Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071, 1092 (1988) (book review) (observing that "the Court has never offered a constitutionally satisfactory explanation of its severability decisions"); *see also* Board of Natural Resources v. Brown, 992 F.2d 937, 947 (9th Cir. 1993) (noting that "[t]he test for severability has been stated often but rarely explained").

[11] Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 419 (1942).

[12] Stern, *supra* note 1. For an even earlier criticism of severability doctrine, see Note, *Effect of Separability Clauses in Statutes*, 40 HARV. L. REV. 626, 626-27 (1927). Of course, not all early commentary was critical. *See, e.g.*, Comment, *Constitutional Law: Partial Invalidity of Statutes: Power of Legislature to Alter General Rules of Construction*, 2 CAL. L. REV. 319, 319 (1914); Note, *Constitutional Law—Partial Unconstitutionality of Statutes—Effect of Saving Clause on General Rules of Construction*, 25 MICH. L. REV. 523, 525 (1927).

[13] ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 3 (1995).

[14] Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 874, 874 (1991).

unrelated, subjects.[15] Questions of severability inhere in such legislation. Congress's tendency to enact sweeping, multi-purpose statutes, along with the continuing expansion of the United States Code—the Code almost tripled in size between 1964 and 1988[16]—assure that severability doctrine will retain great practical significance for the foreseeable future.

Practical significance is not the only reason the controversy lingers, however. A more profound explanation lies in severability doctrine itself. Since the mid-nineteenth century, when they began to address the question seriously, courts have analyzed the severability of statutory provisions under a contracts approach. That is, in determining the severability of unconstitutional statutory provisions, courts have applied essentially the same test they employ to determine the severability of illegal contract terms. In contracts law, severability turns on the intent of the parties to the agreement. A court will sever an illegal term and enforce the remainder of an otherwise valid contract where the court concludes the term was not "an essential part of the agreed exchange,"[17] that is, where the court concludes the parties would have made the agreement even without the illegal term.[18] The language of the

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[15] *See* Frank P. Grad, *The Ascendancy of Legislation: Legal Problem Solving in Our Time*, 9 DALHOUSIE L.J. 228, 251-52 (1985) (discussing character of twentieth-century legislation).

[16] *See* W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 402 (1992) (noting that the United States Code comprised 27,308 pages in 1988, compared to 9797 pages in 1964). Except for enacted titles, the Code establishes "prima facie the laws of the United States." 1 U.S.C. § 204(a) (1994). The United States Statutes at Large serves as "legal evidence of laws . . . in all the courts of the United States" and of "the several States." *Id.* § 112.

[17] RESTATEMENT (SECOND) OF CONTRACTS § 184(1) (1981).

[18] *See* discussion *infra* text accompanying notes 44-78.

Courts also use the phrase "severability" to describe a related, but different, concept in contracts law. A court will sometimes describe a contract as "severable" where the court can resolve the contract into separate and independent agreements, some of which are enforceable and others unenforceable. Take, for example, a contract in which a homeowner hires an unlicensed plumber to do some work on his home; the homeowner agrees to pay the plumber $1,000 for labor and $500 for materials. Assume that a local ordinance prohibits labor by unlicensed plumbers. Rather than hold the entire contract unenforceable, a court might hold that there are, in effect, two contracts: an illegal $1,000 contract for labor and a legal $500 contract for materials. The court could then "sever" the illegal contract for labor and enforce the legal, and independent, contract for materials. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 183, cmt. b, illus. 1.

It might be less confusing to give this concept another name, perhaps "divisibility," or "apportionability." Indeed, the Second Restatement of Contracts avoids all such terminology

written memorial of the agreement—even a clause providing for the severance of illegal terms—will not necessarily dispose of the question. Because severability turns on the intent of the parties, a court may examine extrinsic evidence, including the contract's negotiating history, to discover whether the parties in fact believed the illegal term to be essential.[19]

Courts employ this same analysis to determine the severability of unconstitutional statutory provisions. A statute is viewed for these purposes as a "bargain" among the legislators who enact it;[20] in deciding whether a given statutory provision is severable, a court will look to that provision's "importance" in that "bargain."[21] If the court concludes that the provision was relatively unimportant to the legislators, that the legislators would have enacted the remainder of the statute in its absence, the court will sever the provision and enforce the remainder of the statute. If, by contrast, the court concludes that the provision was essential to the legislators, that the legislators would not have enacted the remainder of the statute in its absence, the court will refuse to sever the provision.[22] Just as in contracts law, the writing will not necessarily dispose of the question. Because severability turns on the intent of the legislators, a court may examine the statute's legislative history for indications of what the legislators would have wanted.[23] While it may create a "presumption" in favor of severability, even an express severability clause cannot overcome "strong" indications in the legislative history that the legislators in fact "intended otherwise."[24]

To resolve questions about severability by looking to the intent

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in the interests of clarity. *Id.* § 183, cmt. a. In any event, I do not address this version of "severability" doctrine here. Rather, I address the question whether, assuming that a contract cannot be divided into separate agreements, an illegal term renders the entire contract unenforceable. For a further discussion of the difference between the two types of "severability" in contracts law, see *Technical Aid Corp. v. Allen*, 591 A.2d 262, 271-72 (N.H. 1991).

[19] *See* discussion *infra* text accompanying notes 51-53.

[20] Alaska Airlines v. Brock, 480 U.S. 678, 685 (1987).

[21] *Id.*

[22] *See* discussion *infra* text accompanying notes 108-110.

[23] *See* discussion *infra* text accompanying notes 113-115.

[24] *Alaska Airlines*, 480 U.S. at 686; *see also* POPKIN, *supra* note 8, at 433 (noting apparent consensus that "a severability clause is not dispositive").

of the parties, rather than the written memorial of their agreement, comports with a proper understanding of contracts. A contract is a private ordering that binds only the parties who make it. A contract cannot impose obligations upon third persons, nor can it confer benefits upon them where they object.[25] Moreover, in contemporary understanding, a contract exists independently of any written memorial the parties may adopt. The writing is not the contract, but merely evidence of the contract: the contract itself is an abstraction that derives its existence from the shared intent of the parties.[26] For these reasons, a court can properly look to the parties' shared intent, rather than the words of the written memorial of their agreement, to resolve disputes about a contract's interpretation—including disputes about the severability of illegal terms.

The contracts approach makes much less sense with respect to statutes, however. A statute is not, like a contract, a private ordering that affects only the legislators who enact it. Rather, a statute is a "political document"[27] that binds persons outside the legislative branch. Those persons have only limited access to the statute's "negotiations." In order to conform their conduct to the requirements of law, they must, as a practical matter, rely on the text of the statute itself. Moreover, unlike a contract, a statute does not exist apart from its written text. The statute *is* the written text: the intent of the legislators has no independent authority.[28] Finally, it is much more difficult, as a practical matter, to determine the intent of the legislators who pass a statute than it is to determine the intent of the parties to a traditional bipolar contract.[29]

For these reasons, the contracts approach is an inappropriate method for resolving the severability of statutory provisions. In resolving questions about the severability of statutory provisions, courts should forgo the contracts approach in favor of a textual approach. Under such an approach, the text of the statute would be dispositive. Where the text addressed severability, either

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[25] *See* discussion *infra* text accompanying notes 80-84.
[26] *See* discussion *infra* text accompanying notes 92-96.
[27] POPKIN, *supra* note 8, at 323.
[28] *See* discussion *infra* text accompanying notes 179-183.
[29] *See* discussion *infra* text accompanying notes 191-198.

directly or indirectly, a court would enforce the statute's commands; a court would not, as under the contracts approach, look to legislative history to overcome the plain meaning of statutory language in this regard. Where the statute remained silent on the question, the court would, as a matter of default, sever the unconstitutional provision and enforce the remainder of the statute.

Part II of this Article describes the severability of illegal contract terms and demonstrates how the focus on the parties' shared intent comports with a proper understanding of contracts.[30] Part III discusses the severability of statutory provisions and shows why the contracts approach makes much less sense with respect to statutes.[31] Part IV sets forth a textual approach to the severability of statutory provisions.[32] Finally, this Article concludes in Part V with some observations about the utility of further comparative study of contractual and statutory interpretation.[33]

II. SEVERABILITY OF ILLEGAL CONTRACT TERMS

It is axiomatic that the law does not, in general, concern itself with the subject matter of a contract. As long as the parties have freely assented to the essential terms and have complied with limited formal requirements, a court will enforce their agreement without regard to the substance of the exchange.[34] Yet freedom of contract has its limits. Even where there exists an offer, acceptance, and consideration, a court will not enforce a contract whose subject matter is illegal or contrary to public policy.[35] A court will not, for example, enforce a contract to commit a crime[36] or a

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[30] *Infra* pp. 46-56.

[31] *Infra* pp. 57-73.

[32] *Infra* pp. 73-82.

[33] *Infra* pp. 82-83.

[34] *See* Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 116-17 (1988).

[35] Courts often equate the terms "illegal" and "contrary to public policy" in this context. *See* E. ALLAN FARNSWORTH, CONTRACTS § 5.1, at 347-48 (2d ed. 1990). There can be a difference, of course. A contract may be legal, in the sense that the laws do not prohibit its making, and yet unenforceable on ground of some judicially recognized policy. *See id.* This difference bears no relevance to questions of severability, however, and I follow the common practice in using the terms interchangeably here.

[36] *See, e.g.*, Homami v. Iranzadi, 260 Cal. Rptr. 6 (Cal. Ct. App. 1989) (agreement to avoid compliance with federal and state income tax regulations).

tort;[37] a contract to exempt oneself from liability for intentional wrongs;[38] a contract to waive one's constitutional rights;[39] or a contract that imposes an unreasonable restraint on competition.[40] In such circumstances, the courts have determined that the public interest outweighs the parties' right to order their affairs as they see fit.[41]

Sometimes a contract contains one illegal—and hence, unenforceable—provision along with other, perfectly legal, terms. Such a contract presents a court with three options. First, the court might simply rewrite the offending provision to make it conform to public policy. Courts have demonstrated an understandable reluctance to alter the parties' terms in this fashion, however, and have generally avoided this approach.[42] Second, the court might refuse to enforce the entire contract, legal and illegal terms alike. This option seems incongruous, however, with the law's overriding policy in favor of enforcing agreements.[43] Finally, the court might sever the illegal provision and enforce the remainder of the otherwise valid contract.

The law has adopted this third approach, with an important restriction. A court will sever an illegal term and enforce the remainder of an otherwise valid contract, but only where the illegal

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[37] *See, e.g.*, Sayres v. Decker Auto. Co., 145 N.E. 744 (N.Y. 1924) (agreement to defraud third party).

[38] *See, e.g.*, Zuckerman-Vernon Corp. v. Rosen, 361 So. 2d 804 (Fla. Dist. Ct. App. 1978) (contractual language exempting party from liability for fraud).

[39] *See, e.g.*, Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390 (9th Cir.) (contract precluding party from seeking or holding elective office), *cert. denied*, 501 U.S. 1252 (1991).

[40] *See, e.g.*, Technical Aid Corp. v. Allen, 591 A.2d 262 (N.H. 1991) (restrictive covenant in employment contract).

[41] *See* FARNSWORTH, *supra* note 35, § 5.1, at 345.

[42] The one exception involves the covenant not to compete, or "restrictive covenant," which appears frequently in employment contracts. Such a covenant violates public policy where it has an unreasonably broad scope. *See, e.g.*, *Allen*, 591 A.2d at 265. In some circumstances, a court will rewrite a restrictive covenant to render it more narrow and, therefore, enforceable. For example, a court might alter a covenant that requires an employee to refrain from competing with his employer for twenty-five years after termination of his employment to one that requires the employee to refrain from such competition for only two years. *See* FARNSWORTH, *supra* note 35, § 5.8, at 385 (discussing recent trend in favor of reducing scope of unreasonable covenants). This approach remains controversial. *See, e.g.*, Vlasin v. Len Johnson & Co., 455 N.W.2d 772, 776-77 (Neb. 1990).

[43] *Pacta sunt servanda*. *See generally* FARNSWORTH, *supra* note 35, § 5.1, at 348 ("One of the factors that a court will weigh in favor of enforceability [of a contract] is the public interest in protecting the justified expectations of the parties.") (footnote omitted).

term "is not an essential part of the agreed exchange."[44] Whether a given provision is an essential part of the agreed exchange turns on the intent of the parties to the contract.[45] A court must determine whether the parties would have made the agreement even without the illegal term.[46] If the court believes that the illegal term is not essential, that the parties would have made the agreement even without it, the court will sever the term and enforce the remainder of the contract.[47] If, by contrast, the court believes that the provision is essential, that the parties would not have entered into the agreement without it, the court will declare the provision inseverable and refuse to enforce the contract in its entirety.[48]

How will a court discover the parties' intent with respect to severability? It will begin, of course, with the language of any writing the parties have adopted to reflect their agreement. The writing may, for example, contain a severability clause providing

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[44] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 184.

The Second Restatement also provides that the party seeking enforcement of the contract must not have engaged in "serious misconduct." *Id.* Whether a party's behavior constitutes "serious misconduct" depends on the nature of the public policy implicated and the extent of its violation: the more significant the policy and the more extensive the violation, the more "serious" the party's "misconduct." *Id.* § 183 cmt. b. The "serious misconduct" requirement goes more to the illegality of the term than the intent of the parties with respect to severability and, in any event, has not figured prominently in cases addressing the severability of illegal contract terms. *But see* Zerbetz v. Alaska Energy Ctr., 708 P.2d 1270, 1283 (Alaska 1985) (discussing "serious misconduct" requirement); *Allen*, 591 A.2d at 272 (same).

[45] Toledo Police Patrolmen's Ass'n, Local 10 v. City of Toledo, 641 N.E.2d 799, 803 (Ohio Ct. App.), *appeal denied*, 639 N.E.2d 795 (Ohio 1994).

[46] *See, e.g.*, Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp., 992 F.2d 1398, 1407 n.17 (5th Cir. 1993); Panasonic Co. v. Zinn, 903 F.2d 1039, 1041 (5th Cir. 1990); *Zerbetz*, 708 P.2d at 1283 & n.19; Hargrave v. Canadian Valley Elec. Coop., 792 P.2d 50, 60 (Okla. 1990); Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 858 P.2d 245, 259 (Wash. 1993); *see also* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 22-2(d), at 894 (3d ed. 1987) ("Primarily the criterion would appear to be whether the parties would have entered into the agreement irrespective of the offending provisions of the contract." (footnote omitted)).

[47] *See, e.g.*, *Zinn*, 903 F.2d at 1041-42; *Allen*, 591 A.2d at 272; *City of Yakima*, 858 P.2d at 259.

[48] *See, e.g.*, National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 333-34 (5th Cir.), *cert. denied*, 484 U.S. 943 (1987); *Zerbetz*, 708 P.2d at 1282-84 (remanding for determination whether illegal provisions were essential); Hill v. Names & Addresses, Inc., 571 N.E.2d 1085, 1100 (Ill. App. Ct. 1991); *Hargrave*, 792 P.2d at 60 (remanding for determination whether parties would have agreed absent allegedly unenforceable provision).

for the severance of unenforceable terms.[49] Alternatively, it may contain a clause designating certain provisions in the agreement as "essential."[50] Such language will be persuasive, but not necessarily dispositive, on the question of severability. Because severability turns on the intent of the parties, a court may examine extrinsic evidence—evidence outside the writing—to determine whether the parties actually intended an illegal term to be severable.[51] One type of extrinsic evidence a court may examine is particularly significant for our purposes: the history of the contract's negotiation.[52] Evidence of the positions the parties took in negotiating the contract can overcome the language of the written memorial, even an express severability clause.[53]

To appreciate how courts determine the severability of illegal contract terms, consider a couple of representative cases. Consider first a case from Alaska, *Zerbetz v. Alaska Energy Center*.[54] In *Zerbetz*, a state agency hired the plaintiff as its executive director for a term of three years. The employment contract was extremely deferential to the plaintiff, providing that he could declare the agreement terminated and receive the balance of his three-year salary if the agency attempted to interfere with his management in certain specified ways—for example, by "reducing [his] authority or increasing [his] responsibilities."[55] The contract also provided that the agency could declare the agreement terminated by giving the plaintiff thirty-days notice of its termination.[56] The plaintiff and

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[49] For a sampling of cases addressing contracts containing severability clauses, see Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1400 (9th Cir.), *cert. denied*, 501 U.S. 1252 (1991); Eckles v. Sharman, 548 F.2d 905, 907 (10th Cir. 1977); *Hill*, 571 N.E.2d at 1088; *City of Toledo*, 641 N.E.2d at 803-04. For a case discussing a severability "clause" in an oral contract, see Whorton v. Dillingham, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988).

[50] *See, e.g.*, Abbott-Interfast Corp. v. Harkabus, 619 N.E.2d 1337, 1343-44 (Ill. App. Ct. 1993); *Hill*, 571 N.E.2d at 1100.

[51] *See, e.g.*, *Zinn*, 903 F.2d at 1041-42; *City of Yakima*, 858 P.2d at 259. *But see* Save Elkhart Lake, Inc. v. Village of Elkhart Lake, 512 N.W.2d 202, 207 (Wis. Ct. App. 1993) (unambiguous severability clause must be enforced as written).

[52] *See, e.g.*, *Eckles*, 548 F.2d at 909; *Zerbetz*, 708 P.2d at 1283; *City of Toledo*, 641 N.E.2d at 802-04 (unenforceable term severable where contract contained severability clause and history of term's negotiation did not show that term was quid pro quo for other, enforceable, terms).

[53] *See Eckles*, 548 F.2d at 909.

[54] 708 P.2d 1270 (Alaska 1985).

[55] *Id.* at 1273.

[56] *Id.* at 1272.

the agency apparently did not get along well, and the agency declared the contract terminated by providing the plaintiff the required thirty-days notice.[57] When the plaintiff brought suit for the balance due him under the contract, the agency argued that the contract was unenforceable on grounds of public policy. The trial court agreed and granted summary judgment for the agency.[58]

The Supreme Court of Alaska reversed and remanded for further factual findings.[59] The court agreed that the provisions allowing the plaintiff to declare the contract terminated if the agency interfered with his management constituted an improper and unenforceable abdication of public authority.[60] The court believed, however, that those provisions might be severable from the remainder of the contract, including the thirty-days notice clause on which the agency had relied in terminating the plaintiff.[61] Whether the provisions were severable, of course, would depend on whether they were " 'essential part[s] of the agreed exchange,' "[62] that is, whether the parties would have made the agreement even without them.

The court believed that one could not determine the parties' intent in this regard on the basis of the language of the written contract alone. Rather, the court explained, it would be necessary to examine extrinsic evidence, including the positions the parties took during the contract's negotiation, to "establish which of [the agreement's] provisions were essential."[63] Without further examination of the parties' "motives and priorities" in making the contract, the court believed, resolution of the severability question was impossible.[64] The court directed the trial judge to make such

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[57] *Id.* at 1273.

[58] *Id.*

[59] *Id.* at 1284.

[60] *Id.* at 1279.

[61] The court suggested that the thirty-days notice clause might itself be void as a penalty and directed the trial court to consider the question on remand. *Id.* at 1280-82.

[62] *Id.* at 1283 (quoting RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 184 cmt. a).

[63] *Id.* The court also directed the trial judge to examine the negotiating history to determine whether the plaintiff had engaged in any "serious misconduct." *Id.* For a discussion of the "serious misconduct" requirement with respect to the severability of illegal contract terms, see *supra* note 44.

[64] 708 P.2d at 1283.

an examination on remand.[65]

The written contract in *Zerbetz* did not designate any of its provisions as "essential," nor did it contain a severability clause. But evidence of a contract's negotiating history can overcome even such express language. Consider, in this regard, another case involving an employment contract, *Eckles v. Sharman*.[66] The contract in *Eckles*, between the owner of a professional basketball team and the team's coach, contained provisions granting the coach an option to purchase a five percent ownership interest in the team and allowing the coach to participate in a pension plan.[67] When the coach quit to work for another team, the owner brought suit against him for breach of contract.[68]

The coach argued that the option and pension provisions were unenforceable under applicable state law and that the entire contract was therefore invalid.[69] The owner, by contrast, argued that the contract was enforceable, at least in part. The owner pointed to the contract's severability clause, which provided that " '[i]n the event that any one paragraph of this Agreement is invalid, this Agreement will not fail by reason thereof but will be interpreted as if the invalid portion were omitted,' "[70] and argued that the allegedly invalid option and pension provisions were therefore severable from the remainder of the contract.[71] The district court agreed and granted a directed verdict for the owner.[72]

The court of appeals reversed and remanded. The court agreed with the coach that the option and pension provisions were unenforceable under state law. Moreover, the court explained, there was insufficient evidence to direct a verdict on severability. Whether the unenforceable provisions were severable, of course,

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[65] *Id.* at 1284.

[66] 548 F.2d 905 (10th Cir. 1977).

[67] *Id.* at 907.

[68] *Id.*

[69] The coach argued that these provisions were unenforceable, not because they were "illegal," but because they were insufficiently definite under applicable state law. *See id.* at 909. Nothing turns on this distinction for purposes of severability analysis.

[70] *Id.* at 907.

[71] *Id.* at 909.

[72] *Id.* at 908-09.

depended on whether they were "essential to the contract,"[73] which, in turn, depended on the intent of the parties.[74] The contract's severability clause was " 'but an aid to construction' " in this regard:[75] more relevant evidence appeared in the history of the parties' conduct during negotiations and afterward. That evidence was inconclusive; a reasonable person could draw "an inference one way or the other on the question of [the parties'] intent."[76] Although the parties had negotiated for about fifteen months over the unenforceable provisions, and although the coach and other witnesses testified that he would not have signed the contract without them, the record also contained evidence that he had made no serious efforts to clarify the option clause or do anything at all about the pension clause.[77] The question required further factual determination; the trial court had erred in granting a directed verdict for the owner.[78]

Cases like *Zerbetz* and *Eckles* make clear that, in determining the severability of illegal contract terms, courts look to the intent of the parties rather than the written memorial of their agreement. This approach to severability comports well with a proper understanding of contracts and their interpretation.[79] To see why this is so, it is necessary to understand two fundamental concepts of contemporary contracts law.

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[73] *Id.* at 909.

[74] *Id.*

[75] *Id.* (quoting Moffat Tunnel Improvement Dist. v. Denver & S.L. Ry., 45 F.2d 715, 731 (10th Cir. 1930)). The United States Supreme Court has used much the same language to describe the effect of a severability clause in a statute. Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (dictum) (asserting that severability clause is "merely" an "aid" in determining legislative intent, "not an inexorable command"). For further discussion of the effect of statutory severability clauses, see *infra* text accompanying notes 111-115.

[76] 548 F.2d at 909.

[77] *Id.*

[78] *Id.* at 909-10.

[79] Some scholars have drawn a distinction between the "interpretation" and "construction" of a contract. "Interpretation," on this understanding, "refer[s] to the process by which courts determine the 'meaning' of the language" the parties have used. E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 940 (1967). "Construction," by contrast, refers to the process by which a court determines the legal effect of the language, which may have little to do with the parties' intentions. *See id.* at 939; Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 835 (1964). This distinction proves difficult to maintain, and courts have largely ignored it, FARNSWORTH, *supra* note 35, § 7.7, at 496-97, as I do here.

First, a contract is a private ordering.[80] The parties who make a contract bind only themselves, not third persons. To be sure, a party to a contract can promise action on the part of a third person, as where a promisor promises that a third person will perform services for the promisee.[81] If the third person fails to perform, however, the promisee's action for breach lies against the promisor, not the third person; the third person has incurred no independent contractual obligation.[82] Moreover, while a contract may confer a benefit on a third person—a contract "beneficiary"[83]—it cannot do so where he objects. A beneficiary can "render any duty to himself inoperative . . . by disclaimer."[84]

That a contract binds only the parties, and not third persons, has profound implications for its proper interpretation. In resolving a dispute about a contract's interpretation, a court need not worry about expectations the contract's language may create in the minds of strangers to the transaction. As Farnsworth observes, the proper "object of contract law is to protect the justifiable expectations of the contracting parties themselves, not those of third parties, even reasonable third parties."[85] Indeed, it is established doctrine that a court will not interpret the language of a contract in light of common understanding.[86] Rather, a court will attempt to discover the meaning the language would have for a person in the position

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[80] *See* Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667, 669 (1991).

[81] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 2 cmt. c.

[82] *See id.*; 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.13, at 36-37 (Joseph M. Perillo ed., rev. ed. 1993).

[83] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 2(4).

[84] *Id.* § 306 ("A beneficiary who has not previously assented to the promise for his benefit may in a reasonable time after learning of its existence and terms render any duty to himself inoperative from the beginning by disclaimer."); *see* CALAMARI & PERILLO, *supra* note 46, § 17-11, at 715.

[85] Farnsworth, *supra* note 79, at 951; *see also* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORN. L.Q. 161, 164 (1965) (arguing that judge should realize that object of contract interpretation "is the ascertainment of the intention of the parties (*their* meaning), and not the meaning that the written words convey to himself or to any third persons, few or many, reasonably intelligent or otherwise").

[86] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 212 cmt. a.

of the parties:[87] a person with knowledge of the parties' goals,[88] any prior course of dealing between them,[89] any linguistic usages to which they have customarily held,[90] and, significantly, the positions the parties took during the contract's negotiation.[91]

The second concept has to do with the independence of a contract and the writing that serves as its memorial. There is no general requirement, of course, that a contract be in writing: a contract may be manifested by oral communication or even non-verbal conduct.[92] Even where the parties have adopted a writing to reflect their agreement, moreover, the contract has an independent existence. It is a rudimentary principle of contemporary contracts law that the written memorial is not the contract, but only evidence of the contract.[93] Authorities disagree on which verbal formula-

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[87] *See id.* § 202(1) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight."); *id.* § 212 cmt. a ("[T]he operative meaning [of a contract] is found in the transaction and its context rather than . . . in the usages of people other than the parties.").

[88] *Id.* § 202(1).

[89] FARNSWORTH, *supra* note 35, § 7.13, at 528.

[90] *Id.* § 7.13, at 528-30.

[91] *Id.* § 7.12.

[92] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 4; *see also* JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 19, at 34 (3d ed. 1990) (explaining that "a contract does not have to be manifested in language but may be evidenced by conduct"). To be sure, statutes of frauds provide that a party can, in certain circumstances, avoid the enforcement of a contract where he has not signed a written "memorandum" of its contents. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 110; *see also* FARNSWORTH, *supra* note 35, § 6.8, at 435 (discussing signature requirement). But statutes of frauds apply only to certain categories of contracts, RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 110, and, in any event, to say that a party can avoid enforcement of a contract in certain circumstances is not to say that the contract does not exist. *See* Borchardt v. Kulick, 48 N.W.2d 318, 325 (Minn. 1951) (explaining that oral contracts within statutes of frauds "are not void in the strict sense that no contract has come into being at all, but are merely unenforceable at the option of the party against whom enforcement is sought"); *see also* FARNSWORTH, *supra* note 35, § 6.10, at 445 (agreement that fails to comply with statute of frauds is still a " 'contract' "). A party who has failed to sign a written memorandum, for example, can enforce a contract against one who has. *See id.* § 6.8, at 435; MURRAY, *supra*, § 74, at 339.

[93] MURRAY, *supra* note 92, § 8, at 17; 1 CORBIN, *supra* note 82, § 1.3, at 12; John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1342 (1975); *see also* D.A.F., *The "Unwritten Constitution" and the U.C.C.*, 6 CONST. COMMENTARY 217, 221 (1989) (explaining that courts do not view " 'understanding of the parties' as being solely embodied in a written text").

An earlier view, associated primarily with Samuel Williston and the First Restatement of Contracts, held that, as a general matter, the intent of the parties could have no operative

tion best captures the essence of a contract—"a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty";[94] the "total legal obligation which results from the parties' agreement";[95] "the relations among parties to the process of projecting exchange into the future,"[96] to give just a few examples. The important point for these purposes, though, is that the contract is an abstraction that derives its existence and its authority from the shared intent of the parties. That shared intent, not the adoption of a writing, is the operative fact in the contract's creation.

A contract's independence from the writing that serves as its memorial also has profound implications for its proper interpretation. Because the writing is not the contract, but only evidence of the contract, a court can properly look beyond the writing to resolve a dispute about a contract's meaning. A court can properly look to extrinsic evidence—evidence, for example, of the contract's negotiating history—to discover the parties' shared intent. The established rules of contract interpretation confirm this understanding. While the parol evidence rule generally forbids the introduction of extrinsic evidence to contradict the terms of a writing,[97] the rule applies only to language that is "clear" or

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force apart from the written memorial. *See* RESTATEMENT OF CONTRACTS § 230 (1932); 2 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 610 (1920). By assenting to the words of a writing, Williston argued, the parties had rendered their actual intent irrelevant: "if the parties have made a memorial of their bargain . . . their actual intent unless expressed in some way in the writing is ineffective, except when it can be made the basis for reformation of the writing." *Id.* at 1175-76; *see also id.* § 606, at 1165 (discussing contracts where parties attach different meaning to language used in the writing). While this view has by no means disappeared, *see* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 307 (1985), the prevailing trend is to the contrary. *See* Melvin A. Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1133-34, 1135 (1994). Indeed, even the most recent edition of Williston's treatise explains that "although the word contract may, to one in business or a lay person, mean the writing that evidences a bargain or agreement, it is being used in a different sense in this treatise." 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1:1, at 3-4 (Richard A. Lord, ed., 4th ed. 1990) (footnote omitted).

[94] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 1.

[95] U.C.C. § 1-201(11) (1991).

[96] IAN R. MACNEIL, THE NEW SOCIAL CONTRACT 4 (1980).

[97] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 215; FARNSWORTH, *supra* note 35, § 7.2, at 465.

"unambiguous";[98] the rule does not prohibit the introduction of extrinsic evidence to clarify contractual ambiguities. Indeed, the current trend, as reflected by the Second Restatement of Contracts, is to allow the introduction of extrinsic evidence of the parties' intent even where the meaning of the writing is "plain."[99] The Second Restatement provides that where the contract's negotiating history shows that the parties shared an intent at odds with the "plain meaning" of the writing, the parties' shared intent, not the writing, controls.[100]

One can easily see that established severability doctrine comports with these fundamental concepts of contemporary contracts law. As a contract binds only the parties who make it, a court need not worry about expectations the written memorial may create in the minds of third persons. Moreover, as a contract exists independently of the writing, extrinsic evidence of the parties' intent can take priority over the language of the writing—even, in the view of the Second Restatement, language that bears a plain meaning. As a consequence, it seems entirely appropriate for a court, in deciding whether to sever illegal terms, to look to the shared intent of the parties rather than the written memorial of their agreement—even where the written memorial contains a clear severability clause.

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[98] *See, e.g.*, Wilson Arlington Co. v. Prudential Ins. Co. of Am., 912 F.2d 366, 370 (9th Cir. 1990); McDonald's Corp. v. Lebow Realty Trust, 888 F.2d 912, 913-14 (1st Cir. 1989); Pelletier v. Jordan Assocs., 523 A.2d 1385, 1386 (Me. 1987); W.W.W. Assocs. v. Giancontieri, 566 N.E.2d 639, 642-43 (N.Y. 1990).

[99] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 212 cmt. b. For a sampling of cases reflecting this trend, see, e.g., White v. Roughton, 689 F.2d 118, 120 (7th Cir. 1982); Alaska Diversified Contractors v. Lower Kuskokwim Sch. Dist., 778 P.2d 581, 583-84 (Alaska 1989); Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1140-41 (Ariz. 1993); Berg v. Hudesman, 801 P.2d 222, 227-30 (Wash. 1990). The extrinsic evidence must "advanc[e] an interpretation" of which the writing is "reasonably susceptible." A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., 852 F.2d 493, 496 (9th Cir. 1988) (citing Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. Rptr. 561, 564 (Cal. 1968)).

[100] *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, § 201(1) & cmt. c, illus. 1; *id.* § 212 cmt. b, illus. 4; *see also* Eisenberg, *supra* note 93, at 1133-34 (parties' shared subjective meaning controls even where unreasonable); Farnsworth, *supra* note 79, at 959-60 (discussing view that extrinsic evidence is admissible, for purposes of interpretation, even where contract's language is not ambiguous).

III. SEVERABILITY OF UNCONSTITUTIONAL STATUTORY PROVISIONS: THE CONTRACTS APPROACH

Questions about severability occur with respect to federal statutes[101] in much the same form they occur with respect to contracts. Just as a court must refuse to enforce an illegal contract, a court must refuse to enforce an "illegal" statute: a statute contrary to the Constitution of the United States.[102] Moreover, just as a contract may contain an illegal clause along with other, perfectly valid, terms, a statute may contain an unconstitutional provision along with others that pose no constitutional difficulty whatever. Such a statute presents a court with three options: the same options presented by a contract illegal only in part.

First, of course, the court might simply rewrite the statute to make it conform to constitutional requirements. This poses an obvious difficulty with regard to the separation of powers, however. Legislative supremacy is a fundamental principle of American constitutional law:[103] "[a] deeply-embedded premise of the American political system" is that the legislature, within constitutional limits, "has authority to prescribe rules of law that, until changed legislatively, bind all other governmental actors within the system."[104] For a court to edit the words of a statute, even to

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[101] For the sake of convenience, I limit myself to a discussion of the severability of federal statutes. The severability of state statutes, of course, is a matter of state law. *See* Brockett v. Spokane Arcades, 472 U.S. 491, 506 (1985). It is worth noting, however, that the states uniformly have adopted the federal rule. *See* Dorf, *supra* note 1, at 290-91, app. at 295.

[102] Such, after all, is the teaching of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See id.* at 180 (affirming "principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument"); *see also* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 36 (describing holding in *Marbury*).

[103] *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281, 283 (1989); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 9 (1988); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995).

[104] Maltz, *supra* note 103, at 9.

render the statute constitutional, would contravene this principle.[105] A court has no constitutional authority to rewrite legislation.

Second, a court might refuse to enforce the entire statute, constitutional and unconstitutional provisions alike. This option, too, raises separation-of-powers concerns. Just as a court cannot rewrite a statute, a court cannot ignore a statute.[106] To refuse to enforce a statute's constitutional provisions, as well as its unconstitutional provisions, would violate the court's obligation to give effect to the commands of a statute to the extent the Constitution allows. As the Supreme Court has explained, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of [a] court to so declare, and to maintain the act in so far as it is valid."[107]

As with respect to contracts, therefore, courts have adopted a third approach. Indeed, courts have adopted the contracts approach: the severability of an unconstitutional statutory provision depends on its importance in the "legislative bargain."[108] A

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[105] *See* EVA HANKS ET AL., ELEMENTS OF LAW 227 (1994); Dorf, *supra* note 1, at 292; *cf.* United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1019 (1995) ("[A]s the Court of Appeals recognized, its remedy required it to tamper with the text of the statute, a practice we strive to avoid.") (footnote omitted). *But cf.* United States Nat'l Bank of Or. v. Independent Ins. Agents, 113 S. Ct. 2173, 2186 (1993) ("Courts . . . should 'disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.' ") (quoting Hammock v. Loan and Trust Co., 105 U.S. 77, 84-85 (1881)).

[106] HANKS, *supra* note 105, at 227.

[107] El Paso & N.E. Ry. v. Gutierrez, 215 U.S. 87, 96 (1909); *see also* Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion) ("[A] court should refrain from invalidating more of the statute than is necessary."); *cf. id.* at 664 n.2 (Brennan, J., concurring in part and dissenting in part) (tracing derivation of severability doctrine to "general rule of construing statutes to avoid constitutional questions").

[108] Alaska Airlines v. Brock, 480 U.S. 678, 685 (1987).

Alaska Airlines also teaches that a court must refuse to sever an unconstitutional provision where the statute cannot function in the provision's absence, that is, where severance of the unconstitutional provision would render the statute inoperative. *See id.* at 684; *see also* New York v. United States, 505 U.S. 144, 187 (1992) (holding provision severable where statute would remain operative in its absence). Courts have paid "scant attention" to this element of the *Alaska Airlines* test, Board of Natural Resources v. Brown, 992 F.2d 937, 948 (9th Cir. 1993), and it constitutes merely a "subsidiary" to the inquiry into legislative "intent": "the fact that valid provisions of a statute are incapable of having legal effect by themselves is ordinarily conclusive proof that the legislature did not intend them to stand by themselves." Stern, *supra* note 1, at 76 n.1; *see also Alaska Airlines*, 480 U.S. at 684 ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the

provision's importance, in turn, depends on the intent of the "parties" to that "bargain," namely, the legislators who passed the statute. If the court believes that the provision was not essential to the legislative bargain, that the legislators would have passed the statute even in the provision's absence, the court will excise the unconstitutional provision and enforce the remainder of the statute.[109] If, by contrast, the court believes that the provision was essential to the legislative bargain, that the legislators would not have passed the statute without it, the court will declare the provision inseverable and refuse to enforce the statute in its entirety.[110]

How will a court discover the intent of the legislators in this regard? It will begin, of course, with the text of the statute. Like a contract, a statute may contain a severability clause declaring that the invalidity of any provision shall not affect the remainder of the statute.[111] While such a clause will be an important factor in a court's determination with regard to severability, it will not necessarily dispose of the question. As the Supreme Court has observed, "the ultimate determination of severability will rarely turn on the presence or absence" of a severability clause.[112]

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statute if the balance of the legislation is incapable of functioning independently."). *But cf.* Dorf, *supra* note 1, at 292 ("The only real test of severability for all practical purposes is whether the remaining statute can function as a coherent whole.").

[109] *See, e.g., New York*, 505 U.S. at 186-87; *Alaska Airlines*, 480 U.S. at 697; INS v. Chadha, 462 U.S. 919, 931-35 (1983); Buckley v. Valeo, 424 U.S. 1, 108-09 (1976) (per curiam); United States v. Jackson, 390 U.S. 570, 586 (1968); *Brown*, 992 F.2d at 948; Gulf Oil Corp. v. Dyke, 734 F.2d 797, 803-04 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984); EEOC v. Hernando Bank, 724 F.2d 1188, 1192 (5th Cir. 1984).

[110] *See, e.g., Alaska Airlines*, 480 U.S. at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."); Carter v. Carter Coal Co., 298 U.S. 238, 313-16 (1936); Retirement Bd. v. Alton R.R., 295 U.S. 330, 362 (1935); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635-37 (1895); City of New Haven v. United States, 809 F.2d 900, 905-06 (D.C. Cir. 1987).

[111] For a recent example of a severability clause, see the Congressional Accountability Act of 1995, Pub. L. No. 104-1, § 509, 109 Stat. 3, 44 (to be codified at 2 U.S.C. § 1438) ("If any provision of this Act or the application of such provision to any person or circumstance is held to be invalid, the remainder of this Act and the application of the provisions of the remainder to any person or circumstance shall not be affected thereby.").

[112] *Jackson*, 390 U.S. at 585 n.27. As Justice Brandeis explained in dictum in Dorchy v. Kansas, 264 U.S. 286, 290 (1924), a severability clause "provides a rule of construction which may sometimes aid in determining [legislative] intent. But it is an aid merely; not an inexorable command." One court has adopted similar language in describing the effects of a contractual severability clause. *See supra* note 75 and accompanying text (discussing

Because the severability of a statutory provision depends on the intent of the legislators, a court may go beyond the text and examine extrinsic evidence—the statute's legislative history—to determine whether the legislators in fact intended the provision to be severable.[113] While it may create a "presumption" in favor of severability,[114] a severability clause cannot overcome "strong" indications in the legislative history that the legislators "intended otherwise."[115]

The contracts approach to the severability of statutory provisions has a long lineage. Indeed, it derives from the first case seriously to address the question, *Warren v. Mayor of Charlestown*, which the Supreme Judicial Court of Massachusetts decided in 1854.[116] At issue in *Warren* was a Massachusetts statute purporting to annex the city of Charlestown to the city of Boston, across the Charles River.[117] By its terms, the statute was to take effect upon the affirmative vote of Charlestown's "inhabitants" at a town meeting called for that purpose.[118] The statute required the Mayor and Board of Aldermen of Charlestown to certify the results of the town meeting to the Secretary of the Commonwealth, who would, in turn, certify that the law had taken effect.[119] Although the meeting approved the statute, members of the Board of Aldermen refused to certify the results.[120] They argued that they had no duty to fulfill the statute's requirements because the statute was itself unenforceable: certain of its provisions regarding the election

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Eckles v. Sharman, 548 F.2d 905 (10th Cir. 1977)).

[113] *See Chadha*, 462 U.S. at 932 (explaining that presumption of severability raised by severability clause is supported by legislative history); Dorf, *supra* note 1, at 289 (discussing *Chadha* Court's reliance on legislative history).

[114] *Alaska Airlines*, 480 U.S. at 686; *see also* POPKIN, *supra* note 8, at 433 ("Severability clauses at most create a presumption favoring severability.").

[115] *Alaska Airlines*, 480 U.S. at 686.

[116] 68 Mass. (2 Gray) 84 (1854). Before *Warren*, the severability of unconstitutional statutory provisions was assumed, though a few courts suggested in dicta that "the constitutional parts of the law must be capable of being 'carried out' or 'intelligently acted upon' if they were to stand." Stern, *supra* note 1, at 79 (footnotes omitted).

[117] 68 Mass. (2 Gray) at 89.

[118] *Id.* at 90. The act also required that the "inhabitants" of Boston approve annexation, *id.*, but their approval was not at issue in the case.

[119] *See id.*

[120] *See id.* at 85.

of state and federal representatives were unconstitutional.[121]

Disgruntled "inhabitants" of Charlestown then brought suit for a writ of mandamus to require the aldermen to certify the results of the meeting.[122] The plaintiffs conceded that the aldermen had no duty to obey an unconstitutional statute[123] and that the provisions in question might pose constitutional difficulties.[124] But, they argued, the presence of some unconstitutional provisions could not render an entire statute unenforceable: the "obnoxious" provisions would remain inoperative while the constitutional provisions took effect.[125] Here, they asserted, the Massachusetts legislature had authority to enact "the first six lines" of the statute, which provided for the annexation of Charlestown to Boston; those six lines could take effect, whatever the fate of other, more problematic, clauses.[126] As a consequence, the plaintiffs argued, the presence of some unconstitutional provisions could not excuse the aldermen's failure to certify the entire act.

Writing for the court, Chief Justice Lemuel Shaw agreed with the plaintiffs that "the same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others,"[127] and that a court could refuse to enforce the unconstitutional provisions, and enforce the constitutional provisions, as though the legislature had passed two discrete statutes.[128] But, he continued, the provisions, "respectively constitutional and unconstitutional, must be wholly independent of each other."[129] To make his point, Chief Justice Shaw used the language of contracts law:

> [I]f [the provisions] are so mutually connected with and dependent on each other, as *conditions, considerations, or compensations* for each other, as to warrant a belief that the legislature intended them as a

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[121] *Id.* at 97.
[122] *Id.* at 84.
[123] *Id.* at 97.
[124] *Id.* at 91-92.
[125] *Id.* at 99.
[126] *Id.* at 91, 106.
[127] *Id.* at 98.
[128] *See id.* at 99.
[129] *Id.*

> whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them.[130]

Chief Justice Shaw agreed with the aldermen that the provisions regarding the election of state and federal representatives were unconstitutional.[131] Moreover, he concluded that those provisions could not be separated from the remainder of the statute under the test he had announced. The provisions were "connected" with the act's main object, the annexation of Charlestown to Boston, and there existed "no ground on which to infer" that the members of the legislature "would have sanctioned such annexation" in the absence of those provisions.[132] As a consequence, the aldermen had correctly refused to enforce the entire statute.[133]

Chief Justice Shaw's reference in *Warren* to "conditions, considerations, or compensations" is significant. These, of course, are basic concepts of contracts law. Indeed, Chief Justice Shaw's opinion in *Warren* rests on the assumption—implicit, perhaps, but there all the same—that the severability of statutory provisions should be analyzed as though it were a contracts problem. A statute, in Chief Justice Shaw's view, was a sort of contract: a bargain among the legislators who enacted it. To decide whether a given provision were severable, a court had merely to evaluate the provision's significance to the parties involved. A court could not sever a provision so central as to amount to "consideration" for the statute's passage. A court could, however, excise less important statutory terms.

The contracts approach set forth in *Warren* quickly became established doctrine with respect to the severability of statutory provisions.[134] State courts adopted *Warren* throughout the mid-

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[130] *Id.* (emphasis added).
[131] *Id.* at 106-07.
[132] *Id.* at 100.
[133] *Id.* at 107.
[134] *See* Stern, *supra* note 1, at 80. *See generally* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 178-79 & n.1 (1868) (setting forth *Warren* approach).

nineteenth century.[135] The United States Supreme Court first cited *Warren* in 1876,[136] and continued to do so in a number of decisions around the turn of the century.[137] And, although the locution has changed some over time—the Supreme Court has cited *Warren* only once since 1936,[138] and courts today rarely speak expressly of "conditions, considerations, or compensations" in connection with the severability of statutory provisions[139]—the central element of Chief Justice Shaw's opinion, the contracts approach, survives.[140]

Consider, in this regard, two of the United States Supreme Court's more recent cases addressing severability, *INS v. Chadha*[141] and *Alaska Airlines v. Brock*.[142] *Chadha* involved the constitutionality of section 244(c)(2) of the Immigration and Nationality Act,[143] which, at the time of *Chadha*, authorized either house of Congress to invalidate, by resolution, the Attorney General's decision to suspend deportation of an alien.[144] The Court held that this one-house "legislative veto" violated the bicameralism and presentment requirements of Article I of the

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[135] *E.g.*, State *ex rel.* Huston v. Commissioners of Perry County, 5 Ohio St. (1 Critch.) 497, 507 (1856); Slauson v. City of Racine, 13 Wis. 444, 450-51 (1861); *see also* COOLEY, *supra* note 134, at 179 nn.1-3 (citing cases adopting *Warren* approach); Nagle, *supra* note 1, at 213-14 n.54 (same).

[136] People v. Commissioners of Taxes, 94 U.S. 415, 418 (1876). The Court discussed *Warren* in more detail four years later in Allen v. Louisiana, 103 U.S. 80, 84 (1880).

[137] *E.g.*, International Textbook Co. v. Pigg, 217 U.S. 91, 113 (1910); Berea College v. Kentucky, 211 U.S. 45, 55 (1908); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635-36 (1895).

[138] Marchetti v. United States, 390 U.S. 39, 60 n.18 (1968); Carter v. Carter Coal Co., 298 U.S. 238, 316 (1936).

[139] This is not to say that courts never use such language. For examples, see Eubanks v. Wilkinson, 937 F.2d 1118, 1128-29 (6th Cir. 1991); Gerken v. Fair Political Practices Comm'n, 863 P.2d 694, 706 (Cal. 1993) (Arabian, J., dissenting); Small v. Sun Oil Co., 222 So. 2d 196, 199-200 (Fla. 1969); Fiorito v. Jones, 236 N.E.2d 698, 704 (Ill. 1968); Fairway Ford, Inc. v. Timmons, 314 S.E.2d 322, 324 (S.C. 1984).

[140] Writing in 1937, Robert Stern observed that, although severability doctrine had "been restated in various ways by different courts, in substance it has survived without change since the original Massachusetts decision." Stern, *supra* note 1, at 80; *see also* Nagle, *supra* note 1, at 213 (stating that *Warren* approach "has remained virtually unchallenged to this day").

[141] 462 U.S. 919 (1983).

[142] 480 U.S. 678 (1987).

[143] Ch. 477, 66 Stat. 163, 216 (1952) (current version at 8 U.S.C. § 1254(c) (1994)).

[144] 462 U.S. at 923, 925.

Constitution and was, therefore, unenforceable.[145] The Court concluded, however, that the legislative-veto provision was severable from the remainder of the Act.[146] Its analysis in this regard is instructive.

The Court began by noting that the Act contained an express severability clause declaring that " '[i]f any particular provision of this Act . . . is held invalid, the remainder of the Act . . . shall not be affected thereby.' "[147] The Court conceded that this clause was "unambiguous" and that section 244(c)(2) qualified as a "provision" within its meaning.[148] Nonetheless, the clause did not, in the Court's view, dispose of the question. The severability clause merely raised a presumption of severability: in the Court's view, it remained necessary to conduct an examination of the Act's legislative history to determine whether the members of Congress had actually intended that the legislative veto be severable.[149] While that examination suggested that the members of Congress had been reluctant to grant the Attorney General final authority with respect to deportations—a matter emphasized by then-Justice Rehnquist in dissent[150]—the Court concluded that the legislative history was "not sufficient to overcome the presumption of severability" that the severability clause had raised.[151]

Even more than its opinion in *Chadha*, perhaps, the Court's unanimous opinion in *Alaska Airlines* demonstrates the persistence of the contracts approach. *Alaska Airlines* involved the Airline Deregulation Act of 1978,[152] section 43 of which established an "Employee Protection Program" to assist airline workers who had been displaced by the industry's deregulation.[153] Section 43

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[145] *Id.* at 944-59.

[146] *Id.* at 931-35.

[147] *Id.* at 932 (quoting 8 U.S.C. § 1101 note) (emphasis omitted).

[148] *Id.*

[149] *See id.* ("The presumption as to the severability [of section 244(c)(2)] is supported by the legislative history.").

[150] *Id.* at 1015 (Rehnquist, J., dissenting).

[151] *Id.* at 932. The Court also noted that section 244, which authorized the Attorney General to suspend deportations, would continue to operate even absent the unconstitutional provision. *Id.* at 934-35.

[152] Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.) (repealed 1994).

[153] Alaska Airlines v. Brock, 480 U.S. 678, 680 (1987).

authorized the Secretary of Labor to issue regulations necessary for the program's implementation[154] and contained a legislative-veto provision declaring that such regulations would take effect sixty days after the Secretary had submitted them to Congress, unless during that period either house had adopted a resolution disapproving them.[155]

When the Secretary published implementing regulations, fifteen airlines brought suit to challenge the program's constitutionality.[156] The Secretary conceded that the legislative-veto provision was unconstitutional under *Chadha*, but argued that it was severable from the remainder of section 43: a court, the Secretary argued, should excise the legislative-veto provision and enforce the rest of the program.[157] The district court held that the legislative-veto provision was inseverable,[158] but the court of appeals reversed.[159] The court of appeals concluded that there existed "not a shred of evidence" in the Act's legislative history to suggest that Congress had considered the legislative-veto provision "to be a vital feature of the protection plan."[160]

The Supreme Court affirmed. Writing for the Court, Justice Harry Blackmun explained that the test for the severability of an unconstitutional statutory provision was "the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."[161] Just as Chief Justice Shaw did in *Warren*, Justice Blackmun addressed the question in the language of contracts law. A court must determine the importance of the unconstitutional provision, Justice Blackmun explained, in the "legislative bar-

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[154] *Id.* at 682.

[155] *Id.*

[156] Alaska Airlines v. Donovan, 594 F. Supp. 92, 94 (D.D.C. 1984), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985), *aff'd sub nom.* Alaska Airlines v. Brock, 480 U.S. 678 (1987).

[157] *Id.*

[158] *Id.* at 96.

[159] Alaska Airlines v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985), *aff'd sub nom.* Alaska Airlines v. Brock, 480 U.S. 678 (1987).

[160] *Id.* at 1565.

[161] 480 U.S. at 685 (footnote omitted); *see also id.* at 684 (" 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " (citation omitted)).

gain."[162] Congress might ease a court's inquiry in this regard by including a severability clause in the statute, but such a clause would not preclude an investigation of legislative history. Rather, as the *Chadha* Court had indicated, a statutory severability clause would merely raise a presumption of severability that could be overcome by "strong evidence" that Congress in fact "intended otherwise."[163]

The parties in *Alaska Airlines* disagreed whether there was an applicable severability clause: while the Airline Deregulation Act did not itself contain a severability clause, it had amended an earlier statute that did.[164] Justice Blackmun believed it unnecessary to resolve this dispute, however, for there was ample extrinsic evidence to demonstrate Congress's intent that the legislative-veto provision be severable.[165] The legislative history demonstrated that the provision was not important to the legislative bargain; the members of Congress would have enacted the bill even without it. In contrast to their extensive discussion of the substantive elements of the program, Justice Blackmun explained, the members had paid only "scant attention" to legislative oversight.[166]

From the mid-nineteenth century to the present, then, courts have employed a contracts approach to the severability of statutory provisions. As Part II explains, a focus on the parties' shared

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[162] *Id.* at 685.

[163] *Id.* at 686. "In the absence of a severability clause, however," Justice Blackmun continued, "Congress' silence is just that—silence—and does not raise a presumption against severability." *Id.*

During the early part of this century, the Court employed what one scholar has termed a " 'shifting presumptions' " approach. Nagle, *supra* note 1, at 219. Under that approach, the Court would presume that a statute was inseverable if it did not contain a severability clause; the presence of a severability clause would "reverse this presumption . . . and create the opposite" presumption that the statute was severable. Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936). The effect these "shifting presumptions" actually had on the outcome of cases is doubtful, *see* Stern, *supra* note 1, at 118-22, and, in any event, *Alaska Airlines* makes clear that the Court has abandoned this approach.

[164] 480 U.S. at 686 & n.8.

[165] *Id.* at 686-87.

[166] *Id.* at 693. In addition, Justice Blackmun explained, the Secretary's role under the program was "relatively insignificant." *Id.* at 688. Although the Act authorized the Secretary to promulgate implementing regulations, their effect would be incidental to other, more central, aspects of the program; as a consequence, Justice Blackmun reasoned, Congress could not have been greatly concerned about its own role in reviewing those regulations. *Id.*

intent, rather than the written memorial of their agreement, comports with fundamental concepts of contemporary contracts law.[167] Such an approach fails to comport with a proper understanding of statutes, however.

First, unlike a contract, a statute is not a private ordering. A statute does not bind only the parties who make it; a statute is not simply a "deal" among the legislators that affects them alone.[168] Rather, as Judge Easterbrook has explained, a statute is "designed to control the conduct of strangers to the transaction."[169] A statute is a "political document"[170] whose purpose is to provide a rule of conduct for persons outside the legislative branch, namely, the members of the executive and judicial branches and the public at large. Indeed, as the *Chadha* Court itself suggested, the capacity to control the conduct of persons outside the legislative branch is at the core of the concept of legislative power under Article I of the Constitution.[171]

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[167] *See* discussion *supra* text accompanying notes 79-100.

[168] In recent years, some scholars have suggested that courts should view statutes, or at least some statutes, as bargains among legislators and interpret them accordingly. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 541, 547-48 (1983) [hereinafter *Statutes' Domains*]; Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-17 (1984) [hereinafter Easterbrook *Foreword*]; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 708 (1992); Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 250-54 (1992); *cf.* D.A.F., *supra* note 93, at 217 (discussing analogies between contracts and constitutional interpretation); Gillian K. Hadfield, *Incomplete Contracts and Statutes*, 12 INT'L REV. L. & ECON. 257, 258 (1992) ("[T]here are reasons to pursue [the] suggestion that we adopt [a contracts] model in the analysis of statutory interpretation."). This Article suggests, of course, that attempts to draw analogies between contractual and statutory interpretation are misguided. *See* discussion *infra* Part V.

[169] Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 447 (1990).

[170] POPKIN, *supra* note 8, at 323.

[171] The *Chadha* Court explained the "legislative character" of the one-house veto provision at issue in that case as follows:

> Examination of the action taken here by one House . . . reveals that it was essentially legislative in purpose and effect. In purporting to exercise [its constitutional] power . . . to "establish an uniform Rule of Naturalization," the House took action that had the purpose of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and [a private party], all outside the Legislative Branch.

INS v. Chadha, 462 U.S. 919, 952 (1983).

That a statute is meant to bind people outside the legislative branch has profound implications for its proper interpretation. Before those people can conform their conduct to a statute's requirements, they must know what those requirements are.[172] While members of the executive branch and some larger private organizations may keep a close watch on Congress,[173] relatively few persons outside the legislative branch—even those assisted by counsel—have the resources to follow a statute's "negotiation" closely. The legislative history provides a record of this "negotiation," of course, but the relevant materials are numerous, comprising "committee reports, conference reports, records of committee hearings, floor statements, Presidential signing statements, and all previous legislation or documents of any nature to which any of the foregoing refer."[174] To research these materials takes enormous effort.[175] Many are not even available outside major metropolitan centers.[176]

As a practical matter, therefore, most people obtain their knowledge of a statute's requirements from the most obvious and accessible source, the text of the statute itself.[177] As a conse-

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[172] *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 51 (1989) [hereinafter LEGISLATIVE HISTORY]; Easterbrook, *supra* note 169, at 447.

[173] *Cf.* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 19 (1991) (noting that interest groups with "substantial resources . . . engage in sophisticated political strategies").

[174] Slawson, *supra* note 16, at 408. The use of presidential signing statements in statutory interpretation is a fairly recent, and controversial, development. *See* MIKVA & LANE, *supra* note 13, at 784-85.

[175] Slawson, *supra* note 16, at 408.

[176] *Id.*; *see also* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396-97 (1951) (Jackson, J., concurring) (noting that legislative history is available in "a few offices in the larger cities"); Monroe H. Freedman, Book Review, 28 GEO. WASH. L. REV. 503, 503-04 (1960) (discussing Justice Jackson's opinion in *Schwegmann*).

[177] *See* LEGISLATIVE HISTORY, *supra* note 172, at 52; *see also* William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621, 667 (1990) [hereinafter *New Textualism*] (statutory text is "material most accessible to the citizenry"); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 (1990) [hereinafter *Practical Reasoning*] (noting "rule-of-law value that citizens ought to be able to read the statute books and know their rights and duties"); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 57 (1994) [hereinafter *Foreword*] (noting "traditional rule-of-law view that statutory text should be the key source of statutory meaning"); Slawson, *supra* note 16, at 424 (noting

quence, a focus on intent makes much less sense in statutory interpretation than it does in the context of contracts law. A contract binds only the parties who make it, and there seems nothing inappropriate in holding the parties to their shared intent, even where the writing they have adopted fails to reflect that intent. In contrast, a statute binds third persons, and it seems unrealistic and unfair to require people outside the legislative branch to abide by private understandings among the legislators of which they may have little, if any, notice. As Justice Jackson once observed, to allow "legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country."[178]

Moreover, unlike a contract, a statute does not exist apart from the written text. The writing does not "reflect" the statute; the writing does not "memorialize" the statute; the writing does not serve as "evidence" of the statute.[179] The writing *is* the statute, and the statute is "law":[180] the intent of the legislators has no independent authority. This follows from the detailed mechanism the Constitution establishes for a statute's adoption.[181] As Max Radin observed, the Constitution does not grant legislators the power "to impose their will . . . on their fellow citizens, but to 'pass statutes,' which is a fairly precise operation" whose familiar details appear in Article I:[182] A bill becomes "a Law" only after it passes both the House of Representatives and the Senate and receives the approval of the President, or, if it does not receive the President's approval, it passes both the House and Senate on reconsideration by a two-thirds vote.[183]

That legislative intent lacks authority apart from the words of a statute also has profound implications for statutory interpretation. Once again, a focus on intent makes much less sense with respect

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that "statutes are generally much more accessible than legislative history").

[178] *Schwegmann Bros.*, 341 U.S. at 396-97 (Jackson, J., concurring).

[179] *Cf. In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) ("Statutes are law, not evidence of law.").

[180] *Id.* For an excellent discussion of a theory of "law as statute," see Slawson, *supra* note 16, at 384, 416, 424.

[181] *See* LEGISLATIVE HISTORY, *supra* note 172, at 26; William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 372-74 (1990).

[182] Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871 (1930).

[183] U.S. CONST. art. I, § 7, cl. 2.

to statutes than it does with respect to contracts. And while scholarly debate about the place of legislative intent continues to churn,[184] the United States Supreme Court has in recent times held to a theory of interpretation that places primacy on the statute's text.[185] To be sure, the Court has not been very consistent in this regard.[186] The Court may, for example, examine legislative history to clarify statutory ambiguities,[187] and will not hold to the text of a statute where doing so would produce an "absurd,"[188] or perhaps an "odd," result.[189] Nonetheless, as the Court has explained, "the beginning point must be the language of

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[184] Eskridge and Frickey have identified three main theories of statutory interpretation: "intentionalism," which emphasizes the actual or presumed intent of the legislature enacting the statute; "purposivism," which emphasizes the purpose, or objective, of the statute; and "textualism," which emphasizes the commands of the statute's text. *Practical Reasoning*, *supra* note 177, at 324. Some scholars, Eskridge and Frickey among them, have advocated "dynamic" theories that hold that the meaning of a statute can evolve over time. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); *Practical Reasoning*, *supra* note 177, at 343, 351-52, 358-60. The popularity of these theories ebbs and flows, *see* William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1732-43 (1993), and a full discussion of their relative merits is beyond the scope of this Article. As the text explains—and with the important qualifications there stated—the Court has in recent times held to a textualist approach.

[185] *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992); *Foreword*, *supra* note 177, at 57-58, 59; Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 246. As David Shapiro observes, "[w]hile academics vigorously debate the merits and applicability of deconstructionism, public choice theory, purposive analysis, and various theories of 'dynamic' statutory interpretation, justices of the Supreme Court are attempting with missionary zeal to narrow the focus of consideration to the statutory text and its 'plain meaning.' " David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 921-22 (1992) (footnotes omitted).

[186] *See Foreword*, *supra* note 177, at 57 ("[T]he Court does not adhere to any single foundation for statutory meaning."); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1076 (1992) (empirical study demonstrating that Court "often" relies on legislative history "to complement textual sources").

[187] *See Foreword*, *supra* note 177, app. at 100 & n.40.

[188] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510-11 (1989); *id.* at 527 (Scalia, J., concurring in judgment); Breyer, *supra* note 185, at 848-49; Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 158 (1994).

[189] Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 454-55 (1989); *cf.* Slawson, *supra* note 16, at 414 (arguing that *Public Citizen* demonstrates that Court is not really committed to textualism).

the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."[190]

Even apart from these conceptual differences, there exist serious practical difficulties in applying the contracts approach in the statutory context. Discovering the intent of the legislators who enact a statute is likely to be a far more difficult enterprise than discovering the intent of the parties who make a contract. It is one thing for a court to examine the negotiating history of a traditional, bipolar contract, involving two parties, thorough negotiations, and a limited subject-matter.[191] It is quite another for a court to scour the legislative history of a typical federal statute. Rather than two parties, a "legislative bargain" involves hundreds, namely, the members of Congress who vote for the bill[192] and, indeed, one party that severability doctrine simply ignores: the President. The vast majority of these "parties" remain silent during the bill's consideration.[193] The congressional leadership may express its

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[190] Estate of Cowart v. Niklos Drilling Co., 505 U.S. 469, 475 (1992); *see also* Metropolitan Stevedore Co. v. Rambo, 115 S. Ct. 2144, 2147 (1995) (quoting *Cowart*).

[191] Of course, a contract may comprise multiple parties and cover many different subjects. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 17, §§ 10, 288; *id.* ch. 13 (introductory note); 4 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 923 (1951). As a contract grows in complexity, its interpretation becomes more problematic. The interpretation of a particularly complex contract, involving numerous parties and various topics, may present the same practical difficulties as a piece of legislation.

Some scholars, notably Ian Macneil, have argued that the traditional bipolar model fails to reflect how people make contracts in the real world. These scholars hold that the correct model is one of a "relational" contract, comprising many subjects and numerous parties with only vaguely defined aims. *See* MACNEIL, *supra* note 96, at 10, 20; Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589, 595-96 (1974). Indeed, relational-contracts scholars argue that the parties to a contract often have goals that are "non-economic." Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, app. at 902 (1978); *see* Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 158; William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 550. Whether the "relational" contract model is the correct one is beyond the scope of this Article. Suffice it to say that a relational contract approximates legislation more than the traditional model described in the text, and would present similar interpretive difficulties.

[192] *See* Farber, *supra* note 80, at 689 ("[I]nstead of being split into two camps, the legislators may be spread out along a spectrum."); McNollgast, *supra* note 168, at 710-11.

[193] *See* Radin, *supra* note 182, at 870-71.

views, of course, but those may bear only a tenuous relation to the understanding of their colleagues.[194] As Slawson has observed, "[a]bsence of disagreement on the record is . . . likely to represent the other members' inattention, lack of interest, or absence."[195]

Moreover, instead of a limited, well-defined subject matter, a federal statute may comprise numerous, unrelated topics on which the legislators have widely divergent views.[196] Indeed, the legislators may care relatively little about the substance of the bill itself. "[P]olitical science scholarship teaches that," in addition to their views on the merits of the legislation, "legislators vote for bills out of many . . . motives, including logrolling, loyalty or deference to party and committee, [and the] desire not to alienate blocks of voters . . . ."[197] Thus, as the Realists recognized more than sixty years ago, a search of legislative history to discover the "intent of the legislators" is of dubious value.[198]

To summarize Part III: under the contracts approach, the intent of the legislators, not the words of the statute, controls with regard to the severability of unconstitutional provisions. But this makes severability turn on private understandings among legislators of which persons outside the legislature may have little or no notice. Moreover, under the contracts approach, the intent of the legisla-

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[194] *See* Eskridge, *supra* note 181, at 383-84; *Practical Reasoning*, *supra* note 177, at 327. Recent public choice scholarship confirms this observation. Public choice may be defined " 'as the economic study of nonmarket decision making, or simply the application of economics to political science.' " FARBER & FRICKEY, *supra* note 173, at 7 (citation omitted). Among other things, public choice scholarship suggests that, by manipulating the order in which the body votes, the legislative leadership can determine which option, among many, the body chooses. *See id.* at 38-42; Shepsle, *supra* note 168, at 241-50; *Statutes' Domains*, *supra* note 168, at 547-48. Indeed, some versions of public choice theory suggest that a clever leadership can manipulate the agenda to obtain a result at odds with the intent of the legislators. FARBER & FRICKEY, *supra* note 173, at 39-40. To be sure, public choice remains a controversial understanding of the legislative process. *See* MIKVA & LANE, *supra* note 13, at 19-24; Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CAL. L. REV. 1657, 1657 (1993) (book review). Whatever the merits of its broader assertions about the nature of democratic government, though, public choice theory should make one wary of equating the expressed views of the legislative leadership with the intent of the legislators.

[195] Slawson, *supra* note 16, at 403-04.

[196] *See* discussion *supra* text accompanying notes 14-16.

[197] *Practical Reasoning*, *supra* note 177, at 326.

[198] MORRIS R. COHEN, LAW AND THE SOCIAL ORDER 129-30 (1933); Zechariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 399-400 (1941); Radin, *supra* note 182, at 870-71; Radin, *supra* note 11, at 410-11.

tors controls not only where statutory language is ambiguous, or where statutory language would create an "absurd" result. Under the contracts approach, the intent of the legislators prevails even over a clear severability clause. Finally, the contracts approach requires courts to conduct a search for legislative intent that is far more difficult, as a practical matter, than a search for the intent of the parties to a traditional contract. One can see, then, why the contracts approach to severability is inappropriate in the statutory context.

IV. SEVERABILITY OF UNCONSTITUTIONAL STATUTORY PROVISIONS: A TEXTUAL APPROACH

What, then, is the correct approach? If present doctrine is flawed in the ways this Article suggests, what should take its place? If a court cannot properly employ the contracts approach to determine the severability of unconstitutional statutory provisions, what approach should it employ?

The answer follows from the criticisms contained in Part III. In resolving questions about the severability of statutory provisions, courts should employ a textual approach. Under such an approach, the text of the statute would be dispositive. Where the text of the statute addressed severability, either directly or indirectly, a court would enforce the statute's commands; a court would not, as under the contracts approach, look to legislative history to overcome the plain meaning of statutory language in this regard. Where the statute remained silent on the question, the court would, as a matter of default, sever the unconstitutional provision and enforce the remainder of the statute.

To understand how a textual approach would work in practice, and how it would differ from present doctrine, consider first the most common way that statutes address the question of severability. The most common way for statutes to address severability, of course, is by means of an express severability clause:[199] a clause,

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[199] A statute might also contain an "*in*severability" clause, that is, a clause declaring that the invalidity of any one provision *shall* invalidate the remainder of the Act. *E.g.*, 25 U.S.C. § 1734 (1988) ("In the event that any provision of [a named section] is held invalid, it is the intent of Congress that the entire subchapter be invalidated."); *id.* § 1760 (same); 42 U.S.C. § 300aa-1 note (Supp. V 1993) (declaring that "if any provision [of two named parts] is held

like the one contained in the recently enacted Congressional Accountability Act of 1995, that declares that "[i]f any provision of this Act . . . is held to be invalid, the remainder of this Act . . . shall not be affected thereby."[200] Under present doctrine, as we have seen, "the ultimate determination of severability will rarely turn on the presence or absence" of such a clause.[201] While it may create a presumption of severability, even a clear severability clause cannot, under the contracts approach, overcome "strong" indications in the legislative history that the legislators "intended otherwise."[202]

Under a textual approach, the effect of such a clause would be quite different. An express severability clause would be dispositive: a court would give effect to the clear commands of such a clause, and hold a statute severable, without further inquiry into legislative intent. To be sure, even under a textual approach, interpretive questions might remain with respect to the application of a particular severability clause. Most severability clauses, for example, apply to statutory "provisions";[203] in any given case, it might be a nice question whether unconstitutional statutory language qualified as a "provision" within the meaning of the relevant severability clause.[204] But, assuming that it did apply

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invalid by reason of a violation of the Constitution, both such parts shall be considered invalid"); *see* Zobel v. Williams, 457 U.S. 55, 65 (1982) (dictum) (discussing Alaska statute). *See generally* MIKVA & LANE, *supra* note 13, at 75-76 (describing advantages of inseverability clauses). Inseverability clauses are comparatively rare in federal statutes and have not figured in the Court's severability opinions. *See* Nagle, *supra* note 1, at 251 n.235. Nonetheless, there appears no reason why, under a textual approach, an inseverability clause should receive treatment different from that afforded a severability clause. Under a textual approach, a court would give effect to an inseverability clause without further inquiry into legislative intent.

[200] Pub. L. No. 104-1, § 509, 109 Stat. 3, 44 (to be codified at 2 U.S.C. § 1438).

[201] United States v. Jackson, 390 U.S. 570, 585 n.27 (1968); *see* discussion *supra* text accompanying notes 111-115.

[202] Alaska Airlines v. Brock, 480 U.S. 678, 686 (1987).

[203] *Supra* note 200 and accompanying text.

[204] The Court addressed this matter, though only briefly, in INS v. Chadha, 462 U.S. 919 (1983), discussed *supra* text accompanying notes 143-151. To recall, *Chadha* involved the severability of a legislative-veto provision contained in section 244(c)(2) of the Immigration and Nationality Act. The Act contained a severability clause that applied to " 'any particular provision' " of the Act. In the course of its opinion, the *Chadha* Court noted that the legislative-veto provision in section 244(c)(2) was "clearly a 'particular provision' of the Act as that language [was] used in the severability clause." 462 U.S. at 932. *See generally* Dorf,

to the unconstitutional language in question, a severability clause could not be overcome, under a textual approach, by evidence in the legislative history that the legislators in fact intended the statute to be inseverable.

Over the years, a number of commentators have argued against assigning dispositive weight to statutory severability clauses on the ground that they are simply "boilerplate":[205] words that members of Congress append thoughtlessly to legislation more or less as a matter of routine.[206] "Are we really to imagine," asked Max Radin in 1942, "that the legislature had, as it says it had, weighed each paragraph literally and come to the conclusion that it would have enacted that paragraph if all the rest of the statute were invalid?"[207] As the members of the legislature fail to pay much, if any, heed to the presence of a severability clause, the argument runs, a court should not pay much heed either.

This argument mistakes the object of statutory interpretation. Again, the comparison with contracts is instructive. A court will sometimes refuse to give effect to boilerplate language in a contract on the theory that such language reflects the absence of true agreement between the parties.[208] A court may fear, for example, that the party with superior bargaining power forced the language on the other;[209] or that one party silently inserted the language

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supra note 1, at 290 (suggesting that unconstitutional statutory language would qualify as a "provision" within the meaning of a severability clause).

[205] *See* POPKIN, *supra* note 8, at 433; TRIBE, *supra* note 4, at 79-80; Radin, *supra* note 11, at 419; Stern, *supra* note 1, at 122-23; *Severability*, *supra* note 2, at 1185-86.

[206] MIKVA & LANE, *supra* note 13, at 579; Radin, *supra* note 11, at 419.

[207] Radin, *supra* note 11, at 419; *see also* Stern, *supra* note 1, at 122 ("When legislatures declared that 'The invalidity of any part of this statute shall not affect the remainder', they did not mean it.").

[208] For a now classic description of this problem, see KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 362-71 (1960); *see also* CALAMARI & PERILLO, *supra* note 46, § 9-46, at 427 (noting that standardized contracts may not reflect "true assent"); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 522 (1993) (noting that parties to standardized contract "never had a meaningful opportunity to bargain"); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 32-33 (1984) (discussing Llewellyn's insight about lack of true assent in standardized contracts).

[209] *See* FARNSWORTH, *supra* note 35, § 4.28, at 332-33; Friedrich Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

in an attempt unfairly to surprise the other;[210] or that neither party really paid much attention to the language.[211] While the extent to which a court can refuse to enforce contractual language on these grounds remains controversial,[212] the emphasis on the parties' actual agreement, rather than the words of the written memorial, comports with the fundamental principles of contracts law discussed in Part II.[213]

Refusing to enforce boilerplate language in a statute makes much less sense, however. A court that attempts to police a bargain between private parties need not worry about the impact on third persons.[214] A court that attempts to police a "legislative bargain," however, must consider the effect on "strangers to the transaction" as well.[215] As we have seen, a statute is meant to bind people outside the legislature, people who must, as a practical matter, rely on the text of the statute to ascertain their rights and responsibilities.[216] It hardly seems appropriate to hold that those people must forgo reliance upon plain statutory language because it is merely boilerplate to which members of the legislature paid little attention.

The boilerplate argument fails for other reasons as well. It is not at all clear, for one thing, that members of Congress fail to appreciate the significance of severability clauses.[217] Congressional counsel can advise members of the impact of such clauses. Indeed, after the Court announced its opinion in *Chadha*, congressional counsel expressed frustration at the members' rejection of

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[210] *See* Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 246-47 (1995); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1921-22 (1992).

[211] *See* CALAMARI & PERILLO, *supra* note 46, § 9-46, at 427 (noting that party "may reasonably believe that he is not expected to read a standardized document"); LLEWELLYN, *supra* note 208, at 370; Eisenberg, *supra* note 210, at 242 ("Few hurried travelers, for example, will pause to read the boilerplate provisions of their car rental agreements."); John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1453-54 (1994).

[212] *See* FARNSWORTH, *supra* note 35, § 4.26, at 312-13.

[213] *Supra* text accompanying notes 80-100.

[214] *See* discussion *supra* text accompanying notes 80-91.

[215] Easterbrook, *supra* note 169, at 447.

[216] *See* discussion *supra* text accompanying notes 168-178.

[217] Nagle, *supra* note 1, at 241.

their repeated warnings in this regard.[218] In addition, while severability clauses are widespread, they do not appear in every piece of legislation, or even in every constitutionally questionable piece of legislation.[219] Indeed, controversial legislation sometimes includes an inseverability clause, a clause declaring that, if any one provision of the statute is held invalid, the remainder of the statute shall *not* have effect.[220]

Under a textual approach, then, a court would enforce a severability clause, in accordance with its plain meaning, without further inquiry into legislative intent: this is its most significant departure from present doctrine. While an express clause is the most common way for the text of a statute to address severability, however, it is not the only way. Even where a statute does not contain an express severability clause, the text might address the question indirectly. The statute might, for example, contain language that declares policies or purposes in the context of which a given provision appears insignificant.[221] Under a textual approach, a court would follow such an indirect textual "command" and sever the unconstitutional provision.

Consider, in this regard, the Court's opinion in *New York v. United States*.[222] *New York* addressed the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985,[223] which directed that each state " 'be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State.' "[224] The Act contained three "incentives" to encourage states to comply with

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[218] *See Legislative Veto and the "Chadha" Decision: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 41 (1983) (statement of Stanley M. Brand, General Counsel to the House Clerk) ("I always believed, even while these cases were going on, that severability clauses were against our interest, and consistently advised committees not to insert them.").

[219] *See, e.g.*, New York v. United States, 505 U.S. 144, 186 (1992) (noting absence of severability clause in Low-Level Radioactive Waste Policy Amendments Act of 1985).

[220] *See, e.g., supra* note 199 (discussing and providing examples of inseverability clauses).

[221] *See New York*, 505 U.S. at 186-87; EEOC v. Hernando Bank, 724 F.2d 1188, 1190-92 (5th Cir. 1984); Gulf Oil Corp. v. Dyke, 734 F.2d 797, 803 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984).

[222] 505 U.S. 144 (1992).

[223] Pub. L. No. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. §§ 2021b-2021j (1988)).

[224] 505 U.S. at 151 (quoting 42 U.S.C. § 2021c(a)(1)(A)) (alteration in original).

their statutory obligations,[225] one of which offered states, "as an alternative to regulating pursuant to Congress' direction, the option of taking title to and possession of the low level radioactive waste generated within their borders."[226] The Court held that this "take title" provision amounted to "coercion" of the states in violation of the Constitution.[227]

The Court also held, however, that the take title provision was severable from the remainder of the Act.[228] The Act contained no severability clause.[229] It did, however, contain language that made apparent its objective: that the states "attain local or regional self-sufficiency in the disposal of low level radioactive waste."[230] Even without the take title provision, the Court reasoned, the Act would serve this purpose. After all, there remained two incentives to "coax" the states "along [the] road":[231] the Act encouraged states to take responsibility for low-level radioactive waste by providing certain cash payments and by restricting states' access to certain disposal sites.[232] These two incentives, the Court noted, would continue to have effect even without the take title provision; invalidation of that provision, therefore, would not negate the Act's overall objective.[233] As a result, the Court held, it was possible to sever the take title provision and "leave the remainder of the Act in force."[234]

Admittedly, the result in *New York* is somewhat dubious. One can question the Court's conclusion about the relative insignificance of the take title provision to the Act's overall objective of encouraging states to take responsibility for the disposal of low-level

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[225] *Id.* at 152.

[226] *Id.* at 174-75. The provision also required states to accept liability for certain damage claims. *Id.* at 175.

[227] *Id.* at 177 ("Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.").

[228] *Id.* at 187.

[229] *Id.* at 186.

[230] *Id.* at 187; *see id.* at 151.

[231] *Id.* at 187.

[232] *Id.* at 152-53.

[233] *Id.* at 187.

[234] *Id.*

radioactive waste.[235] The precise result in *New York* is not important for these purposes, however. The important point has to do with the Court's method. *New York* demonstrates that, even where a statute does not contain an express severability clause, a court can determine the severability of an unconstitutional provision by looking to the statute's text.[236] Indirect instructions are always more ambiguous than direct commands, of course, and the absence of an express clause may well make a court's determination with respect to severability more difficult—but not impossible.[237]

Under a textual approach, then, a court must give effect to a statute's commands, direct or indirect, with regard to the severability of unconstitutional provisions. One final question remains, however. What result where the text of the statute contains no such commands? What result where the statute contains neither an express severability clause nor, as in *New York*, more oblique language bearing on the severability of unconstitutional provisions? For reasons explored in Part III, a search of the legislative history for indications of legislative intent with regard to severability would be misguided.[238] How, then, should a court resolve the question?

The best approach would seem to be a default rule in favor of

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[235] *Cf.* Carter v. Carter Coal Co., 298 U.S. 238, 314 (1936) (refusing to sever unconstitutional labor provisions from price-fixing provisions in act to regulate bituminous coal industry, reasoning that "the primary contemplation of the act is stabilization of the industry through the regulation of labor *and* the regulation of prices; for, since both were adopted, we must conclude that both were thought essential").

[236] Significantly, the *New York* Court did not say whether the Act's legislative history supported its decision. *Cf.* Dorf, *supra* note 1, at 291-92 (arguing that *New York* Court's failure to cite legislative history suggests departure from traditional intent-based test).

[237] As we have seen, the *New York* Court did not rely on legislative history in holding the take title provision severable. *Supra* note 236. Nonetheless, the United States Supreme Court's statutory interpretation cases indicate that an examination of legislative history is appropriate to clarify ambiguous statutory language or to avoid an "absurd" result. *Supra* text accompanying notes 187-189. Even under a textual approach, therefore, a court might examine legislative history to clarify ambiguous statutory language that relates to severability or to avoid creating an "absurd" statutory remnant. To employ legislative history in this manner is to depart from a strict textualist position, of course, but it is a departure the Court's cases allow, if not require. In any event, relying on legislative history in this fashion differs greatly from granting legislative history priority over the plain meaning of a severability clause, as required by the contracts approach.

[238] *Supra* text accompanying notes 168-198.

severability.[239] Where a statute is silent on the question, a court should sever unconstitutional provisions and enforce the remainder of the statute. Such a default rule follows both from separation-of-powers concerns and an appreciation of present legislative practice. As explained in Part III, it is a basic principle of constitutional law that a court must give effect to the commands of a statute to the extent the Constitution permits.[240] For a court to refuse to enforce a statute's constitutional provisions, as well as its unconstitutional provisions, would run afoul of this principle. As the Supreme Court has explained, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of [a] court to so declare, and to maintain the act in so far as it is valid."[241] A regard for the proper role of the judiciary suggests that a court should "invalidate as little of a statute as possible" unless the statute indicates, directly or indirectly, a contrary result.[242]

In addition, a default rule in favor of severability comports with present legislative practice. As we have seen, an important reason for the abiding significance of severability doctrine is Congress's tendency to enact sweeping, multi-purpose statutes that address

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[239] Adopting a default rule in these circumstances would not be inconsistent with textualism. Textualism holds that courts must read statutes in light of "maxims" or "canons" of construction that derive both from generalized notions of legislative intent and from substantive concerns. *See* Richard J. Pierce, *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 743-44 (1992); Shapiro, *supra* note 185, at 925. The default rule that I advocate here may be seen as just such a canon.

To be sure, textualism's reliance on canons is controversial. *See* MIKVA & LANE, *supra* note 13, at 772. Scholars have argued that a reliance on judicially-crafted canons belies any claim of fidelity to legislative supremacy, *see id.* at 773-74; Schacter, *supra* note 103, at 644, and that, in any event, many established canons are simply incorrect as a descriptive matter. *See* MIKVA & LANE, *supra* note 13, at 773-74. *But see* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1224 (arguing that "many traditional maxims of statutory interpretation embody legitimate and valid inferences of legislative intent"). A thorough discussion of the place of canons in a textualist theory is beyond the scope of this Article. For a good introduction to the debate, see Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

[240] *See* discussion *supra* text accompanying notes 106-107.

[241] El Paso & N.E. Ry. v. Gutierrez, 215 U.S. 87, 96 (1909); *see also* Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion).

[242] Nagle, *supra* note 1, at 251.

numerous, sometimes unrelated, subjects.[243] To allow an isolated constitutional error to wreck such omnibus legislation would create unnecessary confusion and inconvenience.[244] At the very least, Congress would need to reenact the valid portions of the statute;[245] in the case of some omnibus legislation, like appropriations or authorization bills, Congress might need to act on an emergency basis. The executive branch would need to review any regulations that it had promulgated under the invalidated statutory scheme. To be sure, such costs are imposed any time a court declares a statute unconstitutional. Their existence, however, suggests that the invalidity of one provision should not be taken, at least without further statutory indication, to invalidate an entire statutory scheme.[246]

One might argue, of course, that the default rule should be precisely the opposite: that where a statute is silent on the question, a court should declare unconstitutional provisions inseverable and refuse to enforce the remainder of the statute. A default rule against severability, the argument runs, would avoid the potential for "judicial legislation" that exists where a court enforces, without any statutory authorization, only *part* of a statute that Congress has enacted.[247] Moreover, such a rule would help ensure that a court did not inadvertently upset any "compromise" that the legislators had reached in passing the legislation:[248] a default rule against severability would prevent a court from ripping

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[243] *Supra* text accompanying notes 14-16.

[244] *Cf.* Shapiro, *supra* note 185, at 925 (arguing that close questions of statutory construction should be "resolved in favor of continuity and against change").

[245] *See* Nagle, *supra* note 1, at 227.

[246] One might argue that a court should not sever an unconstitutional provision where doing so would leave a statute incapable of operation. In those circumstances, the argument runs, a court should declare the unconstitutional provision inseverable and refuse to enforce the statute as a whole. *See supra* note 108. This argument is specious. By definition, an inoperative statute cannot be enforced. There is no practical difference between holding a provision severable and creating an inoperative statute, and holding a provision inseverable and refusing to enforce the statute as a whole.

[247] *See* TRIBE, *supra* note 4, at 79-80; Dorf, *supra* note 1, at 292-93.

[248] *Cf.* Eric Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 657 (1987) ("Since the building of majorities necessarily requires compromise, a broad reading of a controversial statute is far more likely to undermine legislative intent than support it.").

"the quid from the quo."[249] Finally, as Dorf has recently suggested, a default rule against severability might encourage members of the legislature to take more seriously their obligation to enact legislation in conformity with constitutional requirements.[250] If members of Congress knew that a single constitutional error would invalidate an entire statute, Dorf suggests, they might well pay closer attention to constitutional issues that the legislation presents.[251]

Though plausible, these arguments ultimately fail to persuade. It is true that a default rule in favor of severability might create the potential for judicial overreaching. But this is a difficulty that Congress can easily avoid. If Congress wishes to preclude a court's discretion to sever unconstitutional statutory provisions, it need merely include an inseverability clause of the sort described earlier.[252] Moreover, for the reasons explained in Part III, there is little sense in honoring private legislative "compromises" that fail to appear in the language of a statute.[253] Finally, the impact of the sort of judicial encouragement that Dorf describes is doubtful. "In the end," as Dorf himself concedes, "judicially crafted rules can only go so far towards ensuring that Congress fulfills its constitutional role."[254]

V. CONCLUSION

The contracts approach to the severability of statutory provisions, which has been part of established law since the mid-nineteenth century, fails to comport with a proper understanding of statutes. The same rule for severability cannot obtain with respect to both contracts and statutes. The severability of statutory provisions should be governed by a textual approach.

A more profound observation follows from this conclusion. As

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[249] Nagle, *supra* note 1, at 226.

[250] Dorf, *supra* note 1, at 293.

[251] *Id.*

[252] *Supra* note 199. In their recent book, Judge Abner Mikva and Professor Eric Lane suggest that Congress should include inseverability clauses in controversial legislation for just this reason. *See* MIKVA & LANE, *supra* note 13, at 579.

[253] *See* discussion *supra* text accompanying notes 168-198.

[254] Dorf, *supra* note 1, at 293.

Farber has remarked, there is very little scholarship comparing, in any systematic way, the interpretation of contracts and statutes.[255] What comparative scholarship there is, moreover—mostly work in law-and-economics and public-choice theory—largely assumes that difficulties in statutory interpretation can be solved by applying the interpretive methodology of contracts law.[256] This scholarship suggests that if courts would interpret statutes—at least some statutes[257]—the way they interpret contracts, the enterprise of statutory interpretation would make much more sense.

This Article demonstrates, however, that applying the methodology of contracts law to the interpretation of statutes may create difficulties, not solve them. That, after all, was Chief Justice Shaw's mistake in *Warren v. Mayor of Charlestown*,[258] and it has plagued severability doctrine ever since. As we have seen, contracts and statutes differ in fundamental ways, and one should be wary of their casual equation.[259] Further comparative study would illuminate both.

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[255] Farber, *supra* note 80, at 667. Farber believes that the lack of comparative work stems from scholarly specialization. "Few constitutional law or legislation scholars teach courses like property or contracts; of those few, most probably regard these courses as pedagogical chores rather than potential sources of inspiration." *Id.* at 668.

[256] *See* sources cited *supra* note 168. *But see* Easterbrook, *supra* note 169, at 445-46 (discussing difference between interpreting contracts and statutes). For a recent comparison of interpretation in the context of statutes and collective bargaining agreements, see James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283 (1995).

[257] *See* Easterbrook *Foreword*, *supra* note 168, at 15-17; *Statutes' Domains*, *supra* note 168, at 541.

[258] 68 Mass. (2 Gray) 84 (1854) (discussed *supra* text accompanying notes 116-133).

[259] *See* Easterbrook, *supra* note 169, at 445-46; Hadfield, *supra* note 168, at 257; William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 544, 570-71 (1988).