



NOTE

Regulatory Severability

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Abstract. When a court reviews an agency’s regulation and finds it to be partially invalid, the court must determine the proper remedy. Should the court vacate the entire regulation, issue a remand to the agency without vacatur, or sever the offending portion and allow the lawful remainder to take effect? The issue of regulatory severability is increasingly important in administrative law after *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* effectively eliminated the statute of limitations for APA challenges and *Loper Bright Enterprises v. Raimondo* ended judicial deference to agency interpretations of law.

Few circuit courts or scholars have considered regulatory severability as a concept distinct from statutory severability. Yet as this Note argues, there is good reason for a difference to exist: While judicial review of statutes is governed by constitutional first principles, judicial review of regulations is governed by statutes. Indeed, in early administrative law cases, the Supreme Court looked to statutory review provisions to determine what remedies a court could provide for a partially invalid agency action. This Note advances a novel interpretation of the APA’s judicial review provision as instructing courts to sever regulations where possible.

The Supreme Court has repeatedly described the APA as the “fundamental charter of the administrative state.” And in landmark cases from *Darby v. Cisneros* to *Loper Bright*, the Court has proven willing to overturn settled practices in the circuit courts when those practices fail to align with the APA’s text. Obeying the APA’s preference for severability is a critical next step in the wake of decisions rendering more agency actions more vulnerable to judicial second-guessing.

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Introduction

The question of severability traditionally arises when a court confronts a partially unconstitutional statute. The court must determine whether the statute’s valid parts can be severed from the invalid parts and allowed to go into effect, or whether the whole statute must fall together. But a similar question arises when a court reviews an agency regulation and holds it to be partially invalid. The court must determine whether to vacate the entire regulation, issue a remand to the agency without vacatur, or sever the offending portion and allow the lawful remainder to take effect.

In the context of statutes, the Supreme Court “vacillated” for much of its history over whether to apply a presumption of severability (or inseverability) to acts of Congress under review.¹ The modern Court has settled on a “strong presumption of severability,”² holding that an “unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.”³ Severability clauses strengthen that presumption even further: A severability clause provides the “definitive expression of Congress’s will” that all valid parts of a statute should remain in effect.⁴ Against this background, it is rare to find a lower court rejecting a partially invalid statute in its entirety.⁵

In contrast, courts are often more hesitant to sever regulations. Lower courts regularly vacate or enjoin entire rules on the basis of certain defective parts.⁶ The Supreme Court has provided very little guidance on regulatory severability, although it has noted that the rules for severability may be context-specific.⁷ Many courts nevertheless apply statutory severability

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1. See John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 218-25 (1993) (discussing the history of statutory severability).
 2. *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2350 (2020) (plurality opinion) (collecting cases).
 3. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2209 (2020) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)).
 4. See *Am. Ass’n of Pol. Consultants*, 140 S. Ct. at 2349.
 5. For recent examples of circuit courts’ ready severance of federal statutes, see *Lofstad v. Raimondo*, 117 F.4th 493, 501 (3d Cir. 2024); and *Texas v. Yellen*, 105 F.4th 755, 774 (5th Cir. 2024).
 6. See, e.g., *Missouri v. Trump*, 128 F.4th 979, 998 (8th Cir. 2025); *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1144 (D.C. Cir. 2022); *Mayor of Baltimore v. Azar*, 973 F.3d 258, 292 (4th Cir. 2020) (en banc).
 7. Cf. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (assuming “that the severability standard for statutes also applies to Executive Orders,” but holding open “whether Executive Orders can be severed into valid and invalid parts, and if so, what standard should govern the inquiry” (emphasis omitted)).

precedents to regulations.⁸ Other courts apply a similar test derived from *K Mart Corp. v. Cartier, Inc.*,⁹ the Supreme Court's sole decision commenting on regulatory severability under the APA.¹⁰ But under both approaches, courts have demonstrated their reluctance to sever.

In *Mayor of Baltimore v. Azar*, for instance, the en banc Fourth Circuit applied statutory severability precedents to a regulation but refused to sever for purposes of a preliminary injunction¹¹—even though the regulation contained a severability statement.¹² A vocal dissenting judge would have followed the severability clause and limited any remedy “to those provisions found unlawful.”¹³

Taking the second route, the Eighth Circuit in *Missouri v. Trump* applied a test derived from *K Mart* to answer the same question: whether to sever a regulation for purposes of a preliminary injunction.¹⁴ But it, too, refused to sever despite a severability statement in the regulation.¹⁵ In so doing, it drew the opposite severability presumption, and reached the opposite result, from that of a Fifth Circuit panel applying the same language from *K Mart*.¹⁶

The Supreme Court's emergency-docket intervention on the question provided little clarity. In *Department of Education v. Louisiana*, the Court denied the government's request to sever a regulation for purposes of a preliminary

8. See, e.g., *Fowler v. Gage*, 301 F.2d 775, 778-79 (10th Cir. 1962) (“The law is well settled that when a part of a statute is declared void, the entire statute falls unless the invalid portion can be separated from the remaining part of the statute. That applies with equal force to a regulation which has the force of law.”); *Cnty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393-94 (D.C. Cir. 1990) (citing Supreme Court precedent about statutory severability to evaluate regulatory severability); *Mayor of Baltimore*, 973 F.3d at 292 (same); *Bernstein v. U.S. Dep't of Just.*, 176 F.3d 1132, 1146-47 (9th Cir.) (same), *reh'g en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991) (same).

9. 486 U.S. 281 (1988).

10. See Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2296 (2015) (discussing the *K Mart* test).

11. 973 F.3d at 292.

12. *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714, 7725 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59).

13. *Mayor of Baltimore*, 973 F.3d at 325 (Richardson, J., dissenting).

14. 128 F.4th 979, 998 (8th Cir. 2025).

15. See *id.*; *Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program*, 88 Fed. Reg. 43820, 43828 (July 10, 2023) (to be codified at 34 C.F.R. pts. 682, 685).

16. *Contrast Missouri v. Trump*, 128 F.4th at 997-98 (quoting *K Mart* to support the possibility of severability “[i]n certain circumstances”), *with VanDerStok v. Garland*, No. 23-10718, 2023 WL 4945360, at *1 (5th Cir. July 24, 2023) (per curiam) (quoting the same language in *K Mart* to conclude that “severance is preferred”).

injunction.¹⁷ In a cursory per curiam opinion, the Court cited no precedent at all and denied the request on the basis that

the Government has not provided this Court a sufficient basis to disturb the lower courts' interim conclusions that the three provisions found likely to be unlawful are intertwined with and affect other provisions of the rule. Nor has the Government adequately identified which particular provisions, if any, are sufficiently independent of the enjoined definitional provision and thus might be able to remain in effect.¹⁸

The Court gave no further guidance on when a rule's provisions might be "sufficiently independent" to merit severability.¹⁹ Indeed, the Court otherwise ignored the government's briefing²⁰ identifying several provisions of the rule as independent of the contested changes. Steve Vladeck described the opinion as "a huge mess."²¹

The stakes of regulatory severability are increasingly high as both political parties, facing congressional impotence, pursue major political goals through omnibus regulations. When a court invalidates an entire regulation on the basis of a politically contentious provision, many other changes are undone with little fanfare. The litigation in *Mayor of Baltimore v. Azar*, for example, focused on a provision barring abortion referrals, but the challenged regulation also addressed compliance with sexual-abuse reporting laws.²² *Missouri v. Trump* concerned large-scale student loan forgiveness, but the regulation at issue also updated the rules for borrowers deferring loans due to cancer treatment or military service.²³ *Department of Education v. Louisiana* concerned Title IX protections for transgender students, but the challenged regulation also added protections for pregnant students and employees.²⁴

17. 144 S. Ct. 2507, 2509-10 (2024) (per curiam).

18. *Id.* at 2510.

19. *Id.*

20. See Stay Application at 26-27, *Dep't of Educ. v. Louisiana*, 144 S. Ct. 2507 (No. 24A78).

21. Steve Vladeck, 95. *The Title IX Ruling is a Huge Mess*, ONE FIRST (Aug. 19, 2024) <https://perma.cc/9U3H-Q89B>.

22. 973 F.3d 258, 266 (4th Cir. 2020) (en banc); Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7717 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59).

23. 128 F.4th 979, 984-85 (8th Cir. 2025); Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program, 88 Fed. Reg. 43820, 43903 (July 10, 2023) (to be codified at 34 C.F.R. pts. 682, 685).

24. 144 S. Ct. at 2509-10 (per curiam); *id.* at 2513 (Sotomayor, J., dissenting in part); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33887 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106).

If these regulations had instead come as bills from Congress, it is far more likely that courts would have engaged in severance. Richard Fallon has described statutory severability as reflecting the principle “that when Congress enacts a statute, it votes to give legal effect to all of the statute’s provisions and applications unless it indicates otherwise”—a view shared by other scholars.²⁵ Even if one provision is unconstitutional, the others remain good law. On this theory, refusing to sever a valid provision of a statute (or failing to follow a valid severability clause) would amount to defiance of law enacted by Congress.

Courts that refuse to sever regulations may be understandably reluctant to apply this logic to agencies. After all, agencies lack constitutionally conferred powers. There is no constitutional reason to think that every portion of a regulation is independently valid: Agencies have only the authority that Congress gives them.

This Note proposes that out of that limitation, a framework for regulatory severability emerges. Agency power flows from Congress. So courts considering whether to sever a regulation should ask first whether Congress expressed an intent on regulatory severability. Congress, after all, frequently provides in detail for judicial review of agency action.²⁶ Regulatory severability should thus be treated as a distinct field rooted in the text of judicial review provisions passed by Congress.

In particular, this Note analyzes the judicial review provision of the Administrative Procedure Act (APA).²⁷ That provision, 5 U.S.C. § 706, provides a list of grounds on which “agency action, findings, and conclusions” may be invalidated.²⁸ The text, structure, and drafting history of Section 706 suggest that Congress intended for courts to review agency actions piece by piece and set aside only those provisions found to be invalid.²⁹ Of course, some invalidities might infect an entire regulation. But Section 706 indicates that the remedy should be restricted to the problem—a more stringent test in favor of severability than courts currently apply.³⁰

25. Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 255-56 (2020); see, e.g., William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 5-6, 8 (2023).

26. See generally JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (2022) (cataloging statutes providing for judicial review of agency action).

27. Pub. L. No. 79-404, 60 Stat. 237, 243-44 (codified as amended at 5 U.S.C. § 706).

28. 5 U.S.C. § 706(2).

29. See *infra* Part II.A.

30. See *infra* Part III.C.

The Supreme Court has repeatedly described the APA as “the fundamental charter of the administrative state.”³¹ And in landmark cases from *Darby v. Cisneros* to *Loper Bright Enterprises v. Raimondo*, the Court has proven willing to overturn settled practices in the circuit courts when those practices fail to align with the APA’s text.³² This Note argues that obeying the APA’s preference for severability is a critical next step in the wake of decisions rendering more agency actions more vulnerable to judicial second-guessing.

The Note proceeds in three parts. Part I explains the logic of examining statutes to guide inquiries like regulatory severability. Part II examines the APA’s judicial review provision, 5 U.S.C. § 706, and concludes that the statute instructs courts to sever a partially invalid regulation unless a flaw pervades the regulation in its entirety or the remainder is itself invalid. Part III considers how this theory of regulatory severability would alter existing law.

I. Setting the Terms for Regulation

Questions of regulatory severability closely parallel questions of statutory severability. In both settings, a rule intended to carry the force of law turns out to be partially invalid, and a court must determine whether the valid remainder still has legal effect. It is unsurprising that courts and scholars often import concepts from statutory severability to address issues of regulatory severability. But the distinct legal status of regulations may render such statutory tools unnecessary.

To see why, consider the available tools for statutory construction. Statutes are creatures of the Constitution. The Constitution vests Congress with enumerated “legislative Powers” and defines the process by which Congress, in conjunction with the President, may create law.³³ It specifies that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”³⁴ To the extent that the Constitution’s text contains interpretive principles, those principles operate as binding constraints on Congress and the courts. Indeed, some scholars argue that the Constitution implies a rule of severability: Laws validly enacted by Congress are valid except to the extent they conflict with the Constitution.³⁵ Others have argued that the Constitution renders statutes inseverable because severance “mak[es] something into law that was not

31. See, e.g., *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (plurality opinion)).

32. *Darby v. Cisneros*, 509 U.S. 137, 154 (1993); *Loper Bright*, 144 S. Ct. at 2265.

33. U.S. CONST. art. I, §§ 1, 7, 8.

34. *Id.* art. VI, cl. 2.

35. See, e.g., Fallon, *supra* note 25, at 255-56; Baude, *supra* note 25, at 5-6.

precisely the text that had been approved by Congress and signed by the President.”³⁶

Where the Constitution makes no specification of a particular interpretive principle, Congress is free to pass statutes governing statutory interpretation.³⁷ Congress sometimes tailors interpretive rules to individual statutes—for example, defining the materials that may be used to interpret a particular law.³⁸ Other times, Congress enacts interpretive rules of broad applicability—such as the law defining the effect of repeals.³⁹ In the realm of statutory severability, while Congress regularly adds severability clauses to individual statutes, it has yet to enact a default statutory severability rule.

Relatively few such default rules exist.⁴⁰ In their absence, courts engage in interpretation using a variety of canons and interpretive presumptions. Some of those tools reflect principles of grammar and language usage,⁴¹ while others capture intuitions about how Congress operates.⁴²

Regulations, meanwhile, are written by agencies exercising authority delegated by Congress.⁴³ Because agencies are themselves creatures of statute,

36. Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1496-1500 (2011); see also Amy L. Moore, *Splitting the Statute: Severability as a Canon of Construction or Constitutional Concern?*, 75 CATH. U. L. REV. 50, 53-54 (2025) (discussing “whether severability should be treated as a constitutional concern or as a matter of statutory interpretation”).

37. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1102-03 (2017); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2109-10 (2002).

38. E.g., Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1075 (codified at 42 U.S.C. § 1981) (“No statements other than [a specified] interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act . . .”).

39. Act of July 30, 1947, Pub. L. No. 80-278, ch. 388, § 108, 61 Stat. 633, 635 (codified at 1 U.S.C. § 108).

40. See Rosenkranz, *supra* note 37, at 2147-53 (proposing that Congress should pass systematic rules for statutory interpretation).

41. See Baude & Sachs, *supra* note 37, at 1123-26.

42. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (“[T]he canon of constitutional avoidance . . . is not a method of adjudicating constitutional questions by other means . . . It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” (citations omitted)); *Pulsifer v. United States*, 144 S. Ct. 718, 735 (2024) (“In a given statute, the same term usually has the same meaning and different terms usually have different meanings. Th[is] principle is mostly applied to terms with some heft and distinctiveness, whose use drafters are likely to keep track of and standardize.” (citation omitted)).

43. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”).

the Constitution provides little guidance about the exercise of agency power.⁴⁴ Canons concerning linguistic conventions apply equally to agency decisionmakers because they, like Congress, are users of natural language. But canons reflecting intuitions about Congress’s decisionmaking process may be a much poorer fit. Courts will nonetheless “invoke one interpretive tool or another without stating reasons for doing so.”⁴⁵ Responding to that practice, Kevin Stack has proposed a purposive theory of regulatory interpretation “grounded in the distinctive character of regulations and the institutions that issue them.”⁴⁶ Charles Tyler and E. Donald Elliott have similarly proposed a scheme of deference to regulatory severability clauses based on agencies’ “special insight into their [own] intent” and “specialized expertise in administering” their regulatory domains.⁴⁷

Discussions of agency competency and even linguistic usage, however, skip over the most critical source of constraints: positive law. Congress has the power to enact rules governing the interpretation of regulations, to an extent that matches or exceeds its power to enact rules of statutory interpretation.⁴⁸ Where Congress has enacted a rule, that rule displaces any linguistic background principle or interpretive inference. And in the realm of regulations, unlike the realm of statutes, Congress has enacted many rules to structure agencies’ exercise of power.⁴⁹ Those rules exist both in agencies’ organic statutes, and, importantly, in the Administrative Procedure Act, “the fundamental charter of the administrative state.”⁵⁰ Thus, when confronted with a question of regulatory construction, courts should consider whether Congress has supplied a statutory answer before reaching for abstract principles or canons.

Early administrative law decisions reflect the Supreme Court’s understanding that questions like severability should be decided by considering

44. See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (setting an outer limit in holding that “[t]he nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government”).

45. Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 359-60 & nn.14-18 (2012) (collecting examples).

46. *Id.* at 360-61.

47. Tyler & Elliott, *supra* note 10, at 2332-33.

48. See, e.g., 15 U.S.C. § 2403 (“[I]t is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technical assistance, to stimulate a high rate of productivity growth The laws, rules, regulations, and policies of the United States shall be so interpreted as to give full force and effect to this policy.”).

49. See, e.g., 5 U.S.C. §§ 553, 556, 557 (setting out procedural rules for formal and informal agency rulemaking).

50. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (plurality opinion)).

statutory language—in particular, Congress’s division of authority between agencies and courts. Two cases involving pre-APA “special statutory review”⁵¹ provisions demonstrate that practice. In both, the Supreme Court looked to the text of review provisions when deciding how to address partially invalid agency regulations. And in both, the Court attempted to discern the division of agency and judicial labor dictated by Congress. Notably, the Court made no connection in either between the new question of regulatory severability and the established field of statutory severability.⁵²

First, in *Addison v. Holly Hill Fruit Products, Inc.*, the Supreme Court addressed the severability of a regulation promulgated under the Fair Labor Standards Act.⁵³ The Fair Labor Standards Act set minimum wage and maximum hour requirements.⁵⁴ But the statute exempted some workers, including those engaged in agricultural processing jobs and “employed within the area of production (as defined by the Administrator).”⁵⁵ In a series of regulations, the Administrator of the Wage and Hour Division established that “an individual is employed within the ‘area of production’” if (1) his employer “obtains the commodities from the ‘immediate locality’” or “general vicinity” of the workplace, and (2) “the number of employees in the establishment ‘does not exceed seven.’”⁵⁶

Holly Hill Fruit Products, a canning company, met the geographic requirement for an employee exemption but failed the size requirement.⁵⁷ Defending against an employee suit, Holly Hill contended that the size requirement should be eliminated as invalid, leaving in place a single-prong definition that covered its employees.⁵⁸

The Supreme Court agreed that the statute’s language “restricted the Administrator to the drawing of geographic lines” and, as a result, the size requirement exceeded the Administrator’s authority.⁵⁹ But the Court declined to simply “delet[e] this part of the administrative regulation and, by applying what remains of the definition, exempt[] Holly Hill’s employees from the

51. See Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 YALE L.J. 2305, 2323–24, 2324 n.97 (2024).

52. See *infra* notes 59–61, 69–71 and accompanying text. For a discussion of the history of statutory severability, see Nagle, *supra* note 1, at 210–25.

53. 322 U.S. 607, 611–12, 617–18 (1944).

54. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §§ 6-7, 52 Stat. 1060, 1062–63 (codified as amended at 29 U.S.C. § 203).

55. *Id.* § 13(a)(10), 52 Stat. at 1067.

56. *Holly Hill*, 322 U.S. at 611.

57. *Id.* at 610–11.

58. See *id.* at 618; *id.* at 634 n.16 (Rutledge, J., dissenting).

59. *Id.* at 618–19 (majority opinion).

requirements of the Act.”⁶⁰ The Court made no reference in its opinion to precedents on statutory severability. Instead, it focused on the need to “constru[e] a statute setting up an administrative agency and providing for judicial review of its action” in a manner that respected a congressional division of labor.⁶¹

The Court emphasized that defining the “area of production” was “the Administrator’s duty,” and refused to “assume that the Administrator would have defined [the term] merely by deleting the employee provision, had he known of its invalidity.”⁶² (Indeed, the Administrator opposed applying the severed definition in his amicus brief.⁶³) Consequently, the Court remanded the case to the district court to be held “until the Administrator, by making a valid determination of the area with all deliberate speed, act within the authority given him by Congress.”⁶⁴

Second, in *Federal Power Commission v. Idaho Power Co.*, the Supreme Court analyzed the text of a judicial review provision to support the conclusion that a lower court lacked the “power to exercise an essentially administrative function” by severing an agency order.⁶⁵ Its decision made the issue of statutory interpretation even more explicit.

Idaho Power concerned an order of the Federal Power Commission. The D.C. Circuit had concluded that the Federal Power Commission’s condition on an order was unlawful and entered a judgment instructing that “the case . . . be

60. *Id.* at 618.

61. *Id.* at 621 (quoting *United States v. Morgan*, 307 U.S. 183, 191 (1939)).

62. *Id.* at 618-19.

63. Brief for the Administrator of the Wage and Hour Division, U.S. Department of Labor, as Amicus Curiae at 62-64, *Holly Hill*, 322 U.S. 607 (No. 217), 1944 WL 42781 (“Even if it be assumed that the Administrator’s definition was invalid, we submit that it was error for the court below to extend to respondent an exemption on the basis of the court’s own conception of a fair and reasonable definition.”). The Administrator’s brief also argued that deleting the offending provision was inappropriate because “no direct judicial review was provided by Congress” with respect to the Administrator’s “rule-making powers,” whereas Congress had “expressly provide[d] for judicial review of certain administrative wage orders.” *Id.* at 61 & n.39. Indeed, the Fair Labor Standards Act provided for judicial review “limited to questions of law” and empowered courts to “affirm, modify, or set aside” an order of the Administrator “in whole or in part, so far as [the order] is applicable to the petitioner.” Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 10(a), 52 Stat. 1060, 1065. But the Court in *Holly Hill* made no mention of the statute’s distinction between rules and orders. See *Holly Hill*, 322 U.S. at 620-21 (quoting *Morgan*, 307 U.S. at 191). In practice, “special statutory review provisions that authorized courts to review and set aside ‘orders’ allowed courts to review the legal validity of regulations of general application.” See Sohoni, *supra* note 51, at 2328. There thus seems to be no practical difference between the severability of rules and orders, however denominated.

64. *Holly Hill*, 322 U.S. at 619.

65. 344 U.S. 17, 20-21 (1952).

remanded to the Commission for the entry of an order in accordance with this opinion.”⁶⁶ Subsequently, the Commission “moved for a clarification of the judgment,” and the D.C. Circuit “entered a new judgment, stating that the order of the Commission ‘be . . . modified by striking’” the contested condition, and affirmed the order “as thus modified.”⁶⁷ The Commission then filed a petition for certiorari that was untimely with respect to the original judgment, but timely with respect to the new judgment.⁶⁸

The Supreme Court concluded that the petition for certiorari was timely because the D.C. Circuit’s second judgment undertook a new action. While the first judgment had left the Commission free to decide whether to “reissue[] the order without the contested conditions” or alternately “withh[o]ld its consent to any license” on remand, the second judgment “undertook to modify the license” outright.⁶⁹ To determine the appropriateness of the second judgment, the Supreme Court considered the text of the Federal Power Act. The Federal Power Act authorized a reviewing court “‘to affirm, modify, or set aside’ the order of the Commission ‘in whole or in part’”—but the Court found that instruction insufficient to override other portions of the statute, making clear that “[i]t is the Commission’s judgment on which Congress has placed its reliance.”⁷⁰ As a result, the Court held that the second judgment improperly “usurped an administrative function.”⁷¹

The Court acknowledged that the Federal Power Act might sometimes allow for severance of an unlawful portion of a regulation—for instance, “where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate.”⁷² But the Court ultimately interpreted the statute to place the bulk of decisionmaking authority with the agency, not the courts.

In a D.C. Circuit case decided just before *K Mart*, then-Judge Antonin Scalia cited *Holly Hill* and *Idaho Power* to set out his own test: “Whether an administrative agency’s order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends on the issuing agency’s intent.”⁷³

66. *Idaho Power Co. v. Fed. Power Comm’n*, 189 F.2d 665, 670 (D.C. Cir. 1951), *rev’d*, 344 U.S. 17 (1952).

67. *Idaho Power*, 344 U.S. at 19-20 (citation omitted).

68. *Id.* at 20.

69. *Id.*

70. *Id.* at 20-21 (quoting Federal Power Act, 16 U.S.C. § 8251(b)).

71. *Id.* at 20.

72. *Id.*

73. *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984) (Scalia, J.). Note that then-Judge Scalia explicitly unified orders and regulations under one rule just as the Court in *Holly Hill* did. *See supra* note 63.

If a court had “substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted,” then affirmance of the remainder would be “improper.”⁷⁴ Then Judge Scalia used sweeping language, but he still relied on an analysis of the text of the Natural Gas Act’s judicial review provision, which contained language “identical” to the judicial review provision at issue in *Idaho Power*.⁷⁵

Holly Hill and *Idaho Power* demonstrate the Court’s longstanding recognition that questions of regulatory severability and interpretation may well have binding statutory answers. That conclusion makes logical sense. Congress creates agencies to carry out its policy goals, constrained by certain procedures. Courts review agency decisions for compliance with Congress’s goals and procedural requirements. Their duty in such proceedings is to “ascertain and enforce the spheres of authority which Congress has given to the [agency] and the courts, respectively, through its scheme for the regulation.”⁷⁶ Just as Congress could legislate directly, instead of delegating a task to an agency, Congress has the power to specify what remedy will be available if an agency’s rule should prove partially invalid, and courts are bound by Congress’s decision.

II. Regulatory Severability Under the APA

In the modern era, the APA is the primary statute under which courts review agency actions. Its judicial review provision, 5 U.S.C. § 706, sets out the default framework for judicial review of agency actions.⁷⁷ But the Supreme Court has yet to examine Section 706 to determine courts’ authority to sever regulations—or, viewed in reverse, courts’ authority to strike down whole regulations even when severance is possible. This Part considers what guidance the APA provides for regulatory severability.

A. Interpreting Section 706

Beginning with the text, Section 706 states:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and

74. *North Carolina v. FERC*, 730 F.2d at 796.

75. *Id.*

76. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 136-37 (1940).

77. See SIEGEL, *supra* note 26, at 26-29.

(2) hold unlawful and set aside agency action, findings, and conclusions found to be [unlawful for one of six specified reasons]

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.⁷⁸

When a plaintiff challenges an invalid agency action, the APA thus authorizes the reviewing court to “hold unlawful and set aside” that action⁷⁹ (at least so long as the agency’s error is prejudicial⁸⁰). But how should a reviewing court decide the scope of its remedy? Although the statute lacks a clear command to sever, several features of the text indicate a congressional preference for narrow remedies—in other words, a preference for severing.

First, the text of the judicial review provision expressly authorizes courts to break regulations into smaller parts. The APA defines “agency action” as “the whole *or a part* of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”⁸¹ Inserting that definition into Section 706’s judicial review provision, the APA instructs that reviewing courts shall “compel” or “set aside . . . the whole or a part” of a rule or order, if it is invalid for one of six specified reasons.⁸² At a minimum, the statute *permits* courts to set aside an invalid “part” of a broader regulation rather than the whole of the regulation.⁸³

The best reading, however, is that because the statute asks courts to evaluate regulations both as a whole and in their component parts, Section 706 requires courts to determine whether the whole of a regulation violates one of the specified reasons, or whether the problem implicates only a limited part of the regulation. Consider the category of agency action taken “contrary to constitutional right.”⁸⁴ If a regulation barred private gun ownership and set

78. 5 U.S.C. § 706.

79. Courts and scholars differ on whether the textual instruction that a reviewing court “shall . . . set aside” unlawful provisions *requires* the court to vacate those regulations. See Ronald M. Levin, “*Vacation*” at *Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 309, 315 (2003) (arguing that vacatur is not mandatory, in keeping with a long tradition of remedial discretion); Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 129-31 (2001) (concluding that the APA forbids remand without vacatur). The D.C. Circuit regularly remands rules without vacatur. Levin, *supra*, at 295 & n.11.

80. For further discussion of the rule of prejudicial error, see Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 257-60 (2017).

81. 5 U.S.C. § 551(13) (emphasis added).

82. 5 U.S.C. § 706.

83. See *Carlson v. Postal Regul. Comm’n*, 938 F.3d 337, 351 (D.C. Cir. 2019) (confirming that “the APA permits a court to sever a rule by setting aside only the offending parts of the rule” and then analyzing “[t]wo conditions,” derived from *K Mart*, that “limit the exercise of this power”).

84. 5 U.S.C. § 706(2)(B).

out rules to enforce that bar, it would be unconstitutional in its entirety. But if the regulation barred a range of dangerous products, and only one of the prohibitions violated the Second Amendment, then the constitutional violation would be confined to the provision that barred that product. Pursuant to Section 706, a reviewing court should set aside only the unconstitutional part of the regulation. Setting aside the entire rule on the basis of a partial invalidity would ignore Congress’s instruction to evaluate each regulation as a “whole or part.”⁸⁵

The drafting history of the APA underscores this point. Congress wrote the APA’s flexible definition of agency action—encompassing “the whole or a part of” a regulation⁸⁶—with the judicial review provision in mind. In the Senate Judiciary Committee Print of the APA, the definition of “agency action” was provided exclusively “[f]or the purposes of [Section 706].”⁸⁷ The draft definition similarly embraced “the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof.”⁸⁸ The House Judiciary Committee cut the limiting phrase—“[f]or purposes of [Section 706]”—only because, although “the term ‘agency action’ [was then] not used in other sections,” the definition might “be found useful in later years in connection with additions and amendments.”⁸⁹ But the fact that the definition was drafted expressly for purposes of Section 706’s authorization to “hold unlawful and set aside [invalid] agency action” indicates Congress’s intent for at least some agency actions to be set aside only in part. In other words, Congress intended for courts to sever unlawful portions of regulations from lawful remainders.

Next, the companion terms to “agency action” confirm that courts should evaluate invalidities narrowly where possible. The statute requires courts to “set aside” not just “agency action,” but also “findings” and “conclusions,” when “found to be” invalid for the same six reasons.⁹⁰ Because the same statutory instruction “applies without differentiation to all three categories,” it must bear the same meaning for all three categories.⁹¹

85. *Id.* §§ 551(13), 706.

86. *Id.* § 551(13).

87. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY 15 (Comm. Print 1945). Section 10 of the APA is now codified at 5 U.S.C. § 706.

88. STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 87, at 15.

89. H.R. REP. NO. 79-1980, at 284 & n.4 (1946).

90. 5 U.S.C. § 706(2).

91. *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”).

The natural reading of the instruction to “set aside . . . findings . . . found to be” invalid requires a finding-by-finding evaluation. Similarly, a recipe instruction to “set aside strawberries found to be unripe” would require a cook to check each fruit’s redness, rather than setting aside a whole basket after finding one green berry. Indeed, when a regulation contains a list of findings or conclusions, courts generally understand that each item on the list should be separately checked for invalidities.⁹² Deeming one finding or conclusion insufficiently supported does not automatically invalidate the others.⁹³ Applying the same logic to “agency action,” a term that refers to both the parts and the whole of a regulation, Section 706 instructs that courts should evaluate agency action for invalidities piece by piece.

Finally, Section 706’s opening and closing lines indicate Congress’s preference for narrow remedies. The provision opens by emphasizing that a reviewing court’s authority is restricted “[t]o the extent necessary to decision and when presented” by the case at hand.⁹⁴ And it closes by instructing courts to take “due account” of “the rule of prejudicial error.”⁹⁵ Both elements of the provision suggest that courts should preserve agencies’ work unless reexamining that work is necessary to the case at hand.

Reading Section 706 to instruct severability comports with the fundamental purpose of the APA: to create uniform procedures that balance the needs of private litigants and executive agencies.⁹⁶ Section 706’s provisions focus on grounds for invalidating agency actions.⁹⁷ But judicial review matters only against the backdrop of agency-enabling statutes that allow⁹⁸ or require⁹⁹ agencies to take actions and promulgate regulations. Section 706 thus reflects a balance between Congress’s concern for proper procedure and a respect for careful and lawful agency work. Courts must review agency actions for defects

92. *See, e.g.,* *Wendt Corp. v. NLRB*, 26 F.4th 1002, 1008-14 (D.C. Cir. 2022) (engaging in finding-by-finding review of an agency decision).

93. *See id.* at 1013-14 (remanding for the agency to reevaluate one conclusion). Of course, serious doubts about one aspect might cause the court to hold that the others are arbitrary or unsupported by the facts, but that holding would entail reasoning unrelated to the validity of the other conclusions.

94. 5 U.S.C. § 706.

95. *Id.*; *see* Bagley, *supra* note 80, at 258-62 (discussing the rule of prejudicial error and its application by the courts).

96. *See* Pat McCarran, *Foreword* to STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, at iii (1946).

97. *See* 5 U.S.C. § 706(2).

98. *See, e.g.,* 21 U.S.C. § 356a(d)(1) (authorizing the Secretary of Health and Human Services to make certain drug regulations).

99. *See, e.g.,* 15 U.S.C. § 2056e(a) (requiring Consumer Product Safety Commission to “promulgate a final consumer product safety standard for button cell or coin batteries and consumer products containing button cell or coin batteries”).

that impact private challengers, but remedies should be limited to those defects. The drafters of the APA “anticipated that reviewing courts would take a light touch” when applying Section 706, in keeping with “the era’s optimism that expert agencies could largely be trusted to advance the public interest.”¹⁰⁰

B. Statutory Provisions Outside of the APA

Many statutes besides the APA govern the actions of particular agencies. A full examination of those statutes lies beyond the scope of this Note. But as a general matter, there are at least two ways other statutes may set a different scheme for regulatory severability.

First, other statutes may provide different rules for judicial review, which may not reflect the same preference for severability. The APA makes clear that the default rules of Section 706 can be displaced by agency-specific schemes.¹⁰¹ Congress could, for instance, pass a judicial review provision for an agency that provides for simple up-or-down review of its regulations. Such a rule would make severance impossible: Every regulation would have to rise or fall as a whole on its own.

Second, agencies’ enabling acts could impact agencies’ authority to create severable rules. An agency’s enabling act sets the substantive boundaries for its authority, defining its mission, structure, and tools.¹⁰² The requirements of an agency’s enabling act could render certain regulations inseverable. For instance, if Congress required the agency to regulate two areas in tandem, then the agency’s actions pursuant to that authority would frequently be inseverable. Congress’s requirement makes clear that a regulatory remainder dealing with only one of the two subjects ought not stand.

III. Applying the Instruction to Sever

This Part explains how applying the APA’s preference for severability would change judicial review of agency actions. The current state of regulatory severability doctrine is confused and contradictory, due in large part to the Supreme Court’s one pronouncement on regulatory severability under the APA. Subpart A describes how that pronouncement—a brief passage in the 1988 case *K Mart Corp. v. Cartier, Inc.*¹⁰³—came about. Subpart B explores how lower courts reacted to *K Mart*. Subpart C explains how hewing to the APA’s

100. See Bagley, *supra* note 80, at 258.

101. 5 U.S.C. § 559.

102. See 32 WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 8111 (West 2d ed. 2025).

103. 486 U.S. 281, 294 (1988).

severability preference would resolve the difficulties created by *K Mart* and considers the consequences of that transformation.

A. The *K Mart* Case

Although *K Mart* is frequently cited as the governing precedent on regulatory severability,¹⁰⁴ a careful examination shows that only one Justice endorsed the opinion's language on severability. The Justices' memoranda concerning the case reveal the happenstance nature of its regulatory severability test.¹⁰⁵

K Mart involved challenges to three subsections of a Customs Service regulation that implemented a trademark law.¹⁰⁶ The case required two rounds of oral argument at the Supreme Court.¹⁰⁷ Only eight Justices heard the first oral argument, as the Court was left shorthanded by the retirement of Justice Lewis Powell and the stalled nomination of Robert Bork.¹⁰⁸ After the first argument, five Justices agreed on a threshold jurisdictional question, but the Court split evenly on the merits of the regulation.¹⁰⁹ Draft opinions and memoranda show that four Justices would have upheld the entire regulation, while four Justices would have vacated the regulation in its entirety.¹¹⁰ Justice Scalia, drafting for the dissenters, wrote that part of the regulation "unambiguously contradict[ed]" the statute and that any severability argument was forfeited by the government.¹¹¹ The divided Court, anticipating the arrival of newly confirmed Justice Anthony Kennedy, released an opinion addressing the jurisdictional question and setting the merits for reargument.¹¹²

104. See *infra* Part II.B.

105. The Justices' memoranda concerning *K Mart* are available in the Thurgood Marshall Papers, 1949-1991 collection at the Library of Congress.

106. *K Mart*, 486 U.S. at 288-90.

107. *Id.* at 281.

108. See Linda Greenhouse, *Senate, 97 to 0, Confirms Kennedy to High Court*, N.Y. TIMES (Feb. 4, 1988), <https://perma.cc/97JW-VPQJ>.

109. Letter from Justice Sandra Day O'Connor to Justices William Brennan and Antonin Scalia (Feb. 16, 1988) (on file with Libr. of Cong., Thurgood Marshall Papers); *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182 (1988).

110. See Justice Antonin Scalia, Draft Dissent 18-19, *K Mart Corp. v. Cartier Inc.*, Nos. 86-495, 86-624 & 86-625 (Dec. 2, 1987) (on file with Libr. of Cong., Thurgood Marshall Papers); Letter from Justice Sandra Day O'Connor to Justices William Brennan and Antonin Scalia, *supra* note 109; Letter from Justice William Brennan to Justices Byron White, Thurgood Marshall, and John Paul Stevens (May 19, 1988) (on file with Libr. of Cong., Thurgood Marshall Papers) (explaining after the second round of oral argument that newly confirmed Justice Anthony Kennedy provided the fifth vote needed to break the tie between the two sides).

111. Justice Antonin Scalia, Draft Dissent, *supra* note 110 at 18-19.

112. See *K Mart*, 485 U.S. at 182.

After reargument, Justice Kennedy split the difference. He voted to strike one provision down, but he agreed that the other two could be upheld.¹¹³ As the only Justice in both majorities, Justice Kennedy then wrote the judgment of the Court—his third published Supreme Court opinion.¹¹⁴ In his opinion, Justice Kennedy applied *Chevron* deference to find that two of the regulation’s subsections were “permissible constructions designed to resolve statutory ambiguities.”¹¹⁵ He then concluded that the third subsection failed to reflect any “reasonable construction of the statutory language.”¹¹⁶

Turning to the issue of remedy, Justice Kennedy wrote that “[t]he design of the regulation is such that the subsection of the regulation dealing with [the third issue] is severable.”¹¹⁷ His analysis lasted only one sentence: “The severance and invalidation of this subsection will not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion.”¹¹⁸ He provided no application of the test to the facts of the regulation at issue in *K Mart*, nor did he connect the test to the APA’s judicial review provision. The published version of the passage differs from the initially circulated draft in only one way: In the first draft, Justice Kennedy wrote that the severability question was “clear.”¹¹⁹

The severability portion of Justice Kennedy’s opinion is described in the case’s syllabus as the opinion of the Court because it is found in a section that Justice Scalia, writing for four dissenters, nominally joined.¹²⁰ But the dissent ignores both the conclusion and the reasoning of the severability language, instead finding that all three provisions were in conflict with the statute.¹²¹

113. *K Mart Corp. v. Cartier*, 486 U.S. 281, 292, 294-95 (1988).

114. WESTLAW, “the Supreme Court, Justice Kennedy,” 2 results (Mar. 2, 2026) (on file with the *Stanford Law Review*) (filtered by “Date” to include only results prior to May 31, 1988).

115. *K Mart*, 486 U.S. at 292.

116. *Id.* at 293-94.

117. *Id.* at 294.

118. *Id.* The Court included a *cf.* cite to *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986), and parenthetically described that case as “invalidating a Federal Reserve Board definition of ‘bank’ in 12 C.F.R. § 225.2(a)(1) (1985), but leaving intact the remaining parts of the regulation.” *K Mart*, 486 U.S. at 294. But the challenge in *Board of Governors* was restricted to the definition of “bank[]” and the Court never contemplated the scope of the remedy. See *Bd. of Governors*, 474 U.S. at 363, 368.

119. Compare *K Mart*, 486 U.S. at 294 (“The severance and invalidation of this subsection will not impair the function of the statute as a whole . . .”), with Justice Anthony Kennedy, Draft Opinion 10, *K Mart Corp v. Cartier, Inc.*, Nos. 86-495, 86-624 & 86-625 (May 19, 1988) (on file with Libr. of Cong., Thurgood Marshall Papers) (“It is clear that the severance and invalidation of this subsection will not impair the function of the statute as a whole . . .”).

120. *K Mart*, 486 U.S. at 318 (Scalia, J., dissenting).

121. *Id.* at 329.

Justice Scalia appears to have overinclusively described the portions of the opinion in which he and his three co-dissenters concurred, leaving Justice Kennedy as the sole vote for the severability test.

B. Transformation in the Lower Courts

Despite the fractured nature of the *K Mart* opinion, many lower courts embraced its severability language as authoritative. After all, lower courts had already begun to draw on statutory severability precedents to resolve regulatory severability cases.¹²² And many took *K Mart* to validate that decision. As one judge put it, “the Court basically has adopted the two-part inquiry used by many courts in making statutory severability determinations: an examination of the functional independence of the sections and of the intent of the enacting agency.”¹²³ Another cited *K Mart* for the proposition that severability analysis “differs little in the context of invalidating provisions of regulations promulgated by an agency,” as compared to the context of a statute.¹²⁴ Indeed, one of the only law review articles focused on regulatory severability describes *K Mart* as “repurpos[ing]” the statutory severability test and concludes that “[s]ince the *K-Mart* decision, courts have applied the same test to determine the severability of administrative provisions and the severability of statutory provisions.”¹²⁵

On first look, the *K Mart* test indeed seems to mirror the Supreme Court’s contemporaneous test for statutory severability. *K Mart* stated that an unlawful portion of a regulation could be severed on two conditions. One concerned agency intent: whether “the regulation would not have been passed but for [the unlawful subsection’s] inclusion.”¹²⁶ The other concerned whether “severance and invalidation of [the] subsection” would “impair the function of the statute as a whole.”¹²⁷ Just one year earlier, in *Alaska Airlines v. Brock*, the Supreme Court had summarized the “well established” test for statutory

122. See, e.g., *Fowler v. Gage*, 301 F.2d 775, 778-79 (10th Cir. 1962) (“The law is well settled that when a part of a statute is declared void, the entire statute falls unless the invalid portion can be separated from the remaining part of the statute. That applies with equal force to a regulation which has the force of law.”).

123. *Massachusetts v. Sec’y of Health & Hum. Servs.*, 873 F.2d 1528, 1550 (1st Cir. 1989) (Torruella, J., concurring in part and dissenting in part) (citations omitted), *aff’d on reh’g en banc*, 899 F.2d 53 (1st Cir. 1990), *vacated sub nom.*, *Sullivan v. Massachusetts*, 500 U.S. 949 (1991).

124. *All. for Cmty. Media v. FCC*, 10 F.3d 812, 830 (D.C. Cir. 1993), *rev’d on reh’g en banc*, 56 F.3d 105 (D.C. Cir. 1995), *aff’d in part, rev’d in part sub nom.*, *Denv. Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

125. Tyler & Elliott, *supra* note 10, at 2296.

126. *K Mart*, 486 U.S. at 294.

127. *Id.*

severability: “Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”¹²⁸ In other words, statutory severability depended on (1) congressional intent and (2) the functionality of the statute that would remain.

A critical detail, however, disrupts the comparison between the *K Mart* and *Alaska Airlines* tests. Both tests examined authorial intent. But *Alaska Airlines* then considered the functionality of the statute that would remain after severance. *K Mart*, rather than considering the functionality of the regulation that would remain, asked whether the severed regulation would undermine the function of “the statute” it sought to implement.¹²⁹ Justice Kennedy’s oral announcement of his *K Mart* opinion reinforced that approach: After deeming one part of the regulation “invalid,” Justice Kennedy stated the Court’s judgment that “the balance of the regulation addresses a statutory ambiguity, and that the balance of the regulation is valid.”¹³⁰

Lower courts applying *K Mart* have repeatedly altered the text of its second prong to create a closer parallel with the *Alaska Airlines* statutory severability test. One influential case by the D.C. Circuit, *Davis County Solid Waste Management v. U.S. EPA*, used brackets to make the change, asking whether severance will “impair the function of [the other standards]” of a regulation.¹³¹ Another oft-cited D.C. Circuit case,¹³² *MD/DC/DE Broadcasters Ass’n v. FCC*, makes the same alteration in a paraphrase of the *K Mart* test.¹³³ It asserts that under the *K Mart* test, severability depends (1) upon the intent of the agency and (2) upon “whether the remainder of the regulation could function sensibly without the stricken provision.”¹³⁴ In recent years, as administrative law cases arise more frequently outside of the D.C. Circuit, judges on the Fifth and Sixth Circuits have also relied on bracketed versions of

128. 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam), superseded by statute, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of the U.S. Code)).

129. *K Mart*, 486 U.S. at 294 (emphasis added).

130. Oral Opinion Announcement at 02:40, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (No. 86-495), <https://perma.cc/4QU5-LYSQ>. “The balance” refers to the remainder of the regulation. *Balance*, MERRIAM-WEBSTER, <https://perma.cc/82XW-4QK9> (archived Feb. 1, 2026) (definition 5c).

131. 108 F.3d 1454, 1460 (D.C. Cir. 1997) (alteration in original) (emphasis added) (quoting *K Mart*, 486 U.S. at 294).

132. See Citing References for *MD/DC/DE Broads. Ass’n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), 42 results (Feb. 1, 2026) WESTLAW (on file with the *Stanford Law Review*).

133. 236 F.3d 13, 22 (D.C. Cir. 2001) (citing *K Mart*, 486 U.S. at 294), *reh’g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001).

134. *Id.* (citing *K Mart*, 486 U.S. at 294) (emphasis added).

the *K Mart* test.¹³⁵ And the Eighth Circuit, after quoting the *K Mart* test accurately, applied it by considering only whether “the remainder of the *rule* ‘can function sensibly’ without” the unlawful provision.¹³⁶

None of the lower court opinions have noted or justified their modifications of the *K Mart* test, although some cite *K Mart* in support of the proposition that regulatory severability is equivalent to statutory severability. Because lower courts provide so little explanation of the modification, it is difficult to say whether the lower courts believe they are correcting a one-word error in the *K Mart* opinion—a real possibility, as the brand-new Justice Kennedy adapted the statutory severability test—or if they are independently conflating the statutory and regulatory severability tests.¹³⁷ At least one judge, however, has noted the error. Dissenting from the denial of an en banc petition in *MD/DC/DE Broadcasters*, Judge David Tatel pointed out the panel opinion’s alteration of *K Mart*.¹³⁸ *K Mart*, he wrote, concerned “whether a *statute’s* function would be impaired if, after invalidating a portion of an implementing regulation, the Court left the rest of the regulation in place.”¹³⁹ That question differs from asking “whether the [FCC’s] *Rule* can function without” an unlawful portion.¹⁴⁰

Ironically, lower courts’ efforts to tie regulatory and statutory severability together has ultimately led the doctrines to diverge. When courts tied regulatory severability to statutory severability in the late 1980s, on the authority of the *K Mart* decision, they set out tests for administrative law cases that effectively froze regulatory severability in time, while statutory severability continued to evolve. That helps explain why, even though the Supreme Court currently operates under a strong presumption of statutory severability, lower courts routinely refuse to sever regulations. Indeed, lower courts sometimes refuse to sever regulations despite explicit severability

135. *VanDerStok v. Garland*, No. 23-10718, 2023 WL 4945360, at *1 (5th Cir. July 24, 2023) (per curiam) (“Where a court holds specific portions of a rule unlawful, severance is preferred when doing so ‘will not impair the function of the [rule] as a whole, and there is no indication that the regulation would not have been passed but for its inclusion.’” (alteration in original) (quoting *K Mart*, 486 U.S. at 294)); *Elec. Power Supply Ass’n v. FERC*, 89 F.4th 546, 560 (6th Cir. 2023) (Clay, J., dissenting in part) (quoting *Davis Cnty.*, 108 F.3d at 1460).

136. *Missouri v. Trump*, 128 F.4th 979, 998 (8th Cir. 2025) (emphasis added).

137. One of the only law review articles focused on regulatory severability describes *K Mart* as applying “the same test for the severability of statutes that the Court had articulated in *Alaska Airlines*” and recreates the D.C. Circuit’s bracketing in *Davis County* without comment. Tyler & Elliott, *supra* note 10, at 2296-97.

138. *MD/DC/DE Broads.*, 253 F.3d at 740 (Tatel, J., dissenting from denial of rehearing en banc).

139. *Id.*

140. *Id.*

clauses¹⁴¹—which, in the statutory severability context, command respect as the “definitive expression of Congress’s will.”¹⁴² Courts will justify their disregard for severability clauses through the altered workability prong of the *K Mart* test.

In *MD/DC/DE Broadcasters*, for example, a D.C. Circuit panel read *K Mart* to say “[w]hether the offending portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision.”¹⁴³ The court acknowledged that “the Commission clearly intends that the regulation be treated as severable” because “it said so in adopting the regulation.”¹⁴⁴ Yet in spite of the severability clause, the court went on to ask “whether the balance of the rule can function independently if shorn of its unconstitutional aspects.”¹⁴⁵ On this basis, the panel held that the rule’s unconstitutional provisions “cannot be severed” and vacated the entire rule.¹⁴⁶

More recently, in *Nasdaq Stock Market LLC v. SEC*, the D.C. Circuit noted “the severability provision included” in an agency’s order and yet vacated the entirety of that order.¹⁴⁷ The court did so because it doubted whether the remainder of the order “could ‘function sensibly’”; it found the “challenged features” of the order to be “‘intertwined’ in such a way that made severance problematic.”¹⁴⁸ Although *Nasdaq* did not directly quote *K Mart*, it drew on multiple cases whose precedents ultimately rested on the modified *K Mart* quotations in *MD/DC/DE Broadcasters* and *Davis County*.¹⁴⁹

141. *See, e.g., Mayor of Baltimore v. Azar*, 973 F.3d 258, 292 (4th Cir. 2020) (en banc).

142. *Barr v. Am. Ass’n of Pol. Consultants*, 140 S. Ct. 2335, 2349 (2020) (plurality opinion).

143. *MD/DC/DE Broads. Ass’n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)).

144. *Id.*

145. *Id.*

146. *Id.* at 23.

147. 38 F.4th 1126, 1145 (D.C. Cir. 2022).

148. *Id.* at 1144-45 (first quoting *Carlson v. Postal Regul. Comm’n*, 938 F.3d 337, 351 (D.C. Cir. 2019); and then quoting *Epsilon Elecs., Inc. v. U.S. Dep’t of Treasury*, 857 F.3d 913, 929 (D.C. Cir. 2017)).

149. *Id.* at 1144. In *Nasdaq*, the D.C. Circuit asked whether “the remaining parts of the agency action can ‘function sensibly without the stricken provision.’” *Id.* (quoting *Carlson*, 938 F.3d at 351). In *Carlson v. Postal Regulatory Commission*, 938 F.3d at 351, the court pulled that language from *Sorenson Communications Inc. v. FCC*, 755 F.3d 702, 710 (D.C. Cir. 2014), which itself quoted *MD/DC/DE Broadcasters*, 236 F.3d at 22 (citing *K Mart*, 486 U.S. at 294).

C. Adopting an APA-Based Framework

This Note’s proposal would end the confusion of the *K Mart* era by grounding a presumption of regulatory severability in the text of the APA. Doing so would bring regulatory severability back into alignment with modern statutory severability, under which courts also sever where possible.

Formally, this change may be slight. Some courts have continued to apply statutory severability precedents to regulatory severability questions,¹⁵⁰ and many courts applying *K Mart* conflate the two inquiries. But in practice, understanding regulatory severability as a congressional command might increase courts’ willingness to preserve agencies’ work. Courts appear more reluctant to sever regulations than statutes.¹⁵¹ Recognizing a severability preference in the APA would address a source of that reluctance. Just as courts sever laws to give effect to the valid actions of Congress, courts would sever regulations to give effect to Congress’s design of agency power.

An APA-based severability rule would entail a few outright modifications of the statutory severability test. In the statutory context, a traditional workability inquiry asks whether the remainder of a statute operates in the “manner” intended by its author.¹⁵² Under the APA, by contrast, Congress has supplied a preference for severability, and because Congress provides the agency’s authority, it is Congress’s intent that counts. The severability question then would be whether the remainder still lies within the agency’s legal authority under its enabling statute and the APA. In other words, could the remainder alone pass review under Section 706?

That question could change the outcome in a case like *MD/DC/DE Broadcasters*.¹⁵³ There, the Communications Act of 1934 gave the FCC authority to create regulations promoting equal employment opportunity in broadcasting.¹⁵⁴ The FCC promulgated a rule that “allow[ed] [broadcasters] to select either of two options” to meet their equal employment obligations, in part because it wanted to give broadcasters flexibility.¹⁵⁵ The D.C. Circuit determined that one of the two options was unconstitutional and then refused to sever the other because the one-option rule would fail to serve the FCC’s goal of providing flexibility.¹⁵⁶ Notably, the court disregarded the FCC’s

150. *See supra* notes 8, 11-13.

151. *See supra* notes 1-21 and accompanying text.

152. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted).

153. 236 F.3d at 13, 22.

154. *Id.* at 16.

155. *Id.* at 17.

156. *Id.* at 22.

statement that it intended the two parts of the rule to be severable.¹⁵⁷ It might have more readily followed that statement had it considered that Congress, not the FCC, ultimately defined the goal of the FCC's regulations, and the one-option rule was perfectly adequate to serve Congress's equal employment goals.

Meanwhile, severability might be impossible under the APA-based rule if the regulatory remainder, shorn of the unlawful portion, is no longer consistent with the agency's "statutory jurisdiction, authority, or limitations."¹⁵⁸ Indeed, the Court's stated consideration in *K Mart* focused on a similar concern: whether severing the unlawful part of the regulation and allowing the remainder to go into effect would "impair the function of the statute as a whole."¹⁵⁹ Or severability might be impossible if the statute required an agency to conduct a cost-benefit analysis and the agency never contemplated the costs and benefits of the remainder alone.¹⁶⁰

To address these hurdles, an agency concerned about the partial unlawfulness of a planned regulation would be well-advised to draft and seek comment on a severability clause, which could explain how and why the regulation would be severable.¹⁶¹ Of course, no severability question would arise if a reviewing court held the entirety of a regulation invalid under Section 706. For instance, a failure to observe "procedure required by law" would frequently encompass the entirety of a regulation.¹⁶²

Further difficulties remain, including the interesting question of whether an agency could change the instruction of Section 706 by including an *inseverability* clause. An *inseverability* clause "makes legal provisions contingent, providing that a given rule will cease to have legal force if" another condition is met—here, if another part of the regulation is deemed invalid.¹⁶³ Such a clause would seem to conflict with Congress's instruction. But the instructions in Section 706 are directed at courts, rather than agencies; Congress gave agencies different instructions concerning the issuance of rules

157. MD/DC/DE Broads. Ass'n v. FCC, 253 F.3d 732, 739-40 (D.C. Cir. 2001) (Tatel, J., dissenting from denial of rehearing en banc).

158. 5 U.S.C. § 706(2)(C).

159. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988); see also *Virginia v. EPA*, 116 F.3d 499, 500-01 (D.C. Cir. 1997) (per curiam) (citing *K Mart* and severing a regulation since the remaining "provisions will not give rise to the constitutional or statutory issues [the court] identified").

160. Under the *Chenery* doctrine, a court may uphold a regulation only on the grounds on which the agency itself relied. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

161. This advice is consistent with the recommendations of the Administrative Conference under current law. See ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2018-2: SEVERABILITY IN AGENCY RULEMAKING 2 (2018).

162. 5 U.S.C. § 706(2)(D).

163. See Baude, *supra* note 25, at 14.

in the first instance.¹⁶⁴ An inseverability clause could be better understood as a fallback rule passed by the agency, indicating its policy preference in the event its first choice was invalidated.¹⁶⁵ Typically, courts respect when agencies elect a greater level of procedural oversight than required by the APA.¹⁶⁶

Finally, reading a severability instruction into the APA is compatible with the background rule of remedial discretion. The rule of remedial discretion is “a longstanding judicial presumption that militates against a finding that Congress has placed curbs on the courts’ remedial discretion.”¹⁶⁷ Ronald Levin has pointed to that rule to defend the D.C. Circuit’s common practice of remanding unlawful regulations without vacatur, despite Section 706’s facially mandatory instruction for courts to “set aside” unlawful action.¹⁶⁸ But the rule of remedial discretion generally applies to allow courts to *forbear* from granting authorized relief, rather than authorizing courts to provide additional or overbroad remedies.¹⁶⁹ A severability instruction makes clear that a reviewing court’s remedial power extends no further than the defect it addresses.¹⁷⁰

Conclusion

The Supreme Court has emphasized that the APA was “designed to ‘serve as the fundamental charter of the administrative state.’”¹⁷¹ And in the nearly eight decades since the APA’s enactment, the Court has repeatedly intervened to correct lower court consensuses that diverge from or “completely ignore[]” the text of the APA.¹⁷² Turning to Section 706 for regulatory severability

164. *See supra* note 49.

165. For instance, an agency that promulgates a regulation with two components, A and B, might prefer, in order: (1) A and B together; (2) neither A nor B; (3) either A or B alone. An inseverability clause would embed that preference into the rule.

166. *See, e.g., Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012) (“Notwithstanding the absence of a statutory duty, EPA did undertake a cost-benefit analysis before promulgating the Amended Renovation Rule . . .”).

167. *See Levin, supra* note 79, at 310.

168. *See id.* at 295, 310-12.

169. *See id.* at 310-11 & nn.72-82.

170. *Cf. NAACP v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149, 160-61 (1st Cir. 1987) (Breyer, J.) (“A court, where it finds unlawful agency behavior, may tailor its remedy to the occasion.” (citation omitted)).

171. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (plurality opinion)).

172. *Darby v. Cisneros*, 509 U.S. 137, 145-47 (1993) (“It perhaps is surprising that it has taken over 45 years since the passage of the APA for this Court definitively to address this question.”); Levin, *supra* note 79, at 309 & n.71 (“[I]n a number of recent decisions, [the Supreme Court] has adopted literal or otherwise inflexible readings of other sections of

footnote continued on next page

principles fits neatly into that project, vindicating Congress’s allocation of authority between the executive and judicial branches.

And regulatory severability doctrine is ripe for such an intervention. In *K Mart* and more recently in *Department of Education v. Louisiana*, the Court approached regulatory severability by assuming the applicability of abstract principles rather than looking for a statutory framework.¹⁷³ And as Part III explained, lower courts currently lack a consistent theory of severability and frequently depart from the Supreme Court’s most explicit formulation. Courts and agencies would benefit from fresh guidance.

What’s more, respecting Congress’s preference for severability is especially important in light of the Court’s other recent interpretations of the APA’s text. The landmark cases *Loper Bright Enterprises v. Raimondo*¹⁷⁴ and *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*¹⁷⁵ both emphasized features of the APA’s text that advantage litigants who seek to challenge agency action. First, in *Loper Bright*, the Court ended decades of judicial deference to regulations interpreting law.¹⁷⁶ The Court held that the APA “prescribes no deferential standard for courts to employ” when reviewing agency interpretations of law.¹⁷⁷ Consequently, courts must “decide ‘all relevant questions of law’” and “set aside any [agency] action inconsistent with the law as they interpret it.”¹⁷⁸ Second, in *Corner Post*, the Court ended the general consensus that the APA’s statute of limitations expires six years after the promulgation of a rule. Instead, the Court held that the applicable statute of limitations “does not begin to run until [a plaintiff] is injured,” so APA plaintiffs have a six-year window to bring facial challenges against any rule after they suffer injury.¹⁷⁹ Even if a plaintiff comes into existence decades after a rule came into effect, that plaintiff receives a fresh six-year window to challenge the rule.

the APA, even in the face of longstanding lower court interpretations pointing in a contrary direction.”).

173. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) (pointing to the statute’s functionality and the agency’s intent to justify a severability decision); *Dep’t of Educ. v. Louisiana*, 144 S. Ct. 2507, 2510 (2024) (per curiam) (pointing to the “intertwine[ment]” of the challenged regulatory provision to justify a finding of inseverability).

174. 144 S. Ct. 2244 (2024).

175. 144 S. Ct. 2440 (2024).

176. *Loper Bright*, 144 S. Ct. at 2273 (overruling *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

177. *Id.* at 2261.

178. *Id.* (quoting 5 U.S.C. § 706) (emphasis omitted).

179. *Corner Post*, 144 S. Ct. at 2450. The *Corner Post* majority opinion primarily interpreted the text of 28 U.S.C. § 2401(a), a statute of limitations. *See id.* But the opinion relied on the premise that Section 702 of the APA “equips injured parties with a cause of action.” *Id.* at 2449; *see id.* at 2478-79 (Jackson, J., dissenting) (contesting that characterization).

Together, *Loper Bright* and *Corner Post* render more agency actions subject to less forgiving review. Courts are thus increasingly likely to find agency regulations at least partially invalid. And agencies will increasingly urge courts to consider severing invalid portions of regulations, allowing the valid remainders to go into effect.¹⁸⁰ Severability arguments will also continue to impact the appropriateness of sweeping preliminary injunctions during the course of APA litigation.¹⁸¹

But the plaintiff-favorable rules of *Loper Bright* and *Corner Post* represent only part of the bargain struck in the APA. Their necessary counterpart is strong severability rules that favor preserving valid portions of agencies' work. As courts look to the text of the APA to review agency actions, they should also heed its guidance on severability.

180. See, e.g., Improving Performance, Accountability and Responsiveness in the Civil Service, 90 Fed. Reg. 17182, 17221 (Apr. 23, 2025) (to be codified at 5 C.F.R. pts. 210, 212, 213, 302, 432, 451, and 752) (containing a severability provision); Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066, 2106-07 (Jan. 10, 2025) (to be codified at 16 C.F.R. pt. 464) (providing findings and a detailed discussion of agency intent for the regulation to be severable); see also ADMIN. CONF. OF THE U.S., *supra* note 161, at 4 (recommending that agencies consider issues of severability during rulemaking, including by using severability clauses); Richard L. Revesz, *New Challenges for Federal Regulation: Executive Branch Responses*, 100 N.Y.U. L. REV. 2051, 2095-2100 (2025) (describing a trend of significant expansion in agency use of severability clauses).

181. See, e.g., Dep't of Educ. v. Louisiana, 144 S. Ct. 2507, 2510 (2024) (per curiam) (weighing a challenge to Title IX regulations concerning gender identity); Missouri v. Trump, 128 F.4th 979, 998 (8th Cir. 2025) (weighing a challenge to a rule concerning student loan forgiveness); VanDerStok v. Garland, No. 23-10718, 2023 WL 4945360, at *1 (5th Cir. July 24, 2023) (per curiam) (weighing a challenge to a regulation concerning ghost guns).