Note

Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation

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"Congress occasionally passes legislation that even supporters acknowledge poses serious constitutional concerns and presidents sometimes support legislation they believe to be constitutionally dubious, all because they sense that the courts are available as the ultimate arbiter of constitutional disputes."[1]

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1 Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 277 (2004) (citing Joel Mowbray, *The Bush Way of Compromise*, WASH. TIMES, Apr. 12, 2002, at A23).

Introduction

Congress passing a law regulating abortion is not surprising.[2] Nor is it surprising that President Bush signed the statute into law.[3] Even less surprising, perhaps, is that the law was immediately challenged in three federal courts[4] as unconstitutional under the Supreme Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[5] and in *Stenberg v. Carhart*.[6] What may be surprising, however, is that Congress had reason to think that the Partial-Birth Abortion Ban Act of 2003 ("PBABA")[7] was unconstitutional at the time it was passed.[8]

What role should such legislative knowledge of constitutional infirmity play in a court's review of a statute? In cases where the entire statute is unconstitutional, congressional knowledge of constitutional infirmities is of little importance. If the whole statute is unconstitutional, the whole statute falls.

How should courts respond, however, in cases where only one provision of the statute is constitutionally invalid, but the legislature clearly knew that the specific provision was unconstitutional? Ordinarily, courts employ a presumption of severability to deal with isolated unconstitutional provisions: they presume that unconstitutional language or an unconstitutional application of general language can and

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2 *See* Robin Toner, *For G.O.P., It's a Moment*, N.Y. TIMES, Nov. 6, 2003, at A1 (noting Congress's eight-year struggle to pass the partial-birth abortion ban).

3 *See id.* at A1, A18 (noting President Bush's support for the abortion ban); *see also* Press Briefing by Scott McClellan, Press Sec'y, White House Office of the Press Sec'y, in Washington, D.C. (Nov. 5, 2003), http://www.whitehouse.gov/news/releases/2003/11/20031105-3.html (noting President Bush's strong commitment "to building a culture of life in America" by prohibiting the "[p]artial birth abortion" procedure).

4 *See* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 280–81 (2d Cir. 2006); Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1165–66 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007); Carhart v. Gonzales, 413 F.3d 791, 792 (8th Cir. 2005), *rev'd*, 127 S. Ct. 1610 (2007). The Eighth and Ninth Circuit cases were consolidated and reversed by the Supreme Court on April 18, 2007. *See Carhart*, 127 S. Ct. at 1619, 1639.

5 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

6 Stenberg v. Carhart, 530 U.S. 914 (2000); *see also, e.g.*, James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1737 n.28 (2003) (citing, inter alia, numerous cases that challenged abortion restrictions since the Supreme Court's groundbreaking decision in Roe v. Wade, 410 U.S. 113 (1973)).

7 Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2004) (codified at 18 U.S.C. § 1531 (Supp. IV 2004)).

8 *See Planned Parenthood Fed'n of Am.*, 435 F.3d at 1185–87 & nn.26–29 (finding that Congress explicitly ignored warnings of the PBABA's unconstitutionality, noting that Congress deliberately rejected amendments that would have fixed the constitutional infirmities, and documenting the floor debates where such infirmities were discussed).

should be severed from the remainder of the statute, while allowing the rest of the law to be enforced. In the face of clear congressional knowledge of the constitutional infirmity of a statutory provision (or purposeful inclusion of a provision known to be constitutionally infirm), however, courts should abandon the presumption of severability and strike down the entire statute. As detailed below, rejecting the presumption of severability in these cases complements the longstanding doctrine of judicial restraint by limiting courts' ability to meddle with the text of a statute. Additionally, by refusing to sever unconstitutional provisions or applications in these cases, courts will increase legislators' accountability for the constitutional ramifications of their actions.

Part I of this Note reviews the history of the Court's severability jurisprudence, tracing the line of cases that led to the Supreme Court's modern severability test, set forth in *Alaska Airlines, Inc. v. Brock*,[9] including the presumption of severability that pervades the Court's jurisprudence. Part II examines instances where the Court has employed a presumption of *in*severability, which it has done when adjudicating challenges of statutes' improper legislative purpose, overbreadth, and underinclusivity.

Part III argues that courts should abandon the presumption of severability—or should extend their use of the presumption of inseverability—in cases where the legislature clearly intended to pass an unconstitutional statute. This Part explores how abandoning the presumption complements judicial restraint, separation of powers, and Congress's role in upholding the Constitution. Finally, Part IV presents two circuit court decisions that illustrate this approach in the context of abortion restrictions and explains the values advanced by this approach. In both cases, the courts refused to sever unconstitutional provisions in the face of legislative knowledge of the constitutional infirmity of the statute at issue. These cases provide a model for other courts to follow in similar statutory contexts.

I. History of Severability Jurisprudence

From the first articulation of the Court's power to invalidate statutes to the present, the Court has dealt, even if not explicitly, with severability. Throughout American history, the question of severability has reappeared repeatedly, reflecting an underlying tension between the courts and legislatures. Scholars and jurists have long

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

debated courts' proper role in evaluating the constitutionality of statutes and invalidating those deemed to be beyond the scope of congressional power. Underlying these debates is the notion that the unelected judiciary should not have the power to undermine the majoritarian will expressed by the elected branches of the government by invalidating legislation.[10] On the other side of the argument, of course, is the recognition that courts serve to protect minority rights and constitutional norms from the whims of the majority.[11] Severability jurisprudence, as it has developed over time, implicates this tension by asking judges not only to evaluate the constitutionality of statutes but also to assess whether and to what extent a statute can be saved from invalidation.[12]

A. Early Development of the Severability Standard

As far back as *Marbury v. Madison*,[13] courts have relied on an unarticulated presumption of severability.[14] Specifically, in *Marbury*, Chief Justice Marshall struck down only section 13 of the Judiciary Act of 1789,[15] finding it unconstitutional, without striking down the entire statute.[16] At least twice more before the turn of the twentieth century, the Court reaffirmed the principle that an offending provision can be severed without implicating the enforceability of the remainder of an act.[17]

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10 *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 693 (1995) (noting the countermajoritarian problem of the unelected judiciary invalidating laws passed by the majority through the legislature and signed into law by an elected executive); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (2d ed. 1986).

11 *See, e.g.*, Croley, *supra* note 10, at 694.

12 *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1950–51 (1997) (noting the role of severability as a "saving" doctrine that is considered only after the court assesses the constitutionality of a statute).

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

14 Many scholars have noted the unarticulated role that severability played in the Court's decision in *Marbury*. *See, e.g.*, David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 661–62 (2008); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 212 (1993); Shumsky, *supra* note 1, at 232.

15 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

16 *See Marbury*, 5 U.S. (1 Cranch) at 176.

17 *See* Allen v. Louisiana, 103 U.S. 80, 84 (1880) ("It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. . . . The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."); Bank of Hamilton v. Dudley's Lessee, 27 U.S. (2 Pet.) 492, 526 (1829) (observing

Although allowing for the possibility of severing unconstitutional provisions from an otherwise constitutional statute, the Court was in flux regarding the interpretation of severability clauses explicitly written into legislation. Severability clauses are often added to the end of legislation to indicate that, if any provision of the legislation should be found inoperative, the remainder of the legislation maintains its validity as law.[18]

For more than a century, the Court readily enforced these clauses.[19] In 1922, however, the Court limited the enforcement of a severability clause for the first time, finding that sections of the act at issue were "so interwoven with those [unconstitutional] regulations that they [could] not be separated."[20] The Court began to view severability clauses as "provid[ing] a rule of construction which may *sometimes* aid in determining [legislative] intent," noting that such a clause "is an aid merely[,] not an inexorable command."[21]

In 1932, the Court articulated a standard for determining severability in *Champlin Refining Co. v. Corp. Commission*.[22] The Court held that an unconstitutional provision does not invalidate an entire statute "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of

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that "[i]f any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States"). Although the Court does not seem to rely on the severability doctrine in reaching its decision in *Allen* or *Bank of Hamilton*, these cases are often cited for their clear articulation of the doctrine and to show the deep-seated roots of the doctrine in American jurisprudence. *See, e.g.*, Nagle, *supra* note 14, at 212–14 (citing *Allen*, 103 U.S. at 84; *Bank of Hamilton*, 27 U.S. (2 Pet.) at 526); Shumsky, *supra* note 1, at 232–34 (same); Vermeule, *supra* note 12, at 1945 n.4 (citing *Allen*, 103 U.S. at 83–84); *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (2006) (same).

18 For example, the law at issue in *Ayotte* contained the following severability clause: "If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications." N.H. REV. STAT. ANN. § 132:28 (2005) (repealed 2007), *quoted in Ayotte*, 546 U.S. at 331

19 *See, e.g.*, Ohio Tax Cases, 232 U.S. 576, 594 (1914) ("[T]he act contains a section . . . which in terms declares: 'The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof.' The penalty clauses, if themselves unconstitutional, are severable, and there is therefore no present occasion to pass upon their validity." (citing, inter alia, *Ex parte* Young, 209 U.S. 123 (1908))); *see also* Shumsky, *supra* note 1, at 234.

20 Hill v. Wallace, 259 U.S. 44, 70 (1922).

21 Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (emphasis added).

22 Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 234 (1932).

that which is not."[23] The Court additionally allowed for the severability of the unconstitutional part "if what is left is fully operative as a law."[24] Thus, a statute without a severability clause would be considered inseverable if legislative intent indicated that the bill would not have been passed, or the remaining provisions would be ineffective, without the unconstitutional provision.[25]

Only four years later, however, in *Carter v. Carter Coal Co.*,[26] the Court seemed to shift its thinking and adopt a general presumption of *in*severability.[27] The presence of a severability clause, although still not determinative, served merely to reverse this presumption of inseverability to one of severability.[28] But, even with the severability clause, the Court held that legislative intent was still relevant to the Court's determination of severability.[29]

B. The Modern Severability Standard

Half a century later, in *Alaska Airlines, Inc. v. Brock*,[30] the Court revisited the issue and articulated its current standard for determining severability.[31] In *Alaska Airlines*, the Court addressed a challenge to the Employee Protection Program created by the Airline Deregulation Act of 1978.[32] A section of the Act contained an unconstitutional legislative veto that allowed either house of Congress to override De-

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23 *Id.*

24 *Id.*

25 *See* Shumsky, *supra* note 1, at 237.

26 Carter v. Carter Coal Co., 298 U.S. 238 (1936).

27 *Id.* at 312. At least one scholar has analyzed the confusion of the Court's early severability jurisprudence as having "either (at best) developed so clumsily that no conscious design can be attributed to the Court, or (at worst) resulted from deliberate manipulation by the Court's conservative core to enable it to strike down otherwise constitutional regulatory legislation that conflicted with its libertarian political preferences." Shumsky, *supra* note 1, at 240.

28 *See Carter*, 298 U.S. at 312 (finding that "[t]he effect of the statute is to reverse this presumption in favor of inseparability and create the opposite one of separability").

29 *See id.* at 313 (noting that "a fair approach to a solution of the problem [of severability] is to suppose that while the bill was pending in Congress a motion to strike out the [offending] provisions had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the [remaining] provisions of the code").

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

31 *Id.* at 680. Before its decision in *Alaska Airlines*, a plurality of the Court signaled support of the general presumption of severability, *see* Regan v. Time, Inc., 468 U.S. 641, 652–53 (1984) (plurality opinion) (noting that courts "should refrain from invalidating more of the statute than is necessary"), but it was not until *Alaska Airlines* that the Court articulated the current formulation of the rule.

32 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

partment of Labor regulations implementing the program.[33] The airline industry argued that the entire section should fall with the legislative veto because the program and the legislative veto were inextricably intertwined.[34]

In determining whether it could sever the unconstitutional legislative veto provision, the Court held that "the inclusion of [a severability] clause [in a statute] creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision."[35] So, although not dispositive, a severability clause does create a presumption of severability that can lead the Court to severance.[36] Where such a clause is present, "unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute."[37]

Moreover, the Court held—contrary to its holding in *Carter*[38]—that where Congress has not included a severability clause, Congress's silence "does not raise a presumption against severability."[39] Rather, the Court declared that "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"[40] Thus, under the current severability test, statutes are presumed to be severable unless "(1) Congress intended otherwise—that is . . . Congress would have preferred no legislation at all to the enacted legislation without its unconstitutional provision(s)—or (2) the remaining statutory structure cannot function independent of its unconstitutional parts."[41]

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33 *See Alaska Airlines*, 480 U.S. at 682. The Court had held one-house legislative vetoes unconstitutional four years earlier in *INS v. Chadha*, 462 U.S. 919, 956–59 (1983)—in which the Court also invoked the presumption of severability to save the rest of the statute, *see id.* at 934–35—and the air carriers subjected to the Employee Protection Program challenged it on that ground. *See Alaska Airlines*, 480 U.S. at 680, 682–83.

34 *See Alaska Airlines*, 480 U.S. at 680, 682–83.

35 *Id.* at 686.

36 *See id.*

37 *Id.*

38 *See* Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936).

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

40 *Id.* at 684 (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam)).

41 Shumsky, *supra* note 1, at 243.

II. Shifting Presumptions: The Court's Application of a Presumption of Inseverability

Although the Supreme Court now generally employs a presumption of severability in reviewing the constitutionality of statutes, it has developed jurisprudence in a number of areas that rejects this presumption. In its analysis under the Establishment Clause's impermissible purpose test, the First Amendment's chilling effects test, and the Equal Protection Clause's underinclusivity test, the Court has employed a presumption of inseverability.[42] In applying these tests, the Court has favored striking down an entire statute when one provision or application is found to be unconstitutional. The Court's jurisprudence in these areas provides a model for rejecting the presumption of severability in the face of intentionally unconstitutional legislation.

A. The Establishment Clause and Impermissible Purposes

Perhaps the most apt model is Establishment Clause jurisprudence, under which courts look to the legislative purpose of a statute to determine whether it violates the First Amendment. In *Lemon v. Kurtzman*,[43] the Supreme Court determined that a lack of "secular legislative purpose" could constitute a violation of the Establishment Clause.[44] Under this improper purpose analysis, an unconstitutional provision cannot be severed from the remainder of a statute that has an improper purpose because that purpose "pervades all of the provision's applications," and thus "the idea of severing an application of law from its purpose appears nonsensical."[45]

In *Edwards v. Aguillard*,[46] for example, the Court applied the purpose prong of the *Lemon* test to invalidate a state science curriculum where the legislature's "primary purpose" was to endorse a par-

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42 For a comprehensive discussion of these exceptions to the Court's presumption of severability, see Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 251–83 (1994).

43 Lemon v. Kurtzman, 403 U.S. 602 (1971).

44 *See id.* at 612–13. The *Lemon* test remains valid, although it has been widely criticized. *See* McCreary County v. ACLU, 545 U.S. 844, 861–63 (2005); *cf.* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children . . . ."). The purpose prong of the *Lemon* test has drawn criticism based on the difficulty in ascertaining legislative purpose. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting).

45 Dorf, *supra* note 42, at 279.

46 Edwards v. Aguillard, 482 U.S. 578 (1987).

ticular religious point of view.[47] Because the Court found improper legislative intent, it did not sever the unconstitutional applications from the remainder of the statute but rather invalidated the statute in toto.[48]

Thus, in Establishment Clause cases such as *Edwards*, legislative intent dictates whether the whole bill will fall for the infirmity of even one provision. A similar rationale can be applied in cases where courts find that the legislature intentionally included a provision it knew to be unconstitutional. In such cases, as with improper purpose Establishment Clause cases, severing the unconstitutional provision would undermine the legislative intent of passing the statute in its entirety—with its unconstitutional provisions included.[49]

B. The First Amendment and Overbreadth

Another area in which the Court has chosen not to employ the presumption of severability—or, rather, to employ a presumption of *in*severability—is in its First Amendment overbreadth jurisprudence. In general, an overbreadth challenge to a statute arises when a law is constitutional as applied to the individual defendant in a particular case but would be unconstitutional if applied to a different defendant in a different circumstance.[50] The basic question then becomes, "[w]hen should someone whose conduct is not constitutionally protected escape a legal sanction on the ground that the statute under which she is threatened would be constitutionally invalid as applied to someone else?"[51]

Normally, a party cannot assert rights on behalf of a third party unless the third party's rights are somehow related to, or dependent upon, those of the party before the court.[52] As the Court has noted, it "must deal with the case in hand and not with imaginary ones."[53] It is

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47 *Id.* at 580, 594.

48 *See id.* at 589, 597.

49 For an example of a court reaching such a decision outside of the Establishment Clause arena, see Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1190–91 (9th Cir. 2006) (finding that severing the unconstitutional application of the PBABA would undermine the legislature's explicit intent to pass the bill without a health exception), *rev'd sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007). The Ninth Circuit's decision in *Planned Parenthood Federation of America* is discussed at greater length below. *See infra* Part IV.B.

50 *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 858 (1991).

51 *Id.*

52 *See id.* at 859–60.

53 Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912) (refusing to allow a challenge to the statute based on an unconstitutional application to a hypothetical third party).

thus hesitant to entertain actions asserted on behalf of hypothetical third parties or real parties not before the Court.[54]

Under the overbreadth doctrine, however, the Court entertains such actions. So, although the Court is willing to make an exception, these actions are generally limited to the context of the First Amendment.[55] The exception for First Amendment cases allows overbreadth facial challenge and invalidation if (1) the statute is "substantially overbroad," such that the unconstitutional applications are "too numerous 'judged in relation to the statute's plainly legitimate sweep,'"[56] and (2) "no constitutionally adequate narrowing construction suggests itself."[57]

There are two main rationales for allowing the overbreadth doctrine in the context of the First Amendment. The first, a "prophylactic" rationale, allows a defendant to challenge a statute that would unconstitutionally apply to a hypothetical third party to combat the chilling effect that the statute might have on the third party's constitutionally protected expression.[58] The second rationale is a rights-based argument, asserting that a litigant has the right "'to be judged in accordance with a constitutionally valid rule of law.'"[59]

Based on these two rationales, the overbreadth doctrine seems well suited to application in situations beyond the First Amendment. In fact, at least one scholar has suggested that this chilling effects doctrine could apply to challenges to abortion restrictions.[60] Under this

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54 *See id.* at 219–20.

55 *See* United States v. Salerno, 481 U.S. 739, 745 (1987). *But see* Fallon, *supra* note 50, at 859 n.29 (listing cases in which the Supreme Court has allowed facial challenges to statutes infringing on other fundamental rights outside of the First Amendment—especially abortion). By limiting the application of the overbreadth doctrine and avoiding abstract rulings, the Court ensures that its constitutional rulings are based on concrete facts. *See id.* at 861. The narrow application of the doctrine serves the added goals of respecting the states' ability to punish defendants whose conduct *can* be prohibited constitutionally and ensuring that state courts maintain their roles as primary adjudicators of their own law. *See id.*

56 Fallon, *supra* note 50, at 863 (quoting Osborne v. Ohio, 495 U.S. 103, 110–11 (1990)).

57 *Id.* (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Dombrowski v. Pfister, 380 U.S. 479, 491 (1965)).

58 *See id.* at 868–69; *see also id.* at 870 (comparing the chilling effects doctrine to the Fourth Amendment's exclusionary rule).

59 *Id.* at 871 (quoting Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3); *see also* Dorf, *supra* note 42, at 242–49. This "valid rule of law" argument poses a problem when the presumption of severability is applied because there will always be a "valid rule of law" remaining once the unconstitutional part is severed. For example, in the seminal case of *Yazoo*, the Court severed the potentially unconstitutional applications of the statute and insisted on applying the statute to the litigants in the case because it could be constitutionally applied. *See Yazoo*, 226 U.S. at 219–20.

60 *See* Dorf, *supra* note 42, at 270–71.

theory, the chilling effects created by abortion regulations are more substantial than those experienced with regulations of speech because, absent overbreadth protection, both a woman and her doctor would have to overcome the "chill" to challenge application of a law.[61] Additionally, proceeding on a case-by-case basis in abortion regulations is difficult, if not impossible, given the time constraints of pregnancy.[62]

The Court has already expressed, albeit implicitly, its willingness to allow overbreadth challenges to abortion restrictions. Indeed, the Court in *Roe v. Wade*[63] employed reasoning analogous to overbreadth analysis. In *Roe*, the Court found that the Texas law at issue "swe[pt] too broadly" and therefore "[could] not survive the constitutional attack made upon it."[64] Similarly, the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey* applied an overbreadth-style analysis in overturning Pennsylvania's spousal notification requirement.[65]

Although the Court generally does not apply the overbreadth doctrine outside the context of the First Amendment—and perhaps abortion—the Court's jurisprudence in this area serves as a model for the Court's rejection of the presumption of severability. This rule, by which the Court strikes down an entire statute that unconstitutionally infringes on individual rights, should also apply in cases of intentionally unconstitutional legislation.

C. Equal Protection and Underinclusivity

Like challenges based on overbreadth, challenges to a statute based on underinclusivity necessarily involve a hypothetical third party. In underinclusivity challenges, a statute is challenged on the grounds that it bestows certain benefits to one class while denying

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61 *See id.* at 271.

62 *See id.* at 271–72. In its holding in *Roe v. Wade*, 410 U.S. 113, 123–25 (1973), the seminal abortion case, the Supreme Court first addressed the question of whether the fact that Jane Roe was no longer pregnant at the time of the appeal made the case moot. In holding that it did not, the Court noted the particular timing issues that arise when "pregnancy is a significant fact in the litigation," finding that "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete." *Id.* at 125.

63 Roe v. Wade, 410 U.S. 113 (1973).

64 *Id.* at 164.

65 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894–95 (1992) (analyzing the state abortion law under the theory that "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects"); *see also* Dorf, *supra* note 42, at 276.

them to another.[66] The Court has entertained this type of challenge in equal protection cases.[67]

Because the problem with underinclusive statutes is that a certain class is excluded from receiving a certain benefit, the constitutional cure would seem to be either to extend the class that receives the benefit or to strike down the statute in its entirety.[68] As the Court found in *Orr v. Orr*,[69] "[i]n every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties."[70]

Employing the presumption of severability, the Court would normally avoid striking down the entire statute.[71] Instead, by excising only the provision that limits the law's reach to a particular class, the Court could expand the reach of the statute to include the disfavored class.[72] This "[s]everance by expansion comes closer to conventional severance than severance by nullification," which "kills the patient along with the disease."[73]

The Supreme Court, however, has not employed such an approach. In *Skinner v. Oklahoma ex rel. Williamson*,[74] a case challenging a statute that required sterilization of repeat blue-collar offenders but exempted white-collar crimes such as embezzlement, the Court remanded the case to the state court to decide whether to void the sterilization provision or to expand it to all offenders.[75] *Skinner* is thus an example of the Court's refusal to apply the presumption of severability in underinclusivity challenges.[76]

Like the approach the Court has followed in the context of Establishment Clause impermissible purpose challenges and First Amendment overbreadth cases, the approach the Court has taken in the Equal Protection Clause underinclusiveness context also serves as a model for rejecting the presumption of severability in the face of intentionally unconstitutional legislation. In fact, in *Planned Parent-*

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66 *See* Dorf, *supra* note 42, at 251–52.

67 *See generally, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (analyzing the constitutionality of a gender-based alimony law using the underinclusivity rubric of the Equal Protection Clause).

68 *See* Dorf, *supra* note 42, at 251–52.

69 Orr v. Orr, 440 U.S. 268 (1979).

70 *Id.* at 272.

71 *See* Dorf, *supra* note 42, at 252.

72 *See id.*

73 *Id.*

74 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

75 *See id.* at 542–43.

76 *See* Dorf, *supra* note 42, at 253.

hood Federation of America, Inc. v. Gonzales,[77] the Ninth Circuit engaged in similar reasoning in refusing to add a health exception to the PBABA.[78] In that case, the court refused to "sever" the unconstitutional applications of the statute by the evidence that Congress intended to pass the legislation with the constitutional infirmity.[79]

III. Expanding the Presumption of Inseverability in Cases of Unconstitutional Legislative Intent

Despite the general presumption of severability, the Court has clearly rejected this presumption in Establishment Clause, free speech, and Equal Protection Clause contexts.[80] Based on these models, the presumption of inseverability should be expanded to cover instances where the Court finds a clear indication that the legislature knew of, but chose not to cure, the constitutional infirmity of a statute before passage of the act. Doing so will further the important jurisprudential maxims of judicial restraint and separation of powers and will encourage legislatures carefully to draft constitutional laws.

A. Rejecting Severability Out of Respect for Separation of Powers and as a Form of Judicial Restraint

One prominent rationale supporting a presumption of severability is judicial restraint,[81] which dictates that courts should strike only the narrowest piece of a statute that they find to violate the Constitution.[82] In so doing, this rationale contends, the unelected judges of the

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77 Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

78 *See id.* at 1184–91 (discussing the proper remedy for the unconstitutional statute).

79 *See id.* at 1187.

80 *See supra* Part II.

81 *Cf.* Vermeule, *supra* note 12, at 1952–53 (noting the accepted understanding of severability as furthering the courts' mandate "to save and not to destroy" the legislature's work (citation omitted)). Although not explicitly speaking in terms of judicial restraint, Vermeule's conception of severability as a "saving construction" is compatible with the notion of a limited judicial role in invalidating statutes. *Cf. id.* at 1946.

82 When reading statutes and searching for legislative intent, the Court has long been guided by the maxim of judicial restraint. As a plurality of the Court expressed in *Regan v. Time, Inc.*, 468 U.S. 641, 652–53 (1984) (plurality opinion) (quoting El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 96 (1909)), and as the Court reiterated in *Alaska Airlines*,

> A court should refrain from invalidating more of the statute than is necessary. . . . 'Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting *Time*, 468 U.S. at 652). More recently, the Court held that "invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower . . . relief." Ayotte v. Planned Parenthood of N.

federal judiciary act out of respect for the separation of powers, which grants legislative power to only the elected branches of government.[83]

As in the context of underinclusive legislation, however, "saving" an unconstitutional statute sometimes requires significant judicial action, asking the Court to create statutory provisions out of whole cloth.[84] Courts have, on such occasion, refused to sever an unconstitutional provision and thereby "indulge in major revisions to salvage the statute."[85] As one court noted in refusing to undertake such revisions, "the legislature . . . can do this better than we."[86] In such cases, rejecting the presumption of severability and, instead, striking down the entire law, preserves the balance of power by restraining judges from reformulating or creating legislation. Employing a presumption of inseverability forces courts to maintain their position as reactionary, rather than proactive, bodies, leaving the legislating in the hands of the legislature.[87]

An analogous situation was presented to the Court in the case of *Clinton v. City of New York*,[88] a challenge to the constitutionality of

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New Eng., 546 U.S. 320, 323 (2006). In other words, the Court should strive to strike only as much as would be necessary to rid the statute of its unconstitutionality.

83 *See* Vermeule, *supra* note 12, at 1965–66 (noting that an interpretive regime combining "liberal interpretation with a strong presumption of severability . . . rests on a deferential conception of legislative supremacy," as it gives full effect to the statutes Congress has passed within its constitutional power).

84 *See supra* Part II.C; *see also* Dorf, *supra* note 42, at 252 (describing "severance by expansion" as the cure for unconstitutionally underinclusive statutes); Gans, *supra* note 14, at 654–55 (noting the need for courts to add exceptions to the text of a statute in severing unconstitutional applications of the statute).

There are, of course, instances where judicial restraint is best served by severing an unconstitutional provision from the remaining constitutional legislation. For instance, Professor Vermeule points out that courts employ a much stronger presumption of severability in invalidating revenue statutes. *See* Vermeule, *supra* note 12, at 1970–71 (citing Field v. Clark, 143 U.S. 649, 697 (1892)). The implications of invalidating other (and potentially unrelated) revenue provisions within one complex statute dictate that courts act with special restraint in this area. *See id.*; *see also* Gans, *supra* note 14, at 653 (noting the need for severability in cases of complex statutes). I do not argue here for the wholesale rejection of severability. As others have rightly pointed out, without the severability doctrine, the presence of a single unconstitutional provision could require invalidating the entire United States Code. *See, e.g.*, Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 370 (2007).

85 Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 139 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981).

86 *Id.*

87 *Cf.* Reno v. ACLU, 521 U.S. 844, 884–85 (1997) ("This Court 'will not rewrite a . . . law to conform it to constitutional requirements.'" (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988))); *see also id.* at 885 n.50 (observing that "judicial rewriting of statutes would derogate Congress'[s] 'incentive to draft a narrowly tailored law in the first place'" (quoting Osborne v. Ohio, 495 U.S. 103, 121 (1990))).

88 Clinton v. City of New York, 524 U.S. 417 (1998).

the Line Item Veto Act.[89] In ruling that the line item veto was unconstitutional, the Court noted that any amendment the President may make to an enacted bill must conform to the Presentment Clause of the Constitution, the exclusive constitutional means through which a bill becomes a law.[90] The President's only role in lawmaking is to sign or veto legislation presented by Congress.[91] The Constitution makes no provision for the President's amendments, additions, or deletions after the bill has passed out of Congress.[92] In fact, as the Court noted, George Washington himself acknowledged the President's limited role in this regard.[93] As Washington understood, the President must either "approve all the parts of a Bill, or reject it in toto."[94]

Similarly, when faced with the option of severing an unconstitutional provision from a statute with clear evidence that the legislature specifically intended to include the unconstitutional provision, courts too should reject the bill in toto and return it to the legislature. Much like the President's veto power,[95] striking down a bill instead of redrafting it protects the separation of powers contemplated by the Constitution and preserves a court's role as an adjudicatory rather than a legislative body.

This is particularly important in cases where a court finds legislative knowledge of constitutional infirmities prior to enacting the law. If the legislature intended to pass a statute knowing it to be unconstitutional, a court would be overstepping its reactive role by proactively reshaping the statute, and possibly rewriting it, to cure the constitutional defect. By severing a statute in the face of the legislature's intent to pass an acknowledgedly unconstitutional statute, a court explicitly subverts the will of the legislature to enact the statute as written. In these cases, the court should send the statute back to the legislature to redraft and renegotiate a constitutionally sound law.

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89 Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated by Clinton*, 524 U.S. 417. For a more in-depth comparison of severability to the presidential line item veto, see generally Lars Noah, *The Executive Line Item Veto and the Judicial Power to Sever: What's the Difference?*, 56 WASH. & LEE L. REV. 235 (1999).

90 *See Clinton*, 524 U.S. at 438–39.

91 *See id.* at 438.

92 *See id.*

93 *See id.* at 440.

94 Letter from George Washington to Edmund Pendleton (Sept. 23, 1783), *in* 33 THE WRITINGS OF GEORGE WASHINGTON 94, 96 (John C. Fitzpatrick ed., 1940), *quoted in Clinton*, 524 U.S. at 440.

95 *Clinton*, 524 U.S. at 438–41.

B. Rejecting Severability Supports Congress's Duty to Uphold the Constitution

In rejecting the presumption of severability in the face of intentionally unconstitutional legislation, the Court will serve the additional purpose of supporting Congress's role in upholding the Constitution.[96] All legislators, upon entering office, are required by Article VI of the Constitution to take an oath to "support this Constitution."[97] The text of the oath, laid out by statute, reads in pertinent part, "I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic . . . ."[98] Although good-faith efforts of legislators to advance their legislative agendas surely would not violate their oath of office, the oath clearly emphasizes the imperative that the constitutionality of their actions must be at the forefront of their considerations.[99]

Elected representatives have the task of writing laws that will be both publicly popular and in line with constitutional requirements. A court's role is not to provide political cover for legislators by rewriting an unconstitutional statute into a law that will pass constitutional muster. As one scholar has suggested,

> Judicial willingness to stand in for Congress not only blurs the lines of power between the branches, but also encourages congressional laziness in matters of constitutional principle. Members of Congress, no less than judges, are constitutionally obligated to obey the Constitution. So long as Congress knows that constitutional infirmities in its legislation will affect only minimally the remainder of its work, the incentive to pass only constitutional laws diminishes. At

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96 Paul Brest introduced the notion of the "Conscientious Legislator" in his 1975 *Stanford Law Review* article. *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586–89 (1975). According to Brest, legislators, as much as courts, play a role in evaluating the constitutionality of legislation. *See id.* at 586. Brest grounded his theory on two underlying assumptions: (1) legislators are required to assess the constitutionality of pending legislation, and (2) legislators "should consider themselves bound by, or at least give great weight to, the Supreme Court's substantive constitutional holdings." *Id.* at 587.

97 U.S. CONST. art. VI.

98 5 U.S.C. § 3331 (2000).

99 For a discussion of the basis and effect of the constitutional requirement for public officials to take the oath, see Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387, 389–91 (2003). *See also* MICHAEL A. BAMBERGER, RECKLESS LEGISLATION: HOW LAWMAKERS IGNORE THE CONSTITUTION 7 (2000) (noting the "increase in the number of unconstitutional statutes passed by state and federal legislatures, resulting partly from the failure of the legislators to accept their inherent responsibility as spelled out in their oaths of office").

> worst, strict judicial enforcement of severability clauses, coupled with a preference for severability even in the absence of such clauses, encourages Congress to view the constitutionality of its statutes as solely a judicial matter.[100]

By refusing to clean up the legislature's intentional constitutional infirmities, the courts can force legislators to debate, negotiate, and ultimately enact into law only those acts that uphold the Constitution.[101]

IV. Legislatures Intentionally Passing Unconstitutional Laws

By rejecting the presumption of severability for laws the enacting legislature knew to be unconstitutional, courts would not be venturing into uncharted territory. Rather, two circuits have already adopted this rationale in assessing the constitutionality and severability of federal and state abortion laws. Although the Supreme Court reversed the decision below in each case, these two precedents can serve as a model for courts rejecting the presumption of severability in other contexts where Congress or a state legislature has knowingly passed an unconstitutional statute.

The first case, mentioned above, is *Planned Parenthood Federation of America, Inc. v. Gonzales*, involving a challenge to the federal PBABA.[102] That statute was intentionally drafted and passed without a health exception widely thought at the time to be constitutionally required.[103] The Supreme Court recently reversed the Ninth

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100 Dorf, *supra* note 42, at 293.

101 J. Mitchell Pickerill has noted that Supreme Court opinions invalidating laws can sometimes force Congress to draft bills in line with the Court's opinions. *See* J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 66–67 (2004). This is especially true, according to Pickerill, when the Supreme Court's decisions are particularly well known, recent, or otherwise high profile. *See id.* at 67 (citing Roe v. Wade, 410 U.S. 113 (1973)). Pickerill suggests that these well-known cases can help spur congressional debate on constitutional issues and ultimately shape legislation. *See id.*

102 Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1165–66 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

103 *See id.* at 1185–87. Under the Supreme Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a state's interest in protecting the potential life of a fetus after the point of viability gives way only to the state's interest in protecting the life and health of the pregnant woman. *See id.* at 846 (finding that the state is allowed to "restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"). Accordingly, the Court has held that abortion restrictions must allow for protection of the health of the pregnant woman by including exceptions to the restriction in instances where the health of the woman is threatened. *See* Stenberg v. Carhart, 530 U.S. 914, 929–30 (2000) (finding that Nebraska's partial-birth abortion ban violated the Constitution because, inter alia, it did not contain an exception for protecting the health of the woman). These "health exceptions" have, until recently, been recognized as constitutionally required elements

Circuit, however, upholding the constitutionality of the PBABA as written.[104]

The second case, *Jane L. v. Bangerter*,[105] involved a challenge to a Utah abortion restriction that was written explicitly to challenge the Court's holding in *Roe v. Wade*.[106] The Tenth Circuit's decision in this case also was overruled by the Supreme Court on review, and is also therefore no longer good law.[107]

Upon finding clear intent to pass unconstitutional legislation, both of these circuit courts properly employed a presumption of inseverability, striking down the full statutes rather than severing what were thought to be the unconstitutional provisions. Despite the Supreme Court's ultimate holdings in these cases, these cases serve as important models, illustrating how courts should confront statutes the enacting legislatures knew to be invalid.

A. Congress and the Partial-Birth Abortion Ban Act of 2003

As the Ninth Circuit's decision in *Planned Parenthood Federation of America* reflects, Congress's knowledge of the serious potential constitutional infirmity of the PBABA was not in doubt.[108] For example, one member of Congress stated on the floor of the House that the Act was one "that everyone knows will not pass the muster of the Supreme Court. Because there is no exemption to protect a woman's health, this bill not only fails to meet moral requirements, it fails to meet constitutional requirements."[109] Looking at similar statements

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of abortion restrictions. *See, e.g.*, Carhart v. Gonzales, 413 F.3d 791, 796 (8th Cir. 2005) (finding a "per se constitutional rule" requiring health exceptions in all abortion regulations), *rev'd*, 127 S. Ct. 1610 (2007). In upholding the PBABA without a health exception, however, the Supreme Court has signaled a retreat from this requirement, and in so doing it has abandoned its own precedent requiring a health exception to abortion regulations. *See* Carhart v. Gonzales, 127 S. Ct. 1610, 1635–38 (2007).

104 *See Carhart*, 127 S. Ct. at 1627, 1635–38. For a comprehensive critique of the merits of the Court's decision in *Carhart*, see Sonia Suter, *Evaluating Advanced Reproductive Technologies Through the "Repugnance" Lens of* Gonzales v. Carhart *and Other Theories of Reproductive Rights*, 76 GEO. WASH. L. REV. (forthcoming 2008).

105 Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *rev'd sub nom.* Leavitt v. Jane L., 518 U.S. 137 (1996) (per curiam).

106 *See id.* at 1497.

107 *See* Leavitt v. Jane L., 518 U.S. 137, 146 (1996) (per curiam).

108 *See Planned Parenthood Fed'n of Am.*, 435 F.3d at 1185–87 & nn.26–29 (finding that Congress explicitly ignored warnings of the PBABA's unconstitutionality, noting that Congress deliberately rejected amendments that would have fixed the constitutional infirmities, and documenting the floor debates where such infirmities were discussed).

109 149 CONG. REC. H9137 (daily ed. Oct. 2, 2003) (statement of Rep. Woolsey). As the Ninth Circuit documented in its opinion, both opponents and proponents of the bill acknowl-

and other legislative history, the Ninth Circuit found that Congress explicitly rejected numerous amendments that would have cured the constitutional defect in the legislation by writing the missing health exception into the ban.[110]

The court refused to write a health exception into the law by severing the unconstitutional application from the remainder of the statute.[111] Instead, the court found that "[e]nacting a 'partial-birth abortion' ban *with no health exception* was clearly one of Congress's primary motivations in passing the Act."[112] The court could not find that Congress would have wanted to pass the Act without the unconstitutional provisions.[113]

The Ninth Circuit's lengthy discussion of the remedy in this case was a direct result of the Supreme Court's recent decision in *Ayotte v. Planned Parenthood of Northern New England*.[114] In *Ayotte*, the Court confronted a New Hampshire statute that required parental notification for abortions performed on pregnant minors except where

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edged the contrary Supreme Court precedent controlling the law in this area. *See Planned Parenthood Fed'n of Am.*, 435 F.3d at 1185 n.26 (quoting Senator Santorum, the bill's lead sponsor in the Senate, as stating, "We are here because the Supreme Court defended the indefensible [in *Stenberg*]. . . . We have responded to the Supreme Court. I hope the Justices read this Record because I am talking to you. . . . [T]here is no reason for a health exception" (quoting 149 CONG. REC. S3486 (daily ed. Mar. 11, 2003) (statement of Sen. Santorum))); *id.* at 1185 n.27 (quoting Senator Feinstein, an opponent of the bill, as stating, "What is wrong with [the Act]? . . . To begin with, it is unconstitutional because it lacks a health exception" (quoting 149 CONG. REC. S3601 (daily ed. Mar. 12, 2003) (statement of Sen. Feinstein))). In his floor speech, Senator Santorum further confirmed his knowledge of Supreme Court precedent by noting, "I understand the Justices' feelings on the issue of abortion. It is evident from your decisions. It is obvious from your position." 149 CONG. REC. S3486 (daily ed. Mar. 11, 2003) (statement of Sen. Santorum).

110 *See Planned Parenthood Fed'n of Am.*, 435 F.3d at 1185 nn.26–29.

111 *See id.* at 1191. In this case, "severance" would have left the ban in force only in instances where the life *or health* of the woman was not at risk. This type of severance mirrors that employed in underinclusive equal protection cases where courts are called upon to "save" an underinclusive statute by extending its application to previously disfavored groups. *See supra* Part II.C. In this context, instead of severing the exception for the woman's life altogether, a court would expand the reach of the exceptions to cover others, e.g., women whose health is at risk, thus severing applications of the statute with respect to those women from the rest of the law. As Professor Gans argues, however, severing such unconstitutional applications actually requires a court to engage in a similar form of legislative drafting, that is, "adding new words to qualify what the legislature did." Gans, *supra* note 14, at 654. Rather than removing language from a statute, a court is required to affirmatively draft an exception where one did not exist. *Id.* As noted above, courts are hesitant to engage in this kind of statutory drafting. *See supra* Part II.C.

112 *Planned Parenthood Fed'n of Am.*, 435 F.3d at 1186–87.

113 *See id.*

114 Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006). *See Planned Parenthood Fed'n of Am.*, 435 F.3d at 1184–91.

necessary to prevent the minor's death.[115] On appeal, the state conceded that its law could not, under Supreme Court precedent, forbid abortions without parental notification where necessary to protect the life *or health* of the mother, and instead sought primarily for the offending provision to be severed.[116]

Justice O'Connor, speaking for a unanimous Court, remanded the case to the lower courts to determine the proper remedy by examining the legislature's intent as to whether the entire statute should fall with the unconstitutional provision, or whether instead the invalid portion should be excised.[117] Because the Court in *Ayotte* thus was clear that the lower court should have made a finding on the issue of severability, the Ninth Circuit in *Planned Parenthood Federation of America* left no doubts as to its reasoning for not severing the unconstitutional portion of the PBABA.[118]

Because of Congress's clear intent to pass the statute in its unconstitutional form, the court refused to step in to cure this defect. As the court stated,

> [w]hen Congress deliberately makes a decision to omit a particular provision from a statute—a decision that it is aware may well result in the statute's wholesale invalidation—and when it defeats multiple amendments that would have added that provision to the statute, we would not be faithful to its legislative intent were we to devise a remedy that in effect inserts the provision into the statute contrary to its wishes. Such an action would be inconsistent with our proper judicial role.[119]

The court recognized that curing a constitutional infirmity—an infirmity known to the legislature and purposely not rectified at the time of the statute's passage—would be outside the court's role and would undermine the clear intent of the legislature.

B. The Utah Legislature Testing the Limits of Roe v. Wade

A second example of a court rejecting the presumption of severability when legislative history indicates knowledge of constitutional infirmities is the Tenth Circuit's decision in *Jane L. v. Bangerter*.[120]

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115 *See Ayotte*, 546 U.S. at 323–24.

116 *See id.* at 327–28.

117 *See id.* at 331.

118 *See Planned Parenthood Fed'n of Am.*, 435 F.3d at 1187–89.

119 *Id.* at 1187.

120 Jane L. v. Bangerter, 61 F.3d 1493 (10th Cir. 1995), *rev'd sub nom.* Leavitt v. Jane L., 518 U.S. 137 (1996) (per curiam) (reversing the Tenth Circuit on the issue of severability). Al-

There, the court confronted a Utah statute that attempted to ban abortions at all stages of pregnancy.[121] The Tenth Circuit found that the Utah legislature had passed this abortion restriction, recognizing its potential unconstitutionality, for the express purpose of testing the limits of *Roe v. Wade*.[122] In recounting the extensive evidence of the Utah legislature's knowledge of the legislation's potential constitutional infirmity,[123] the court noted, for example, that when passing the law, "the Utah legislature simultaneously set aside funds in an 'Abortion Litigation Trust Account'" in anticipation of inevitable constitutional challenges.[124]

Finding that the abortion ban was unconstitutional, the court moved immediately to the question of whether the entire abortion ban should fall with the invalid provision.[125] Based on the court's assessment of the legislature's overarching intent—namely, to ban nearly all abortions—and the interdependence of the statute's provisions, the court refused to sever the unconstitutional provisions from the remainder of the statute.[126]

Notably, the Utah statute at issue did contain a severability clause that instructed the court to sever any unconstitutional portions and continue to enforce the remainder of the statute.[127] Despite the presence of that severability clause, however, the court looked to the interdependence of the statutory provisions and to the evidence of legislative intent, found in the statute's structure and history, to determine whether the legislature would have adopted the statute without the unconstitutional provisions.[128] The court justified its decision not to give effect to the severability clause by relying on Utah judicial

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though the Supreme Court ultimately rejected the Tenth Circuit's approach to severability, *see* Leavitt v. Jane L., 518 U.S. 137, 143–44 (1996) (per curiam), I argue that the Tenth Circuit's rejection of the presumption of severability in the face of intentionally unconstitutional legislation was appropriate.

121 *See* UTAH CODE ANN. §§ 76-7-301 to -331 (2003); *Jane L.*, 61 F.3d at 1495. The Utah law banned all abortions subject to five articulated exceptions. UTAH CODE ANN. § 76-7-302. The overarching abortion ban with the five exceptions, *id.* § 76-7-302(2), was then further restricted for abortions after the twentieth week of gestation. *Id.* § 76-7-302(3).

122 *See Jane L.*, 61 F.3d at 1497.

123 *See id.* at 1497–98.

124 *Id.* at 1495 (quoting UTAH CODE ANN. § 76-7-317.1). Although the presence of the litigation fund may not itself prove knowledge of constitutional infirmity, it does provide a clear indication that the legislature was aware of the constitutional vulnerability of the law.

125 *See id.* at 1496–97. Specifically, the court looked at the post-twenty-week ban of § 76-7-302(3) to determine whether it should fall with the general ban articulated in 302(2). *Id.* at 1498.

126 *Id.* at 1497–98.

127 *See id.* at 1498 (citing UTAH CODE ANN. § 76-7-317).

128 *See id.* at 1497–98.

precedent under which such clauses are viewed as subordinate to the statute's substantive purposes.[129] It found that without the unconstitutional ban, "the statute was gutted, and [the remainder of the statute] was left purposeless without an abortion ban to modify."[130] Accordingly, the court refused to rewrite the statute to save the constitutional elements of the abortion law.[131]

On review, the Supreme Court rejected the Tenth Circuit's understanding of the legislative intent and overturned the lower court's ruling on severability.[132] The Court found that the severability clause in the statute provided a clear indication that the legislature intended the statute to be severable.[133] According to the Court, under the direction of the severability clause, the appeals court should have severed the unconstitutional elements and enforced the remainder of the statute.[134]

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129 *See id.* at 1498–99 (reviewing Utah Supreme Court decisions and concluding that "Utah law instructs that we subordinate severability clauses, which evince the legislature's intent regarding the structure of the statute, to the legislature's overarching substantive intentions," and that "[i]n the hierarchy of often conflicting legislative intentions, Utah law mandates that substantive intent take precedence"). Although there is no similarly explicit federal presumption, current severability jurisprudence, as laid out in Part I above, does not provide for strict textualist reading of severability clauses. *See supra* Part I.B. *But see* Shumsky, *supra* note 1, at 245–66 (arguing for a strict textualist approach to interpretation and application of severability clauses). Rather, current federal severability jurisprudence dictates that courts read severability clauses as strong indicators of legislative intent that can be ignored if "there is strong evidence that Congress intended otherwise." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). Therefore, federal severability jurisprudence, although perhaps not quite as explicit, may not be far from Utah's fallback presumption employed by the Tenth Circuit.

130 *Jane L.*, 61 F.3d at 1498.

131 *Id.* Here, the court would have had to write the exceptions from the general abortion ban into the post-twenty-week ban. The Utah legislature had not explicitly written these exceptions into 302(3), but rather, had incorporated them by reference. Once the court struck down the general abortion ban, it would have had to insert the now missing exceptions into the post-twenty-week ban. Rather than engaging in this redrafting, the court correctly refused to sever.

132 *See* Leavitt v. Jane L., 518 U.S. 137, 139–44 (1996) (per curiam).

133 *See id.* at 143–44.

134 *See id.* By focusing its review on the severability clause, the Supreme Court in *Leavitt* avoided addressing the legislature's clear intention to challenge *Roe v. Wade*. *Cf. Jane L.*, 61 F.3d at 1497 (describing legislature's explicit intention to challenge *Roe* by enacting the statute). Moreover, although the Court's "liberal block"—Justices Stevens, Souter, Ginsberg, and Breyer—all dissented, they too declined to deal with the substance of the statute or the legislature's intent to challenge *Roe*. *See Leavitt*, 518 U.S. at 146–48 (Stevens, J., dissenting). Instead, the dissenters argued that the Court should not have heard the case at all and should have deferred the issue of severability to the circuit. *See id.* The dissenters in *Leavitt* seem to have gotten their wish in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 331 (2006). Despite the Court in *Leavitt* engaging in the determination of the legislative intent regarding severability over Justice Stevens's dissent, the Court in *Ayotte* did not reach the issue of severability itself. *See id.* Instead, the Court unanimously reversed the Third Circuit's wholesale

C. Proper Judicial Review of Intentionally Unconstitutional Legislation

Despite the Supreme Court's rejection of the Tenth Circuit's reasoning in *Jane L.*, and its reversal of the Ninth Circuit's decision in *Planned Parenthood Federation of America*, the circuit courts' approaches in these cases exemplify how courts should react to evidence that the legislature knew of the constitutional infirmity of a law. Both the Utah abortion law and the federal PBABA were passed with the intention of stepping over constitutional lines clearly drawn by the Supreme Court in *Roe* and *Stenberg v. Carhart*, respectively. By refusing to sever the unconstitutional provisions of the laws before them, the courts in *Jane L.* and *Planned Parenthood Federation of America* exercised judicial restraint, while at the same time sending the legislatures back to the drawing board to redraft legislation that would not undermine constitutional rights. Moreover, the approach followed by the courts in these cases promotes the key structural values of federalism and separation of powers. In the case of the Utah abortion law, the Tenth Circuit's decision safeguarded federalism by declining to radically reshape the law Utah had chosen. Although the Supreme Court chastised the Tenth Circuit for its insensitivity to federalism concerns raised by federal courts invalidating state law,[135] if the circuit court had restructured Utah's law by severing the law's central provision, leaving the rest intact, it would have disrupted the delicate state-federal balance to a similar degree. Indeed, so long as legislators are on notice of the constitutional limits required by Supreme Court precedent, is it not equally or more intrusive for federal courts to rearrange, edit, modify, or otherwise meddle with a state's legislative pronouncements?

Had the Utah legislature truly wanted to avoid wholesale invalidation by a federal court, it could have carefully drafted its legislation to acknowledge and respond to the constitutional limits on the power to regulate abortions. As the record revealed, however, it deliberately chose not to do so.[136] To respect the Utah legislature's clear intention—albeit an intention to pass either an unconstitutional law or have no law at all—the Tenth Circuit correctly invalidated the law as a whole rather than engaging in the legislative drafting that would have

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invalidation of the New Hampshire law at issue and remanded the case back to the lower court for a determination of legislative intent regarding severability. *See id.*

135 *See Leavitt*, 518 U.S. at 143–45.

136 *See Jane L.*, 61 F.3d at 1497–98.

been necessary to "fix" the law.[137] In so doing, the court not only fulfilled its duty to interpret and apply the Constitution, but it also protected the important principle of federalism.

In a similar way, the Ninth Circuit's decision in *Planned Parenthood Federation of America* safeguarded the separation of powers. Had the Ninth Circuit, in the face of clear legislative intent to the contrary, written a health exception into the statute by severing those applications of the PBABA enforced against women whose health is at risk, it would have been replacing Congress's voice with its own.[138] By instead invalidating the entire statute, the court correctly refrained from interfering with the primacy of Congress in drafting legislation.

These cases also clearly indicate the power the courts can have in forcing legislators to take seriously their responsibility for unconstitutional laws. Because legislators share the courts' obligation to uphold the Constitution, in instances where the legislators (whether for political or ideological reasons) want to pass unconstitutional legislation, a presumption of inseverability would likely force the legislators to draft legislation more carefully around constitutional limits,[139] or else risk wholesale invalidation. Simply put, if courts abandon the presumption of severability in the face of legislative intent to legislate beyond the constitutional limit, the stakes will be too high for Congress or state legislatures to abdicate their constitutional duty.

To be sure, one may argue that raising the stakes to this degree inappropriately interferes with legislative prerogatives, *especially* in areas where it is unclear where the constitutional boundary line falls. For instance, one might argue that the Utah legislature was in fact making a good-faith effort to legislate up to the constitutional limits of

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137 *See id.*

138 Senator Santorum, the lead sponsor of the PBABA, spoke directly to the courts from the floor of the Senate, admonishing them that a health exception was not needed or wanted in this law. *See* 149 CONG. REC. S3486 (daily ed. Mar. 11, 2003) (statement of Sen. Santorum) ("I hope the Justices read this Record because I am talking to you. . . . [T]here is no reason for a health exception.").

139 *See* PICKERILL, *supra* note 101, at 66–67. For an extensive discussion of legislatures passing unconstitutional legislation and the negative implications of such action, see generally BAMBERGER, *supra* note 99. Among other reasons, Professor Bamberger advances a powerful argument that forcing legislatures to think more carefully about the consequences of passing unconstitutional legislation prevents them from shifting the cost of litigating these constitutional violations to the citizenry. *See id.* at 13 ("[W]hy should citizens be required to expend their personal resources to defend their constitutional rights against a statute passed by legislators who generally understood it to be unconstitutional, particularly when the other side is funded by the resources of 'their' government?").

its power,[140] set by *Roe* and its progeny. Those who advance this argument might read the Utah law's carefully worded severability clause—the clause which ultimately saved the statute from full invalidation by the Supreme Court[141]—as evidence that the legislature recognized and provided for the possibility that its statute crossed the constitutional line.[142] By legislating broadly but including a severability clause, Utah created a mechanism for federal courts to remove the portions of the law they might find invalid. Thus, instead of ignoring constitutional limitations, one might argue that Utah was attempting to discover those limits and confine its law to operate within them.

This reading, however, simply is not faithful to the wording of the Utah statute. Had Utah attempted to tailor its legislation even remotely to the standards the Supreme Court had announced, this account might be more plausible. But the legislature made no effort to draft the law carefully around *Roe*'s articulation of allowable abortion restrictions. Rather, it attempted to defy the Supreme Court's decisions in *Roe* and its progeny, severely restricting abortion in all but a

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140 There is an important difference—specifically regarding legislative intent—between a law that is passed to regulate up to the constitutional limit and a law that is intended to overstep the constitutional line. As Professor Vermeule has noted, when a court allows unconstitutional provisions to be severed from the remainder of a statute, it presumes that the legislature intended only to march up to the line of constitutionality and to have the law take effect only to that extent. Vermeule, *supra* note 12, at 1961. Under my thesis, this assumption is unfounded—and thus severability is inappropriate—when the legislative history clearly indicates the legislature knew the constitutional limit but chose to go beyond it.

141 *See* Leavitt v. Jane L., 518 U.S. 137, 139–44 (1996) (per curiam) (discussing the severability clause).

142 The presence of a severability clause, as in the case of the Utah law, presents a difficult question. Given Vermeule's insight that "severability causes statutes to march up as close to the line as possible," Vermeule, *supra* note 12, at 1961, a legislature's inclusion of a severability clause may indicate, to some degree, its desire to legislate up to the constitutional line while asking the courts to save as much of the regulation as possible. In my view, however, there are instances when severability clauses should be read as an indication that the legislature knew of the constitutional infirmity of its law. Specifically, there is a difference between a legislature adding a severability clause to a law it knows to be unconstitutional and adding one to a law that otherwise presents a good-faith attempt to legislate within the constitutional limits. In the first instance, the legislature is sending a message to the courts that it does not respect its own constitutional role by blatantly regulating beyond the constitutional line, utterly abdicating its duty to parse out difficult constitutional questions, or both. In the second scenario, by contrast—where the legislature has made a good-faith effort to regulate—the severability clause advances this notion of good faith by suggesting to the courts that the legislature has done its best to respect constitutional lines, regulating as much as possible within and up to the constitutional limit. As Bamberger has noted, "[t]he obligation of the legislator is not to be right in every case, but rather to recognize and consider constitutional issues deliberately and seriously." BAMBERGER, *supra* note 99, at 6.

few limited circumstances throughout every stage of pregnancy.[143] Accordingly, the charitable assumption that the Utah legislature did not know where the constitutional boundary fell and used severability to legislate up to the limit of its authority is simply untenable.

This same logic applies with even greater force to Congress's action in passing the PBABA. As the Ninth Circuit made clear, supporters and opponents of the PBABA alike were well aware that the statute, as ultimately enacted, would run afoul of the constitutional limits articulated by the Court in *Stenberg*.[144] The drafters' deliberate refusal to conform the statute to *Stenberg*'s requirement of a health exception undercuts any suggestion that Congress was innocuously attempting to legislate up to an unknown limit.[145] Accordingly, the Ninth Circuit was correct to invalidate the whole statute rather than severing its unconstitutional applications.

Both the Tenth Circuit's decision in *Jane L.* and the Ninth Circuit's ruling in *Planned Parenthood Federation of America* thus illustrate how federal courts, faced with facially unconstitutional statutes, can enforce constitutional limits, give maximum effect to legislative intent, and safeguard core structural values of federalism and separation of powers. When legislatures enact laws they know to be constitutionally infirm, courts should not perpetuate the illusion that legislatures do not know where the line falls by using severability to correct the legislatures' mistakes. Rather, courts should take legislators at their word, strike down statutes in which an unconstitutional provision is an integral part, and leave it to the legislature to enact a constitutionally permissible substitute.

Conclusion

Although often considered in all-or-nothing terms, the presumption of severability depends critically on context. The accepted wis-

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143 The Utah law prohibited abortions throughout pregnancy except when performed for one of five articulated exceptions. UTAH CODE ANN. § 76-7-302(2) (2003). Under *Roe*'s central holding, states could not outlaw abortions during the first trimester. *See* Roe v. Wade, 410 U.S. 113, 163 (1973). Because Utah's law prohibited abortions subject to articulated exceptions, it violated *Roe* and *Casey*'s framework. Jane L. v. Bangerter, 61 F.3d 1493, 1496 (10th Cir. 1995), *rev'd sub nom.* Leavitt, 518 U.S. 137.

144 Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1185–86 (9th Cir. 2006).

145 Indeed, the Ninth Circuit addressed this very point, noting that although it might have been willing to sever the unconstitutional applications of the PBABA were the absence of a health exception its only flaw, Congress's evident recognition of the constitutional defect and its determination to pass the statute without such an exception made severability inappropriate. *See id.* at 1185.

dom suggests that courts should always tread lightly in invalidating legislative action, yet courts have recognized certain well-established substantive areas where wholesale invalidation is preferable to severance.[146] Both the general rule presuming severability and its exceptions rest on principles of constitutional supremacy and judicial restraint. Where severability undermines, rather than advances, these ends, courts should abandon the presumption favoring it.

Statutes passed with the legislature's full knowledge of their constitutional infirmity fall into this category. Severing specific statutory provisions or applications of such statutes pays lip service to judicial restraint. Courts faced with such a law should reject the established presumption of severability and instead should strike down the entire law. Doing so not only confines the courts to their proper role, but it also serves important values of separation of powers and federalism while encouraging legislatures to take seriously their burden to uphold the Constitution. By refusing to clean up the legislature's intentional constitutional infirmities, the courts can protect these important ideals.

146 *See supra* Part II.