TO SEVER OR NOT TO SEVER: MIXED GUIDANCE FROM THE ROBERTS COURT

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ABSTRACT

In its 2019–2020 term, the U.S. Supreme Court attempted to clarify its severability jurisprudence in two cases: Seila Law, LLC v. Consumer Financial Protection Bureau *and* Barr v. American Association of Political Consultants. *This Article argues these opinions by Chief Justice John Roberts and Justice Brett Kavanaugh only further muddied the waters on severability, sending inconsistent signals as to the role of legislative intent in severability decisions. However, the competing theory of Justices Clarence Thomas and Neil Gorsuch is clearer in its guidance but might lack the historical support that its advocates claim. The result, after much spilled ink, is a failure to move the needle on how the Court will handle an important question of statutory interpretation going forward.*

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I. INTRODUCTION

The doctrine of severability has a long pedigree in U.S. constitutional and statutory interpretation, and scholarship on the doctrine is voluminous. Nonetheless, questions persist both as to its constitutionality and proper

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application. In recent years, severability has divided the conservative wing of the U.S. Supreme Court, with Chief Justice John Roberts and Justice Brett Kavanaugh defending its validity,[1] while Justices Clarence Thomas and Neil Gorsuch challenge the doctrine's constitutionality as a judicial encroachment on the legislative power.[2]

In short, the core question of severability is whether a single unconstitutional provision of a statute contaminates the whole statute or whether it may separately be deemed unconstitutional while leaving the remainder of the statute intact. Several further questions arise from this, however: Are judges empowered to consider provisions individually, or is a statute an indivisible whole once it is passed by the legislature? If judges are permitted to deem individual provisions unconstitutional, are they "striking" them from the books, thereby making them unavailable for future courts to apply, or are they merely declining to enforce them in the present case? And if judges sever an unconstitutional provision, what becomes of the remainder? Should it be enforced even if the severed portion was essential to the legislature's purpose in enacting the statute, or, on a textualist premise, is legislative intent beyond the realm of what judges may consider? The multiplicity of these questions divides observers not into two camps, but many.

Severability and the Constitution's silence on it has troubled courts since *Marbury v. Madison*, wherein Justice John Marshall wrote to overturn an unconstitutional provision of the Judiciary Act of 1789, leaving the remainder of the Act intact.[3] The rules as to how a court may sever a lone unconstitutional provision went undiscussed by the *Marbury* Court, and they have haunted judges with increasing frequency since.[4] In the post-Civil War era, as federal statutes grew in number and the Fourteenth Amendment opened the door to federal challenges of state statutes, the issue of severability arose more and more in Supreme Court opinions.[5]

1. *See* Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335 (2020).

2. *See Seila*, 140 S. Ct. at 2211–24 (Thomas, J., concurring in part and dissenting in part); *Barr*, 140 S. Ct. at 2363–67 (Gorsuch, J., concurring in part and dissenting in part); Murphy v. NCAA, 138 S. Ct. 1461, 1485–87 (2018) (Thomas, J., concurring).

3. 5 U.S. (1 Cranch) 137 (1803).

4. *See id.*

5. *See, e.g.*, Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902), *overruled in part by* Tigner v. Texas, 310 U.S. 141 (1940); Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 395–96 (1894); Marshall Field & Co. v. Clark, 143 U.S. 649, 681–82 (1892);

By 1936 and the Court's opinion in *Carter v. Carter Coal*, the central tenets of severability analysis dictated that in the event that a court should hold one provision of a statute unconstitutional, courts were to presume the statute non-severable unless explicitly directed otherwise by a severability clause in the statute.[6] And where a severability clause was included, it could be overcome only "by considerations which establish 'the clear probability that[,] the invalid part being eliminated[,] the Legislature would not have been satisfied with what remains.'"[7]

The Court was clear in *Carter*, however, that the core consideration in such a scenario is legislative intent, for which statutory language itself "is an aid merely; not an inexorable command."[8] In any case, even with a severability clause, "in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another."[9] To test for mutual dependency, the *Carter* Court recommended a hypothetical consideration of whether the legislature would have passed the bill into law had the provision in question been stricken at the time.[10]

The Court has affirmed the *Carter* test many times.[11] Most recently, however, it did so in *Seila Law, LLC v. Consumer Financial Protection Bureau*, a removability challenge to the Consumer Financial Protection Bureau's (CFPB) statutory structure.[12] Chief Justice Roberts, writing for a three-Justice plurality, affirmed the Court's existing test in the major respects: legislative intent and workability.[13] Somewhere in the near-century between *Carter* and *Seila*, however, a significant detail of the *Carter* test has changed: the default presumption in the absence of a severability clause is no longer held to be *against* severability but *for* it.[14]

Allen v. City of Louisiana, 103 U.S. (13 Otto) 80, 83–84 (1880).

6. Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936).

7. *Id.* (quoting Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929)).

8. *Id.* at 313 (quoting Dorchy v. Kansas, 264 U.S. 286, 290 (1924)).

9. *Id.*

10. *See id.*

11. *See, e.g.*, Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2208–11 (2020); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684–86 (1987); Regan v. Time, Inc., 468 U.S. 641, 652–53 (1984); I.N.S. v. Chadha, 462 U.S. 919, 931–35 (1983).

12. *See Seila*, 140 S. Ct. at 2190–92.

13. *See id.* at 2208–11.

14. *Compare id.* at 2209, *with Carter*, 298 U.S. at 312.

Legal historians could dig for when precisely that shift in presumptions occurred, but the reality seems to be that the Court was never particularly consistent on this point. Late nineteenth and early twentieth century precedent seems mixed as to where the presumption lies. In some cases, the Court required, or at least heavily relied upon, the presence or absence of a saving provision to sever a portion of a statute.[15] Still, severability seems to have been the default presumption more often than not, with the Court proclaiming the general requirements of workability and legislative intent without inquiring as to the presence of a severability clause.[16] In that context, we might say that *Carter* was the most conspicuous of a few outlier cases in the 1920s and 1930s in which the Court became more stringent about saving clauses.

Part II of this Article lays out the severability debate as composed of two tiers: (1) whether or not judges should sever unconstitutional provisions of otherwise constitutional statutes, and, if so, under what conditions; and (2) once they do sever, what becomes of the severed portion. Is it, as in common parlance, "stricken," or can a court merely decline to apply it in the present case? Part III breaks down Chief Justice Roberts's opinion in *Seila* and Justice Kavanaugh's opinion in *Barr*, arguing that despite the Justices' ostensible consensus on this issue, their opinions differ in fundamental ways that leave lower courts with conflicting guidance. Part IV addresses Justices Thomas and Gorsuch's concurrences in these cases, contending that though their preferred approach has the benefits of being non-contradictory and avoiding separation of powers concerns, it may lack the historical foundations they claim. Part V concludes.

II. The Two Tiers of the Severability Debate

As pure questions of law, severability issues can arise in multiple procedural postures.[17]

15. *See, e.g.*, *Carter*, 298 U.S. at 312; Champlin Refin. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234–35 (1932); Hill v. Wallace, 259 U.S. 44, 70–71 (1922).

16. *See, e.g.*, Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902) (presuming severability), *overruled in part by* Tigner v. Texas, 310 U.S. 141 (1940); Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 635–36 (1895); Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 395 (1894); Marshall Field & Co. v. Clark, 143 U.S. 649, 695–96 (1892); Little Rock & Ft. S. Ry. v. Worthen, 120 U.S. 97, 102 (1887); Allen v. City of Louisiana, 103 U.S. (13 Otto) 80, 83–84 (1880).

17. *See Seila*, 140 S. Ct. at 2208 (noting that "severability presents a pure question of law"); Robinson Twp. v. Commonwealth, 147 A.3d 536, 557–58 (Pa. 2016) ("The

Ultimately, though, questions of severability only arise after a court is persuaded that some statutory provision is constitutionally invalid.[18] These questions take on a particularly difficult nature when the resolution of the case turns on the validity of some complex statutory scheme, of which the invalid provision is only a part.[19] In such cases, courts must address both the invalid portion of the statute and the remainder. The relationship between these two portions of the statute—the invalid and the (counterfactually) valid—raises the two principal dilemmas of the severability debate: whether courts are even permitted to strike statutes (or portions of them) and, if they are, what becomes of the remainder.

How judges answer both questions is inevitably intertwined with their views on the relationship between the judicial and legislative powers, what it means to exercise each, and what constitutes an impermissible overreach by one branch into the other's domain. Before addressing the Court's most recent guidance on these questions, the questions themselves deserve examination.

A. *To Sever or Not to Sever*

Courts have long considered it essential to the judiciary's function of resolving cases and controversies that they retain the authority to declare statutory provisions unconstitutional.[20]

As Alexander Hamilton famously framed the issue in *The Federalist No. 78*:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution

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question of whether unconstitutional portions of a statutory enactment may be severed from the remainder is a pure question of law . . . .").

18. *See Seila*, 140 S. Ct. at 2207–08.

19. Even when both parties argue that a severability analysis is unnecessary, a court may nevertheless conclude otherwise. *See* Med. Ctr. Pharmacy v. Mukasey, 536 F.3d 383, 393 (5th Cir. 2008) (ordering supplemental briefing on severability questions, notwithstanding that "both sides argue that we need not address severability").

20. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–80 (1803).

> ought to be preferred to the statute, the intention of the people to the intention of their agents.[21]

The federal judiciary's authority, of course, is not freestanding, but is instead bound by and flows from its primary charge to resolve "cases and controversies."[22] Regardless, a court's ability to resolve questions of law, and specifically to determine when subordinate law must yield to the constitutive or fundamental law, is now generally accepted.[23] From this general agreement, however, flows the first tier of the severability debate: can one unconstitutional statutory provision be excised from the rest of the statute, or is a statute an indivisible whole that rises or falls together?

A reasonable argument can be made that a piece of legislation is a unified sum, an indivisible whole that is passed *in toto*, and that to sever individual provisions is an act of judicial rewriting. That is generally the view to which Justice Thomas seems disposed, as will be discussed at length below.[24] Arguing from early American judicial practice and separation of powers concerns, Justice Thomas reasons that by simply declining to enforce

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21. THE FEDERALIST NO. 78 (Alexander Hamilton).

22. *See* Carney v. Adams, 141 S. Ct. 493, 498 (2020) ("The Constitution grants Article III courts the power to decide 'Cases' or 'Controversies.' Art. III, §2. We have long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions.") (citations omitted).

23. This is, it is worth noting, a stark departure from circumstances prior to the ratification of the U.S. Constitution, as exemplified by the (unreported) case of *Rutgers v. Washington* (1784). In *Rutgers*, Alexander Hamilton challenged the enforceability of a New York statute on the grounds that it violated the international law of nations, which had been incorporated into the New York constitution, and the nascent Treaty of Paris. William J. Watkins, Jr., *Popular Sovereignty, Judicial Supremacy, & the American Revolution: Why the Judiciary Cannot Be the Final Arbiter of Constitutions*, 1 DUKE J. CONST. L. & PUB. POL'Y 159, 218–22 (2006) (citing 1 THE LAW & PRACTICE OF ALEXANDER HAMILTON 392–419 (Julius Goebel, Jr. ed., 1964)). Judge James Duane rejected Hamilton's arguments, holding, "The supremacy of the Legislative need not be called into question; if they think fit *positively* to enact a law, there is no power which can controul [sic] them." *Id.* at 220–21 (quoting 1 THE LAW & PRACTICE OF ALEXANDER HAMILTON 415)

24. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2219–20, 2223–24 (2020) (Thomas, J., concurring in part and dissenting in part) (citing Murphy v. NCAA, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring)); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 755–57, 768–69 (2010); *see also* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1815 (2008).

unconstitutional provisions in individual cases, prior generations of jurists preserved the sanctity of legislative acts and the legislative power.[25] That is not, however, the prevailing orthodoxy among those generally viewed as purposivists, nor even a universally held position among textualists.[26]

Their argument, which traces at least as far back as *Marbury*, though arguably as far back as Hamilton, is that those statutory provisions which are unconstitutional may rightly be isolated and severed from the broader statutes in which they appear without fear of judicial overreach.[27]

B. *If We Sever—What Then?*

Assuming that an unconstitutional provision in a statute is in fact severed from the whole and we have resolved to treat it separately from the rest, a second inquiry presents itself: What becomes of that unconstitutional provision, and what becomes of the remainder? Is that which is declared unconstitutional now stricken, rendered null and void, or may a court merely decline to enforce it in the present case?

There is, of course, the immediate effect between the litigants, i.e., the resolution of their dispute. To the extent that their dispute depended entirely upon the invalidated provision and not, as discussed below, on other related legal provisions which may or may not rely on the invalidated one, then the answer is simple: their dispute is resolved. The litigation as a whole may continue, if litigable issues remain—unrelated claims, avenues for appeal, and the like. But absent some reversal of the court's invalidity determination, either of its own accord under Federal Rule of Civil Procedure 54(b) or at the behest of an appellate court, that determination fixes the parties' rights and obligations vis-à-vis one another and the statute.

However, and more relevant to the severability debate, there is the effect that such a determination has beyond the present litigants. This is partly a matter of stare decisis: like cases should be treated alike,[28] and a

25. *See Seila*, 140 S. Ct. at 2219 (Thomas, J., concurring in part and dissenting in part).

26. *See id.* at 2208–11 (majority opinion) (for the purposivist view); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GEO. L. REV. 41, 79–82 (1995) (for a textualist argument reaching the same conclusion).

27. *See* THE FEDERALIST NO. 78, *supra* note 21.

28. While this maxim is a useful shorthand for how stare decisis operates, the actual application of stare decisis involves more complex considerations about the form and degree of "alikeness" required to invoke it. *See* Frederick Schauer, *Precedent*, 39 STAN.

statute invalid for one should arguably be invalid for all. The stare decisis analysis, however, is slightly askew from the severability one. Whereas a stare decisis analysis addresses when courts are or are not bound by a prior decision interpreting a statute, the severability analysis addresses whether, after excising the invalid provision, there is any remaining statute left behind.

Consider how alternative answers to the first severability question would affect the opportunities for later courts to reconsider the earlier court's decision. If, when determining the statute is invalid, the earlier court merely declines to apply the provision in a particular case but otherwise declines to invalidate it for future cases, a future litigant may conceivably still rely on that provision and ask a future court to enforce it—i.e., to reject stare decisis and reverse prior precedent, or else to distinguish it in a new or different context. If, however, the earlier court purports to invalidate the offending provision entirely, the provision is effectively a legal nullity and theoretically incapable of resurrection without the passage of new legislation, notwithstanding whether a litigant had strong reasons for rejecting stare decisis as to the invalidity determination. Thus, while the latter circumstance has the same effect as stare decisis, it does so only because of the preclusive effect of the principle that "a legislative act contrary to the constitution is not law" at all, not simply because stare decisis principles compel the decision.[29]

Assuming the latter approach is taken, a court must decide what gets cut and what, if anything, gets left behind, resulting in a different statute than the one passed by the legislature. The traditional analysis frames this issue in terms of legislative intent, i.e., whether the legislature would have intended the remainder of the statute to stand or fall if one of its provisions is unenforceable.[30] Subsumed within this framing, however, are various normative and technical questions that quickly erode its deceptive simplicity. For example, when two individually constitutional provisions operate together in an unconstitutional way justifying severance, would it better

L. REV. 571, 597 (1987) ("The issue is thus not the sterile question of treating like cases alike. It is instead the more difficult question of whether we should base our decisionmaking norm on relatively large categories of likeness, or by contrast leave a decisionmaker more or less at liberty to consider any possible way in which this particular array of facts might be unique."). These and other considerations, however, are beyond the scope of this Article, for which the shorthand shall suffice.

29. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2351 n.8 (2020) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

30. *See* Carter v. Carter Coal Co., 298 U.S. 238, 313 (1936).

effectuate legislative intent by severing both provisions or only one? If only one, then which would the legislature have preferred to sever and which should remain? More fundamentally, are courts equipped to reliably answer these questions? Even if they are so equipped, is it appropriate for courts to reshape statutes in so drastic a way on the counterfactual supposition that Congress would have passed the statute without the severed provision when, in fact, it did not? Is legislative intent even a rationally cognizable standard, or is statutory text the only proper guide? Does the judiciary even have the power to invalidate an act of the legislature, or is declining to enforce its only tool? Though such concerns undergird the entirety of the second prong of the severability analysis, they often get lost amid discussions of the various presumptions that the traditional severability analysis has developed over time.[31] As a result, this Article largely avoids an analysis of the mechanical application of those presumptions, focusing instead on difficult questions that the presumptions may not address and on the doctrines supporting and opposing severability in general.

III. CONFLICTS IN THE ROBERTS-KAVANAUGH APPROACH

The focus of this Article aside, severability is not the headline issue of the *Seila* case. That distinction belongs to the executive removal power. The facts are straightforward: the CFPB subpoenaed information and documents related to the business practices of Seila Law, LLC, a California-based law firm offering debt-related legal services.[32] Seila Law refused, raising the challenge that the CFPB's structure violated the Constitution's separation of powers since its sole director was removable by the president only for cause.[33] Any order issued by the CFPB, Seila argued, was therefore ultra vires and void.[34] The CFPB's structure had, for years, been argued to be unconstitutional on these grounds[35] and was held to be so in a 2016 opinion written by then-Judge Kavanaugh on the D.C. Circuit[36] until, upon a

31. *See id.* at 312; *Seila*, 140 S. Ct. at 2209.

32. *See Seila*, 140 S. Ct. at 2194.

33. *See id.*; 12 U.S.C. § 5491(c)(3).

34. *See Seila*, 140 S. Ct. at 2194.

35. *See, e.g.*, Ilya Shapiro, *CFPB Remains Unconstitutional*, CATO INST. (July 10, 2018), https://www.cato.org/blog/cfpb-remains-unconstitutional [https://perma.cc/3XUA-YSNX]; Brief of the Cato Institute as Amicus Curiae in Support of Defendants-Appellants, Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., No. 18-60302 2018 WL 3426148 (5th Cir. 2018).

36. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 6–8 (D.C. Cir. 2016).

rehearing en banc, the court ruled for the CFPB.[37] Neither PHH nor the CFPB sought review by the Supreme Court.[38] Although the Ninth Circuit in *Seila* adopted the D.C. Circuit's reasoning and rejected Seila Law's challenge,[39] Seila Law—unlike PHH—was willing and able to sustain a case against the insular and powerful CFPB all the way to a Supreme Court and its newest member: Justice Kavanaugh.[40]

The *Seila* Court, in ruling against the agency and deeming its structure unconstitutional, continued a now-decade-long trend of limiting *Humphrey's Executor v. United States*,[41] tracing from *Free Enterprise Fund v. Public Company Accounting Oversight Board*[42] through *Lucia v. Securities Exchange Commission*[43] and to the present decision. Indeed, Justice Thomas, in his partial concurrence, stated *Seila* "has repudiated almost every aspect of *Humphrey's Executor*" and recommended doing so *in toto* in the future.[44] The Chief Justice was characteristically more reserved in describing what the Court was saying. In his plurality opinion, he distinguished the present case from *Humphrey's* by noting that unlike the Federal Trade Commission, "the CFPB is led by a single Director who cannot be described as a 'body of experts' and cannot be considered 'non-partisan' in the same sense as a group of officials drawn from both sides of the aisle."[45] Quoting *Bowsher v. Synar*, he reasoned, "[I]t is 'only the authority that can remove' such officials that [appointees] 'must fear and, in the performance of [their] functions, obey.'"[46] In the end, he concluded, such an insular body "has no basis in history and no place in our constitutional structure."[47]

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37. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 77 (D.C. Cir. 2018) (rehearing en banc). *See* PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177 (D.C. Cir. 2017) (rehearing en banc). *See also* Consumer Fin. Prot. Bureau v. All Am. Check Cashing, 952 F.3d 591 (5th Cir. 2020).

38. Barbara Mishkin, *No U.S. Supreme Court Review Sought in PHH*, J.D. SUPRA (May 4, 2018), https://www.jdsupra.com/legalnews/no-u-s-supreme-court-review-sought-in-32326/.

39. Seila Law, LLC v. Consumer Fin. Prot. Bureau, 923 F.3d 680, 684 (9th Cir. 2019).

40. *See id.*

41. 295 U.S. 602 (1935).

42. 561 U.S. 477 (2010).

43. 138 S. Ct. 2044 (2018).

44. *See* Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring in part and dissenting in part).

45. *Id.* at 2200 (majority opinion).

46. *Id.* at 2197 (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

47. *Id.* at 2201.

The question remained, however, what to do about the lone unconstitutional provision in the broader Dodd-Frank Act. The Chief Justice noted in *Free Enterprise Fund*, that the Court had found unconstitutional removal provisions to be severable without need for an express severability clause "because the surviving provisions were capable of 'functioning independently' and 'nothing in the statute's text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will.'"[48]

Simplifying the problem here, however, was Dodd-Frank's express severability clause,[49] sparing the Court any mystery as to Congress's preference in the event of partial unconstitutionality. As a result, he wrote, "There is no need to wonder what Congress would have wanted . . . ."[50] Still, the Chief Justice spent much of the remaining three pages of his opinion answering petitioners' arguments as to what Congress "really meant," "preferred," or "[would] have wanted."[51] Rather than adopting the philosophical razor of rejecting any inquiry into legislative intent apart from the text itself, the Chief Justice recognized "the only question we have the authority to decide" is "whether Congress would have preferred a dependent CFPB to *no agency at all*,"[52] an unequivocally purposivist inquiry for which Chief Justice Roberts cites concerns such as "regulatory disruption," other agencies' inability to absorb the CFPB's functions, and other extratextual concerns.[53] Finding that it would, the plurality severed the removability clause, vacated the Ninth Circuit's judgment, and remanded the remaining questions for resolution.[54]

In *Barr*, an opinion issued just a week after *Seila*, the Court addressed a challenge to Congress's statutory ban on robocalls on grounds that it made an exception for robocalls meant to collect debts to the federal government.[55] That exception, plaintiffs argued, belied Congress's claim that

48. *Id.* at 2209 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 509 (2010)).

49. 12 U.S.C. § 5302.

50. *See Seila*, 140 S. Ct. at 2209.

51. *See id.* at 2209–11.

52. *Id.* at 2210.

53. *Id.*

54. *Id.* at 2211.

55. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2343 (2020).

the purpose of the statute was to protect individuals' privacy.[56] It constituted, they argued, a content-based restriction and was therefore violative of the First Amendment.[57] The Court split the difference in its conclusion, ruling for the plaintiffs but resolving the issue by striking the exception for government collections and making the robocall ban universal.[58]

Justice Kavanaugh, writing for the Court, made an effort in *Barr* to reconcile the Chief Justice's conclusion in *Seila* with Justice Thomas's concerns (discussed below) as to following text versus extratextual legislative intent.[59] Justice Kavanaugh favorably cited the Chief Justice's opinion in *Seila* but explicitly rejected the search for indicia of legislative intent, calling it an "analytical dead end" because "courts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent."[60] Clearly taking cognizance of Justice Thomas's bicameralism and presentment concerns, Justice Kavanaugh noted that a court "often cannot really know what the two Houses of Congress and the President from the time of the original enactment of a law would have wanted if one provision of a law were later declared unconstitutional."[61] Justice Kavanaugh answered the challenge by seemingly adopting a categorical default presumption in favor of severability without entertaining questions as to legislative intent.[62] In doing so, he garnered the support of the Chief Justice, who signed onto all parts of the plurality opinion.[63]

The *Seila* and *Barr* opinions, however, do less to resolve the severability debate than they portend. The Chief Justice, by signing onto the *Barr* opinion just a week after *Seila* was decided, seems to imply consistency between the two analyses.[64] Justice Kavanaugh, signing onto the Chief Justice's plurality opinion in *Seila*, suggests the same.[65] On a careful reading, however, the Justices' opinions are not in all cases saying the same things.

56. *See id.* at 2348.
57. *See id.* at 2345–47.
58. *See id.* at 2356.
59. *See id.* at 2349–50.
60. *Id.* at 2350.
61. *Id.*
62. *See id.* at 2350–51.
63. *See id.* at 2342.
64. *See id.*
65. *See* Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2190 (2020).

Justice Kavanaugh's opinion in *Barr* rejects the use of legislative intent, whereas the Chief Justice's in *Seila* embraces it.[66]

Further, Justice Kavanaugh's analysis seems to be more focused on characterizing adherence to a severability or non-severability clause as the textualist choice than dealing with the substance of any of Justice Thomas's objections.[67] Kavanaugh's point, in short, is that where the text contains a severability clause, the textualist choice is to follow its instructions and sever.[68] Thomas's most notable textualist objection, however, is to what comes *after* severance, when the Court then has to deal with the aftermath of a statute that is now partially excised.[69]

Justice Kavanaugh's opinion indicates we should not look to congressional intent.[70] So be it, but with his stated support for a presumption of severability, Justice Kavanaugh's writing seems to propone (knowingly or otherwise) severing an unconstitutional provision and letting the chips fall as they may as to the rest of a statute, regardless of whether the resultant law fulfills Congress's intent, which can no longer be considered.[71]

Corroborating that interpretation, the applied portion of Justice Kavanaugh's opinion in *Barr* asks only whether "the remainder of the law is capable of functioning independently and thus would be fully operative as law."[72] Whether a statute is "functioning" or not can be determined without asking "Functioning—to do what?" But this comes dangerously close to assuming away the whole textualist-purposivist controversy and seems like the sort of challenge that future litigants might raise, but for now it stands as the test of severability according to *Barr*.[73]

Justice Kavanaugh also avoided truly wrestling with Justice Thomas's objections concerning standing and the inherent separation of powers

66. *Compare Barr*, 140 S. Ct. at 2350–51 (rejecting legislative intent analysis for a presumption of severability), *with Seila*, 140 S. Ct. at 2209–11 (discussing what Congress would have preferred).

67. *See Seila*, 140 S. Ct. at 2219–20 (Thomas, J., concurring in part and dissenting in part); Murphy v. NCAA, 138 S. Ct. 1461, 1486–87 (2018) (Thomas, J., concurring).

68. *See Barr*, 140 S. Ct. at 2349.

69. *See, e.g.*, *Murphy*, 138 S. Ct. at 1487.

70. *See Barr*, 140 S. Ct. at 2350.

71. *See id.* at 2350–52.

72. *See id.* at 2353.

73. *See id.*

concerns introduced by it.[74] He acknowledged Justice Thomas's standing argument in passing to say that the Court's long-held presumption in favor of severability "recognizes" the standing concern, but it is not clear what that ostensible recognition means after multiple majority and plurality opinions have declined to either incorporate it or argue against it.[75] Nor did he take on the separations-of-powers issue when he explicitly described severed provisions of statutes as "invalidate[d]" without answering Justice Thomas's concerns about invalidation being tantamount to judicial rewriting of statutes.[76] Despite multiple citations to the *Murphy v. National Collegiate Athletic Association* concurrence, by the end of Justice Kavanaugh's *Barr* opinion, Justice Thomas's challenges to the severability doctrine remain vital and unanswered.

Admirable for its attempt at bridge-building, in trying to strike a balance between the Chief Justice's position and Justice Thomas's recent concurrences, Justice Kavanaugh's contribution in *Barr* unfortunately gets us no further toward a clear and unproblematic view of severability. Indeed, taken together with the Chief Justice's opinion in *Seila*, it suggests that even those Justices who are ostensibly in agreement do not necessarily see eye-to-eye on some crucial points. Due to the inconsistency in these opinions, the Court's views on severability may be even more muddied than before.

IV. HISTORICAL DOUBTS IN THE THOMAS-GORSUCH APPROACH

Despite the long history of the severability doctrine in U.S. jurisprudence, a flourish of scholarship on the issue in the last 12 years and 2 recent opinions by Justice Thomas make it prudent to start with current discussion and debate before looking to more antiquated commentaries. Justice Thomas's concurrences, in particular, make a persuasive argument that despite the well-settled precepts of the current severability doctrine, there exist valid concerns as to standing and separation of powers.[77] However, we find that the academic literature that Justice Thomas cites is not as strong in support of his conclusions as he would like it to be. There are valid alternative arguments for his conclusion, and he makes them, but the academic literature that he cites should not be leaned upon for support.

74. *See id.* at 2351; *but see Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

75. *Barr*, 140 S. Ct. at 2351 (citing *Murphy*, 138 S. Ct. at 1487).

76. *See id.*

77. *See generally* Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211–24 (Thomas, J., concurring in part and dissenting in part); *Murphy*, 138 S. Ct. at 1485–87.

Ultimately, on the question of whether the modern severability doctrine is proper or not, there are valid arguments in both directions. One's conclusions on the question are likely to be determined by the extent to which one adheres to either textualist or strict constructionist principles or legislative intent. Textualists and strict constructionists will likely find the current doctrine, with its reliance on judicial interpretations of legislative behavior under alternate, hypothetical conditions to be baseless and beyond the scope of judges' power. Meanwhile, adherents to legislative intent will find the current severability doctrine satisfactory and see non-severability as the path to judicial overreach, empowering judges to disregard perfectly constitutional portions of statutes merely because a separate provision of the same law was constitutionally invalid. Unfortunately, the historical record does not cleanly resolve the question, making the solution dependent upon fundamental questions as to the relationship between the legislative and judicial branches.

A. *Thomas's Critiques of Severability*

Justice Thomas, in his recent concurring opinion in *Seila*, joined by Justice Gorsuch, argued that it is not consistent with an originalist view of the judicial power to sever any unconstitutional portion of a statute and that doing so "bring[s] courts dangerously close to issuing advisory opinions" and "nebulous inquir[ies] into hypothetical congressional intent."[78]

He cited Professor Kevin Walsh for the proposition that "[e]arly American courts did not have a severability doctrine"[79] and his own concurrence in *Murphy*, wherein he observed that earlier American jurists instead "recognized that the judicial power is, fundamentally, the power to render judgments in individual cases" rather than to rule upon the general constitutionality of a statute as a whole.[80] "If a statute was unconstitutional," Justice Thomas wrote in *Seila*, "the court would just decline to enforce the statute in the case before it. That was the end of the matter. '[T]here was no "next step" in which [a] cour[t]' severed portions of a statute."[81]

78. *See id.* (quoting United States v. Booker, 543 U.S. 220, 320, n.7 (2005) (Thomas, J., dissenting in part)).

79. *Id.* at 2219 (internal citation omitted) (citing Walsh, *supra* note 24, at 769).

80. *Murphy*, 138 S. Ct. at 1485; Walsh, *supra* note 24, at 755; *see also* Baude, *supra* note 24, at 1815.

81. *Seila*, 140 S. Ct. at 2219 (quoting Walsh, *supra* note 24, at 777).

Nor, according to Justice Thomas, can severance be categorized as a judicial remedy. Remedies, he noted, attach to parties, not to laws. "The Federal Judiciary," he wrote, "does not have the power to excise, erase, alter, or otherwise strike down a statute . . . [a]nd the Court's reference to severability as a 'remedy' is inaccurate. Traditional remedies . . . 'operate with respect to specific parties, not on legal rules in the abstract.'"[82] Despite the repeated characterization of severance as a remedy, this is one of Justice Thomas's strongest objections and has yet to be satisfactorily answered.

Justice Thomas further contended in his *Murphy* concurrence that courts do not have the power to truly "excise" or "strike down" statutes.[83] He concluded, then, that if courts cannot truly excise statutes, in whole or in part, then the severability doctrine is a matter of statutory interpretation.[84] If the severability doctrine has courts decide how statutes operate in the absence of their unenforceable provisions, they are engaged in decision-making, not interpretation.[85]

This, he explained, quickly runs into two issues.

First, "the severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions."[86] A party granted standing to challenge one provision of a statute does not necessarily have standing to challenge the whole statute.[87] A ruling as to the constitutionality of the remainder of the statute comes into play only after a determination has been made as to the constitutionality of the one challenged provision.[88] This renders severability an exception to the normal rules of standing and to separation of powers principles that standing rules protect.[89]

And second, "[i]nstead of requiring courts to determine what a statute means, the severability doctrine requires courts to make a 'nebulous inquiry

82. *Id.* (quoting *Murphy*, 138 S. Ct. at 1486); *see also* John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 85 (2014).

83. *Murphy*, 138 S. Ct. at 1486 (citing Status of D.C. Minimum Wage Law, 39 Op. Atty. Gen. 22, 22–23 (1937)); Harrison, *supra* note 82, at 82; Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018).

84. *Murphy*, 138 S. Ct. at 1486.

85. *See id*. at 1485–87.

86. *Id.* at 1487.

87. *See id.*

88. *Id.*

89. *Id.* (citing Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 101 (1998)).

into hypothetical congressional intent.'"[90] Without an explicitly detailed fallback provision in the statute, discerning congressional intent in the absence of one provision necessarily requires reasoning based on hypothetical intentions that have never made it through the legislative process.[91] As Justice Thomas wrote, "[E]ven if courts could discern Congress' hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment," and "[b]ecause we have 'a Government of laws, not of men,' we are governed by 'legislated text,' not 'legislators' intentions'—and especially not legislators' *hypothetical* intentions."[92]

B. *Trouble in the Academic Literature*

Kevin Walsh's writing on the subject, to which Justice Thomas refers, argues forcefully that under the conception of the judiciary voiced by the Framers, judges faced with an unconstitutional provision of a statute were in no place to "strike down" such provisions but could merely decline to give an unconstitutional statute effect.[93] Recognizing both the Constitution and the statute in question to be law, a court would answer an irreconcilable variance between them as resolved by the supremacy of the Constitution.[94] Most importantly for our question, to the extent that two laws only partially contradict, Hamilton in *The Federalist No. 78* wrote, in relevant part:

> This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this

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90. *Id.* at 1486 (quoting United States v. Booker, 543 U.S. 220, 320, n.7 (2005) (Thomas, J., dissenting in part)).

91. *See id.* at 1486–87.

92. *Id.* (citing Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 119 (2007) (Scalia, J., dissenting)).

93. Walsh, *supra* note 24, at 756.

94. *See id.* at 755–56 (citing THE FEDERALIST NO. 78, *supra* note 21).

> is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other.[95]

Importantly, the last emphasized portion of that passage, referring to "the one" and "the other," must necessarily describe "laws" in its first sentence, as opposed to "provisions," "rules," or some other more limited referent.[96] Thus, Walsh's analysis seems apt on that point; Hamilton seems to be dealing in comparisons of whole acts.[97] In the succeeding paragraph, Hamilton goes on to say:

> [I]n regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.[98]

Here again, Hamilton refers to "statute[s]" as a whole rather than some narrower object, so one could count that as another point in favor of whole-act analysis. It must be acknowledged, however, that "to adhere to" the Constitution over a particular statute is not clearly saying anything as to the severability of one provision of a statute. One could "adhere" to the Constitution by disregarding the statute either in full or in part. And, for that matter, Hamilton's instruction "to give effect to one, in exclusion of the other" in the first passage could cut either way on the question of severability.[99] It is not clear from *The Federalist No. 78* that "in exclusion of the other" means exclusion of all parts, including that which does not contradict. And in the next paragraph, Hamilton wrote, "It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."[100] There, it seems, Hamilton is enshrining legislative intent as the standard so long as that intent is constitutional—a considerable point in favor of the prevailing severability doctrine.

95. THE FEDERALIST NO. 78, *supra* note 21 (emphasis added).
96. *See id.*
97. *See id.*; *see also* Walsh, *supra* note 24, at 756.
98. THE FEDERALIST NO. 78, *supra* note 21.
99. *See id.*
100. *Id.*

Thus, Walsh's conclusion is consistent with one reading of *The Federalist No. 78*, but so is the severability doctrine he opposes.[101] The effect of *The Federalist No. 78* in resolving the question is ambivalent. More broadly, the choice Walsh establishes between "severance and excision" versus "displacement" is effective as an argument against judicial nullification of statutes or provisions thereof, but, as noted, one could just as easily take one provision of a statute to be displaced, leaving the rest intact, and consider it severed and excised.[102] That alone does not seem to answer the question of whether a whole act is unconstitutional for the existence of one unconstitutional part.

Justice Thomas also cited Jonathan Mitchell's article, *The Writ-of-Erasure Fallacy*, as an argument against judicial nullification of statutory provisions and seems to intuit from that a natural connection between severance and nullification and an assumption that they stand or fall together.[103] "The Court's rhetoric when discussing severance," Justice Thomas wrote, "implies that a court's decision to sever a provision 'formally suspend[s] or erase[s it], when [the provision] actually remains on the books as a law.'"[104] As Mitchell makes clear, however, his argument against the judicial power to nullify is independent of the severability debate.[105] In fact, Mitchell comes close to saying just the opposite:

> The idea . . . that a court that preserves and enforces the constitutional applications of an overbroad statute, rather than declaring the statute 'void' in its entirety, is somehow invading the legislature's domain by 're-writing' the statute and enacting a new law that the legislature never voted on . . . is nonsense—and it is another example of the fallacy that treats judicial review as a power to cancel, revoke, or alter the scope of duly enacted legislation.[106]

Granted, Mitchell is referring to preserving alternate, constitutional *applications* of a statute, not provisions of the statute.[107] But the argument

101. *See* Walsh, *supra* note 24, at 741.

102. *Id.* at 778.

103. *See* Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part and dissenting in part) (citing Mitchell, *supra* note 83, at 936).

104. *Id.* at 2220 (quoting Mitchell, *supra* note 83, at 1017).

105. *See* Mitchell, *supra* note 83, at 976

106. *Id.* at 982–83.

107. *Id.*

seems just as plausible if one substitutes "provisions" for "applications" in the above quote. And when he later writes that "[j]udicial review is a non-enforcement prerogative, not a revisionary power over legislation . . . [s]o a court is *never* 'mak[ing] a new law' or 'inserting . . . words of limitation' into a statute when it carves out a subset of unconstitutional statutory applications for non-enforcement,"[108] it is no logical leap to infer that, along the same lines, declaring subsets of a statute unconstitutional is as free of constitutional issues as declaring subsets of applications to be so. Again, Mitchell does not say so explicitly, and he takes no position on severability, but Justice Thomas's cite to Mitchell on this point, and, for that matter, his general reliance on the implication that severability and nullification are intertwined seems to be the weakest leg of his argument.

Overall, Justice Thomas's citations in the academic literature on severance are not as strong as he would like them to be, and the fact that his concurrence fails to cite a single case in which his preferred approach was taken does not help his argument. He alludes to his approach having been the norm at some earlier period, but as noted, his academic sources for that proposition fail to clearly support the argument. There are ample precedents on the question, but the majority of them cut against Justice Thomas's point. Mark Movsesian's article on severability, cited by Justice Gorsuch in his partial concurrence in *Barr* (joined by Justice Thomas), details the historical development of the doctrine in both statutory interpretation and contract law.[109]

In statutory interpretation, Movsesian traces the origin of the severability question to *Warren v. City of Charlestown*, an 1854 case before the Supreme Judicial Court of Massachusetts.[110] There, the court, in an oft-cited passage, wrote that whereas "[i]t is no doubt true . . . that the same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others," the provisions, "respectively constitutional and unconstitutional, must be wholly independent of each other" to allow for severance.[111] Crucially, though, the *Warren* court repeatedly referred to the constitutional portion as therefore "fall[ing]" or rendered "void" for being

108. *Id.* at 983.

109. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2365 (2020) (Gorsuch, J., concurring in part and dissenting in part) (citing Movsesian, *supra* note 26, at 41–42)).

110. Movsesian, *supra* note 26, at 60; Warren v. City of Charlestown, 68 Mass. (2 Gray) 84 (1854).

111. *Warren*, 68 Mass. (2 Gray) at 98–99.

found inextricable from the unconstitutional, suggesting an approach more consistent with the current severability doctrine than with that proposed by Justice Thomas.[112]

Courts followed *Warren*'s approach throughout the first half of the nineteenth century, and their language overwhelmingly followed suit.[113] Courts consistently referred to unconstitutional passages as some variant of "falling,"[114] "failing,"[115] "ceasing to exist,"[116] being "stricken,"[117] or as "void."[118] And if jurists in any of these cases, *Warren* included, intended these words to mean they were merely refusing to give effect to an unconstitutional statutory provision but not actually considering themselves to be "striking" it, they did not make that clear. Rather, they would seem to be, themselves, guilty of Mitchell's writ-of-erasure fallacy.[119]

None of this is to say that Justice Thomas's conclusion is wrong or that it cannot be well substantiated on other grounds; the severability doctrine's reliance upon judicial interpretations of legislative intent and alternate histories are still wholly objectionable on a textualist premise that limits the scope of judges' power to the text in question. Nor are his objections on the basis of standing and remedies law impugned by this literature; both still stand with their original force. It is only in his attempt to discredit severability on the basis of (1) contradiction of original intent or (2) an inherent connection to nullification that the literature fails to support the Justice's argument. As to the role of case law, it cannot definitively be said that he is incorrect in asserting that "decline to enforce" was the prevailing rule in early American jurisprudence, but cases have yet to be offered to illustrate such a role, and until they are, the prevailing severability doctrine enjoys the benefit of a much stronger basis in precedent.

112. *See id.* at 98–100, 104.

113. *See* New York v. Comm'rs of Taxes & Assessments, 94 U.S. (4 Otto) 415, 418 (1876); Allen v. City of Louisiana, 103 U.S. (13 Otto) 80, 83–84 (1880); Poindexter v. Greenhow, 114 U.S. 270, 304–06 (1885); Berea Coll. v. Kentucky, 211 U.S. 45, 55–58 (1908).

114. *See Comm'rs of Taxes & Assessments*, 94 U.S. (4 Otto) at 418.

115. *See Poindexter*, 114 U.S. at 305

116. *See Comm'rs of Taxes & Assessments*, 94 U.S. (4 Otto) at 418.

117. *See Allen*, 103 U.S. (13 Otto) at 84; *Berea Coll.*, 211 U.S. at 58; Int'l Text-Book Co. v. Pigg, 217 U.S. 91, 113 (1910); Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 635–37 (1895).

118. *See Comm'rs of Taxes & Assessments*, 94 U.S. (4 Otto) at 418; *Poindexter*, 114 U.S. at 306; *Pollock*, 158 U.S. at 637

119. *See* Mitchell, *supra* note 83, at 934–37.

V. CONCLUSION

The current state of the severability doctrine debate, measured by the opinions in *Seila* and *Barr*, is frustrating not for the success and predominance of a wrong argument but for the ambivalence in which we are left by two very good ones. Two justices, Chief Justice Roberts and Justice Kavanaugh, defend the prevailing doctrine of severing and excising unconstitutional statutory provisions, with some inconsistent signs of disagreement between them as to how and whether to employ legislative intent in doing so. Meanwhile, Justices Thomas and Gorsuch point to a doubtful history to support their "decline to enforce" approach but, in the process, make a formidable case that the sever-and-excise approach is an affront to the separation of powers.

The resulting sense is that the severability debate will and should continue. The recent opinions, despite laboring to bring some clarity to the issue, have not done so. Where they succeed, however, is in illustrating the merits of both perspectives. Does the sever-and-excise camp enjoy the support of jurisprudential history? Very probably. Does that make their approach simply a longstanding intrusion of courts into what is properly the legislative power? Very possibly. If so, is that intrusion worth its conveniences? That is a question not easily subjected to rational calculation, the very propriety of which depends upon one's preferences for formalism versus functionalism in constitutional jurisprudence.