ARE INSEVERABILITY CLAUSES CONSTITUTIONAL?

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In 1987 the state legislature of Pennsylvania passed a seemingly ordinary bill with one extraordinary feature. At first glance, the bill seemed like one of those general-purpose measures to increase government pay that legislators find politically distasteful but periodically feel compelled by economic circumstance to enact. It raised the salaries of judges at all levels, of the governor and other elected state officials, of state department heads, and, beginning with the legislative session following the next election, of state legislators; it also gave the legislators, including those already serving, an unvouchedered expense allowance of $12,000 a year. Pay increases for government employees are never politically popular, but this bill seemed unremarkable—although one could question the propriety of having the increase in expense allowances take effect immediately, so that the legislators were in effect voting an increase for themselves. Yet the truly extraordinary feature of the bill was not the hint of self-dealing, but rather the way in which the legislators sought to clothe the self-dealing in protective garb. For the bill contained the following language: “The provisions of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.”

The implications of this clause are inescapable: there was some question as to the constitutionality of having legislators increase their own expense allowances; the

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2 See infra notes 3–11 and accompanying text. According to the parties who eventually challenged the act, two provisions of the Pennsylvania Constitution were implicated:
The members of the General Assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise. No member of either House shall during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term.

PA. CONST. art. II, § 8.
legislature foresaw that a constitutional challenge was possible; and the inseverability clause ensured that if a court struck down the increase in legislators’ expense allowances, the increase in judicial salaries would be sacrificed as well.

The statute was indeed challenged, by a state representative and two private citizens, in *Kennedy v. Commonwealth*. The plaintiffs focused much of their argument on the inseverability clause: not only, they contended, did the clause give the judiciary a personal interest in upholding the law, because it tied judicial pay to the legislative expense allowances, but it also effectively denied the right of representation to those seeking to overturn the statute (because the judicial-pay-raise provision would also make lawyers reluctant to alienate judges by representing parties challenging the law), violated at least the spirit of the state constitutional provision forbidding increases or reductions in judges’ and legislators’ salaries during their terms of office, and was contrary to public policy because of the broad, policy-based presumption in favor of severability.

The court was unpersuaded and dismissed the complaint with prejudice. First, it held that the increase in expense allowances was constitutional. As for the inseverability clause, the court held that the plaintiffs, who appeared *pro se*, had not been denied access to the courts, noting, “Petitioners are here.” (The court did not take up the more specific argument that the statute deprived plaintiffs of their right to representation.) More persuasively, the court dismissed the public policy argument as unripe, on the ground that the inseverability clause would be an issue only if some other provision of the statute were unconstitutional—a condition not satisfied here since the increase in expense allowances was upheld. Finally, the court dismissed as moot the argument that the inseverability clause was contrary to the spirit of the constitutional ban on changes in judicial salaries. Curiously, the court failed to

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A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly shall disclose the fact to the House of which he is a member, and shall not vote thereon.

*Id.* art. III, § 13.

2 *Id.* at 738–39.
3 *Id.* at 739.
4 *Id.* at 737–38.
5 *Id.* at 738 & n.3.
6 *Id.* at 738–39.
7 *Id.* at 739. See also *PA. CONST.* art. III, § 27 (providing that “[n]o law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election
address the plaintiffs’ strongest argument: that it was unconstitutional to make a judicial salary increase hinge on the outcome of a ruling, which is what the inseverability clause was intended to do. All that the majority could bring itself to say, in a bit of understatement, was that “the motives of the Legislature could be viewed as self-serving.”

The suggestion of impropriety provoked such indignant defensiveness on the part of the two judges who wrote separately, concurring in part and dissenting in part, that they did not deign to rebut it, merely stating that the claim of a possible conflict of interest was “an unwarranted and gratuitous insult to the integrity of the judiciary.”

Even those who believe that legislatures should be allowed to do essentially what they want, and that the courts should have no role in reviewing legislation at all, must find the Pennsylvania statute and Kennedy difficult to swallow. Effectively, what the legislature was telling the courts was this: Give us more money and you will get more too; take away our money and we will take away yours. The Pennsylvania statute contains an example of what I will contend is invalid inseverability, Type I.

Inseverability enjoyed a rare moment of notoriety in 2001, when the Bipartisan Campaign Reform Act of 2002, popularly known as McCain-Feingold, was on the verge of being passed by Congress or appointment”); id. art. V, § 16(a) (providing that the compensation of “[j]ustices, judges and justices of the peace . . . shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth”). Significantly, if the legislature had decided to pass separate bills providing for judicial pay raises and increases in legislative expense allowances, and the courts had struck down the latter, then under art. V, § 16(a), the legislature could not have retaliated by repealing the former. Therefore, the combined judicial-pay-raise and legislative-expense-allowance bill enabled the legislature to accomplish with one bill what it could not have accomplished with two. It may be noted that the prohibition in the Pennsylvania constitution against reducing judicial salaries is analogous to that contained in the United States Constitution: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

Kennedy, 546 A.2d at 739.

Id. at 740–41 (Craig, J., dissenting in part and concurring in part, joined by MacPhail, J., dissenting). The question that inevitably arises is whether the court had a positive obligation to strike down the inseverability clause because of the ethical requirement that it avoid even the appearance of impropriety. See ANNOTATED MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. (2004) (“The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”).

The assumption that the courts should have the power to invalidate unconstitutional laws, a cornerstone of U.S. Supreme Court jurisprudence since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), has been subject to periodic reappraisal. For a recent collection of arguments, see Mark Tushnet, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).
after many years of unsuccessful attempts. Opponents of McCain-Feingold, realizing that enactment was increasingly likely and that their best chance to derail the law was in the courts, made a concerted effort to insert an inseverability clause into the bill.\footnote{See Elizabeth Drew, CITIZEN MCCAIN 59–60 (2002). During the debate over McCain-Feingold, the term most often used was “nonseverability.” Id. Other synonyms of inseverability include nonseparability, inseparability, unseverability, disreverability, and reverse severability.} The advocates of inseverability, who ultimately failed, had a motivation precisely opposite from that which guided the authors of the Pennsylvania statute: rather than use inseverability as a shield, to dissuade the courts from exercising their power of judicial review, the opponents of McCain-Feingold sought to use inseverability as a sword, trusting that the bill probably contained some unconstitutional provision and that the rest of the bill could be brought down along with it. Although the pro-inseverability forces disclaimed such ulterior motives and advanced several plausible policy arguments in favor of inseverability,\footnote{See, e.g., Press Release, U.S. S. Republican Policy Comm. Severability and Non-Severability in S. 27 (Mar. 27, 2001), at http://www.senate.gov/~rpc/releases/1999/cf032701.htm.} it was not lost on most observers that the very legislators who were now so strongly supporting an inseverable campaign finance bill had until recently opposed any campaign finance reform bill at all.\footnote{See Excerpts from Senate Debate on Donations: Shirmishing and Predictions, N.Y. TIMES, Mar. 30, 2001, at A16 (quoting Senator Feingold as stating that Senator John McCain of Arizona, the bill’s other principal sponsor, characterized nonseverability as “French for kill campaign finance reform”).} Again, I contend, an illegitimate use of inseverability, this time of Type II.

Inseverability clauses do have legitimate uses. Typically, an inseverability clause is used because the legislature is justifiably concerned that a reviewing court, in invalidating only part of a statute, might leave standing an unworkable law, or one that the legislature would not have enacted in the form that it took after the unconstitutional part was removed. Most courts will sever the unconstitutional provisions of a statute only if they believe the contrary: that the valid provisions of a statute are functionally capable of standing alone, and that the legislature would have enacted the valid provisions of the statute without the invalid ones.\footnote{Champlin Ref. Co. v. Corp. Comm’n of Okla., 286 U.S. 210, 234 (1932) (setting forth the test for severability).} But this is guesswork by definition, and it is understandable for legislators to fear that the courts might guess wrong. Two U.S. Supreme Court cases in particular, INS v. Chadha\footnote{462 U.S. 919, 932 (1983) (invalidating a “one-House veto” provision while upholding the...} and Buckley v.
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Valeo, have done much to give judicial severing a bad name.

The two other uses of inseverability clauses are tactical, and questionable. In the first of these, referred to above as Type I, the inseverability clause serves an in terrorem function, as the legislature attempts to guard against judicial review altogether by making the price of invalidation too great. Leaving aside such innovative provisions as that at issue in Kennedy, an inseverability clause might provide that in case the courts invalidated any part of a wide-ranging, indispensable law (such as a budget bill), the entire law, and perhaps other, previously enacted laws, would cease to exist. The other questionable use of inseverability, a sort of poison-pill device referred to above as Type II, involves an attempt to sabotage a statute. The legislators might assume that the statute contains some unconstitutional provision already (probably a safe assumption in such constitutionally tortuous areas as campaign finance), or they might insert both an inseverability clause and a new provision whose unconstitutionality was fairly plain (such as a provision to outlaw flag burning). Such a clause can serve a dual purpose: it can ensure invalidation of the law, and at the same time legislators who oppose the bill in principle, but whose constituents favor it, can feel comfortable voting for the bill and gaining political advantage without concern that the bill might survive judicial scrutiny.

On the surface, in terrorem clauses seem especially troubling, because they represent an attempt by the legislature to prevent the judiciary from exercising a power that rightly belongs to it (whereas poison-pill clauses invite the judiciary to exercise that power). These clauses, in other words, amount to coercive threats, and the principle that people should not be subject to such threats, or should be free of the consequences of their acts if the acts are coerced, is about as basic as legal principles get. Thus, for example, a contract entered into under duress is void; a will or other donative transfer executed under duress is void, an involuntary confession by a

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19 424 U.S. 1, 143 (1976) (invalidating limits the Federal Election Campaign Act of 1971 placed on political campaign expenditures while upholding limits on contributions).

20 “If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.” Restatement (Second) of Contracts § 174 (1981). See also id. § 175(1): “If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”

21 “A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud.” Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.3(a) (2003).
criminal defendant is inadmissible; and so on. Intuitively, one would expect to find some limit on the legislative power to prescribe the consequences of judicial invalidation: otherwise, there would be nothing to prevent a legislature from shielding any statute from judicial review by making the consequences of invalidation sufficiently dire. But there is a more fundamental problem, one that applies to both in terrorem and poison-pill clauses: as acknowledged by the court in *Kennedy*, statutes are generally presumed severable. The judicial power to sever is not granted by the legislature but rather “flows from powers inherent in the judiciary.”

And the presumption of severability has become increasingly strong since the principle of severability was first set forth by Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts in 1854. At least one commentator believes that the presumption has now become irrebuttable.

Statutory inseverability clauses are infrequently used and even less frequently written about. But as the experience of the

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22 See, e.g., *Bram v. United States*, 168 U.S. 532, 545–57 (citing a long line of precedents from England extending as far back as *Felton’s case*, 3 How. St. Tr. 371 (1628)).

23 Perhaps the closest analogue to the inseverability clause in another area of law is what is known in antitrust law as the illegal tie-in. This is an arrangement whereby a seller insists that a buyer who wishes to purchase product A may do so only on the condition of also purchasing product B. The main rationale for prohibiting such an arrangement is instrumental: a tie-in forecloses the market for a prospective seller who might wish to sell product or service B alone, and this foreclosure is economically inefficient. See 9 Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 910d, at 6 (1991). On this score, tie-in arrangements are analogous to inseverability clauses only to the extent that the enactment of a bill with two interdependent sections A and B can be said to “foreclose” the enactment of separate bills A and B. This notion, it must be conceded, is speculative, even if one accepts in principle that market analogies are useful in the legislative context. On the other hand, there is also a normative component to antitrust law, and prohibiting tie-ins is a way of preventing unfair oppression of the buyer. See *id.* ¶ 1700d3, at 9–10.

24 See *supra* note 3.

25 In two states, however, there is a contrary presumption. See *infra* note 40 and accompanying text.


28 Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994), argues (disapprovingly) that a conclusive presumption of severability is the only explanation for the U.S. Supreme Court’s “as applied” jurisprudence, because “a statute that has unconstitutional applications cannot be constitutionally applied to anyone . . . unless the court can sever the unconstitutional applications of the statute from the constitutionally permitted ones.” *Id.* at 238.

29 Apparently the only published article devoted exclusively to the subject is a student-written piece, Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903 (1997). There is also some discussion of inseverability in Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227 (2004), as well as
Pennsylvania statute and McCain-Feingold make clear, inseverability is a tool that resourceful and increasingly assertive legislators will not hesitate to use. Although the Pennsylvania statute was upheld and the attempt to make McCain-Feingold inseverable failed before the bill was even enacted, there is every reason to expect that legislatures will continue to use inseverability to immunize (or sabotage) controversial bills. When that happens, the courts just might do the unexpected: rather than dutifully strike down an entire statute because some part of it is unconstitutional, they might decide that the inseverability clause itself is unconstitutional—a violation of (at the federal level) the command that “[a]ll legislative Powers . . . shall be vested in a Congress of the United States”\(^ {30} \) or (at the state level) an explicit separation-of-powers provision.\(^ {31} \) My premise is that in the right circumstances a court would be correct if it did so. And if that premise is sound, then there must be some means of distinguishing unconstitutional inseverability clauses from constitutional ones.

Before embarking on the inquiry, a few preliminary observations about the Pennsylvania statute are in order. Let us assume first of all that it was illegitimate for the Pennsylvania legislature to act as it did—to tell the judiciary, “If you strike down the increase in our salary and expenses then your pay raise is struck down as well.” Let us assume also, as I think it safe to do, that the Pennsylvania statute was illegitimate not only because it amounted to an end-run around the Pennsylvania Constitution’s ban on reducing judges’ salaries\(^ {32} \) but also in some more fundamental way—because it offends our sense of what conditions legislators ought to be allowed to impose on judges. In the latter view, the statute would have been impermissible even if there had been no constitutional provision specifically forbidding reductions in judicial salaries; the statute

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\(^ {30} \) U.S. CONST. art. I, § 1.

\(^ {31} \) Such provisions are found in the constitutions of forty states. See infra note 112.

\(^ {32} \) See supra note 2 and accompanying text.
also would have been impermissible if the consequence of striking down the increase in legislative expense allowances was the elimination of several judicial clerkship positions, or the repeal of the entire state criminal code. Perhaps that sort of legislative arm-twisting is offensive because it resembles blackmail, at least in the extended sense of the term.\textsuperscript{33} The well-known paradox of blackmail is that it is illegal, under most criminal codes, for the blackmailer to tie together two acts that would each be legal if done separately. For example, under the paradigm case of blackmail, it is illegal for the blackmailer to tell the victim, “If you give me $10,000, I will not reveal to your wife that you have been unfaithful,” even though it would be legal for the blackmailer to ask for the money, and legal as well (perhaps even praiseworthy) to tell the victim’s wife of her husband’s unfaithfulness. The paradox of blackmail has been the subject of extensive literature,\textsuperscript{34} and it is tempting to believe that whatever is wrong with blackmail might explain what is wrong with the Pennsylvania statute.

On closer inspection, however, the blackmail analogy breaks down: the Pennsylvania statute did not constitute blackmail. More remarkably, if it had fit the blackmail paradigm more closely, it would have been more legitimate, not less. To appreciate this, it is important to note that inseverability clauses are self-executing: if a court strikes down one part of a statute, the rest of the statute falls automatically. The Pennsylvania legislature, that is, did not announce to the courts: “If you strike down the increase in our salary and expenses on constitutional grounds, you can forget about our passing the judicial pay raise that is now in committee.” That would have been more like blackmail, because it would have involved a threat followed by a volitional act carried out by the party that issued the threat. But curiously, doing so would probably have insulated the legislature’s actions from constitutional challenge. Such a maneuver by the legislature might have been high-handed and perhaps impolitic, but it is difficult to see how it would have been unconstitutional.\textsuperscript{35} This scenario gives rise to

\textsuperscript{33} In a narrower sense, blackmail is an “[u]nlawful demand of money or property under threat to do bodily harm, to injure property, to accuse of crime, or to expose disgraceful defects.” \textsc{Black's Law Dictionary} 170 (6th ed. 1990). Even more narrowly, blackmail is specifically an informational crime, the extortion of “payment . . . by threatening to disclose information that could bring disgrace or ruin.” \textsc{Webster's New World Dictionary} 145 (3d College ed. 1994). Popularly, however, the term blackmail is often used to denote any coercive threat.

\textsuperscript{34} For an overview, see Symposium, \textit{Blackmail}, 141 \textsc{U. Pa. L. Rev.} 1565 (1993).

\textsuperscript{35} By contrast, it would have been clearly unconstitutional for the legislature to repeal a pay raise that was already on the books. \textit{See supra} note 2 and accompanying text.
another seeming paradox: If a legislature can announce to the courts “Strike down X and we will not enact Y” (where Y is a judicial pay raise) or even “Strike down X and we will repeal Y” (where Y is something other than a judicial pay raise, such as an appropriation for law clerks or the entire criminal code), then why can it not say “Strike down X and Y is repealed automatically”? That paradox is distinct from the paradox of blackmail, but on the surface it is no less puzzling.

Inseverability clauses are quite unlike severability clauses, which provide that the valid parts of a statute will remain unaffected by the voiding of its invalid parts. Severability clauses are common—so common, in fact, that they are sometimes regarded as boilerplate.\(^{36}\) As will be seen, inseverability clauses differ from severability clauses in other respects as well. But perhaps it is the rarity of inseverability clauses rather than their other features that explains why virtually no court and no commentator, at least not in print, has given more than passing consideration to whether inseverability clauses are constitutional at all.\(^{37}\)

Inseverability clauses are not unique to statutes. They can be used in contracts\(^ {38}\) and wills, and in these contexts their use is unexceptionable: if both parties to an agreement want the entire agreement to be brought down by the voiding of a single provision,
or if a testator wants his or her entire will to fail in similar circumstances, there is no reason why the wish should not be honored.\textsuperscript{39} In statutes, inseverability clauses are most common at the state level, where inseverability takes various forms. The strongest form is that taken in Tennessee and Virginia, where statutes are presumed inseverable unless the legislature has specified otherwise.\textsuperscript{40} Of the many other states that have codified the opposite presumption (\textit{i.e.}, that statutes are presumed to be severable), Indiana, Minnesota, Oregon, West Virginia, and the District of Columbia have specified as well that the presumption of severability can be rebutted by an inseverability clause.\textsuperscript{41} Finally, even in states where inseverability clauses are not provided for explicitly, such clauses may appear as part of individual statutes.\textsuperscript{42} Inseverability clauses have also been used at the federal level.\textsuperscript{43}

There have been few reported cases interpreting inseverability clauses, and in only one case has a court questioned the legislature’s authority to enact the clause.\textsuperscript{44} Only two relevant cases have reached the U.S. Supreme Court: \textit{Zobel v. Williams,}\textsuperscript{45} in which an inseverability clause was discussed in dictum, and \textit{Heckler v. Mathews,}\textsuperscript{46} concerning a statutory provision that was not an inseverability clause as such but functioned very much like one.

In \textit{Zobel}, the Court invalidated a scheme that the state of Alaska used to pay out dividends to its residents from a state mineral revenues fund.\textsuperscript{47} The amount of the dividend was based on the length of each recipient’s residency since statehood, and that

\textsuperscript{39} This assumes that there was no oppression or fraud in inserting the term providing for the contingent voiding of the entire contract or will.

\textsuperscript{40} See Vollmer v. City of Memphis, 730 S.W.2d 619, 622 (Tenn. 1987); Bd. of Supervisors v. Rowe, 216 S.E.2d 199, 214 (Va. 1975).


\textsuperscript{42} See, \textit{e.g.}, Ala. Code § 6-5-504 (1993):

It is expressly provided that each section, clause, provision, or portion of this division shall be construed as inseparable and nonseverable from all others, and in the event that any section, clause, provision, or portion of this division shall be held invalid or unconstitutional by any court of competent jurisdiction, the entire division and each section, clause, provision, or portion thereof shall be inoperative and have no effect.


\textsuperscript{44} Stiens v. Fire & Police Pension Ass’n, 684 P.2d 180 (Colo. 1984); \textit{see infra} notes 80–88 and accompanying text.

\textsuperscript{45} 457 U.S. 55, 64–65 (1982).


\textsuperscript{47} \textit{Zobel}, 457 U.S. at 57.
feature was held to violate equal protection.\textsuperscript{48} The Court dismissed the possibility that the dividend program might be shorn of its unconstitutional feature and maintained.\textsuperscript{49} Chief Justice Burger wrote for the majority:

We need not consider whether the State could enact the dividend program prospectively only. Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion (citations omitted). Here, we need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid:

‘Sec. 4. If any provision enacted in sec. 2 of this Act [which included the dividend distribution plan in its entirety] is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that provision is nonseverable, and all provisions enacted in sec. 2 of this Act are invalid and of no force or effect.’ 1980 Alaska Sess. Laws, ch. 21, § 4.

However, it is of course for the Alaska courts to pass on the severability clause of the statute.\textsuperscript{50}

In \textit{Heckler}, the Court upheld a law that exempted women, and men who established financial dependence on their wives, from an “offset” that reduced Social Security benefits for surviving spouses.\textsuperscript{51} Congress had enacted the exemption after the Court had struck down, on equal protection grounds, an earlier law that had presumed widows to be financially dependent on their spouses, while requiring widowers to demonstrate financial dependence.\textsuperscript{52} The exemption from the offset was a transitional, five-year measure, intended to protect those who had relied on the earlier, invalidated law.\textsuperscript{53} Congress was well aware, however, that even the

\textsuperscript{48} Id. at 57, 65.
\textsuperscript{49} Id. at 65.
\textsuperscript{50} Id. at 64–65. Although the Court remanded to the Alaska Supreme Court, the case has no reported subsequent history. That the inseverability clause was valid was assumed not only by the majority and by the sole dissenter, Justice Rehnquist, but also by the respondents (who might have attempted to salvage the dividend program by attacking the inseverability clause, but did not do so in their brief) and, not surprisingly, by the petitioners. Respondents' Brief (No. 80-1146); Petitioners' Brief (No. 80-1146).
\textsuperscript{51} \textit{Heckler}, 465 U.S. at 731–33, 750–51.
\textsuperscript{52} Id. at 731.
\textsuperscript{53} Id. at 733.
transitional scheme might be unconstitutional, and it was concerned that extending the exemption to all surviving spouses would be too costly. Accordingly, the statute included language to the effect that if the exemption for women were held invalid, it would be repealed outright rather than extended to men: “If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.”

In the end, the Court upheld the transitional scheme, making it unnecessary to reach the validity of the contingent-repeal provision.

If the Pennsylvania pay-raise statute marks the impermissible end of the inseverability spectrum, Heckler is at the other end. Admittedly, Congress was trying to determine the outcome of a judicial finding of invalidity, but there is no indication that it was seeking to stack the deck: it was simply making a policy judgment that (1) exempting only widows from the offset was better than (2) exempting neither widows nor widowers, which in turn was better than (3) exempting both widows and widowers. Heckler is also useful as an illustration that an inseverable statute conferring a benefit may function in much the same way as a severable statute imposing a penalty. Consider the following hypothetical statutes:

**Conferring Benefit, Inseverable**

Section 1. Effective January 1, 2004, the monthly benefit payable to each eligible recipient shall be increased by twenty dollars.

Section 2. For the purposes of Section 1, “eligible recipient” means a recipient belonging to class A.

Section 3. If any section of this act is held invalid by a court of competent jurisdiction, the entire act shall be repealed.

**Imposing Penalty, Severable**

Section 1. Effective January 1, 2004, the monthly benefit payable to each designated recipient shall be reduced by an amount equal to half the average monthly benefit received by the designated recipient from source X during the preceding calendar year.

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54 Id. at 734 (citation omitted).
55 Id. at 750–51.
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Section 2. For the purposes of Section 1, “designated recipient” means a recipient belonging to class A.

Section 3. If any section of this act is held invalid by a court of competent jurisdiction, the validity of the remaining sections of the act shall be unaffected.

There is at least one more Supreme Court case of possible relevance in addition to Zobel and Heckler. That is United States v. Klein, the only case to date in which the Court has struck down an attempt to limit its jurisdiction through an act of Congress. Klein involved property confiscated by the United States during the Civil War. The owner of the property, Wilson, eventually took an oath of allegiance to the Union and was pardoned by President Lincoln. The Court of Claims held that as a result of the pardon, Wilson, now deceased, was entitled to the proceeds from the sale of the confiscated property. Congress then enacted a statute providing that a presidential pardon was not admissible in evidence in the Court of Claims or on appeal, and depriving the Supreme Court of jurisdiction.

Whether Klein calls into question the constitutionality of inseverability clauses is unclear, because the opinion itself is notoriously unclear. If Klein stands for the principle that Congress can never deprive the Supreme Court of jurisdiction—a most unlikely possibility in view of the exceptions clause of Article III—then the case offers no support for the proposition that some inseverability clauses are unconstitutional, because inseverability clauses do not deprive the courts of jurisdiction, although they do circumscribe it. Klein is also irrelevant if it means, more narrowly, that Congress may not “compel a court to decide cases after removing from it the jurisdiction necessary to its deciding those cases in a manner consistent with the Constitution”—that is, Congress may not compel the Court to decide a case according to a rule of law that is unconstitutional on other grounds—because according to the argument being developed here, it is not jurisdictional limitations together with “other grounds” that create

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56 80 U.S. (13 Wall.) 128 (1872).
57 “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 3.
58 See infra note 119 and accompanying text.
the constitutional infirmity but rather the jurisdictional limitations alone. *Klein* can be deployed against inseverability clauses only if it is read so broadly as to prohibit Congress from prescribing the “rules of decision” in any pending case. That reading is plausible, but it represents what is decidedly the minority view.

Thus, neither *Zobel* and *Heckler* nor *Klein* offers much insight into how the U.S. Supreme Court might ultimately rule on inseverability, nor into how to resolve the inseverability puzzle. For that we must look to the states.

*State ex rel. Broughton v. Zimmerman* was one of the earliest cases in which an inseverability clause was at issue. Although the court’s treatment of the constitutional issue was cursory, the case does illustrate that even half a century ago legislators could use an inseverability clause as a bargaining chip, and that their motivation was not purely to provide interpretive guidance to the courts. *Broughton* concerned a redistricting plan for the Wisconsin state legislature. The Wisconsin Constitution provided that apportionment was to be based solely on population, but, in a pattern that was common in the days before *Baker v. Carr*, no reapportionment had taken place since 1932, and “[b]y 1950 the population of assembly districts ranged from 13,715 for the Bayfield county assembly district to 95,534 for the first Dane county assembly district; and the population of senate districts ranged from 61,795 for the Seventeenth senate district to 191,588 for the Eighth senate district.”

A bill to enact a new districting plan was introduced in 1951, but rural legislators, fearing that their power

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60 See Glidden Co. v. Zdanok, 370 U.S. 530 (1968) (characterizing the statute invalidated in *Klein* as “an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case”).

61 “It seems doubtful” that Klein’s “broad language questioning the power of Congress to ‘prescribe rules of decision to the Judicial Department of the government in cases pending before it’ . . . can be taken at face value.” Richard H. Fallon, Jr. et al., *Hart & Wechsler’s THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 339 (5th ed. 2003).


63 Id. at 908. An inseverability clause played a tangential role in *Hubbell Bank v. Bryan*, 245 N.W. 20, 23–24 (Neb. 1932), in which the statute under review contained both a severability clause (applying to sections 1–5 and 16 of the act) and an inseverability clause (applying to sections 6–16). The court, noting that the clauses were contradictory (at least with regard to section 16), decided that they canceled each other out and “amount[ed] to the same thing as an absence of a clear-cut expression of intent.” *Id.* at 24.

64 *Broughton*, 52 N.W.2d at 905–06.

65 369 U.S. 186 (1962). *Baker*, in which the Court enunciated the principle of “one person, one vote,” is regarded as having begun the reapportionment revolution. *Id.* at 207–08.

66 *Broughton*, 52 N.W.2d at 904.

67 *Id.* at 905–06.
would be reduced, insisted on adding two new sections to the bill as the price of their support.\textsuperscript{68} The first of these, Section 3 of the bill, would have scheduled an advisory referendum for November 1952, at which the state’s voters would decide whether to recommend amending the state constitution so as to allow apportionment to be based on geographic area as well as population.\textsuperscript{69} Section 3 also provided that the results of this nominally advisory referendum would determine whether Sections 1 and 2 of the act, setting forth the new districts, would go into effect: if the voters rejected the geographic-representation option, then the districting plan would become effective in 1954; but if they voted in favor of geographic representation, then the plan would not go into effect at all.\textsuperscript{70} Section 4 of the bill read in part as follows:

[It] is the intent of the legislature, in enacting this act, that each part of the act be deemed to be essentially and inseparably connected with and dependent upon every other part. The legislature does not intend that any part of this act shall be the law if any other part is held unconstitutional.\textsuperscript{71}

The plaintiffs alleged that Sections 3 and 4 were invalid\textsuperscript{72} and that therefore the implementation of the redistricting plan should neither be made contingent on the results of a referendum nor delayed until 1954: they asked the court to sever those sections and make the rest of the act effective as of 1952. Taking up the inseverability clause first, the court held that Section 4 left no doubt as to the legislature’s intent, which was dispositive:

In the instant case there is no necessity for this court to grope in darkness in an effort to spell out the legislative intent. The legislature had made it crystal clear by its language in sec. 4 of ch. 728 that it “does not intend that any part of this act shall be the law if any other part is held unconstitutional.” In the absence of sec. 4, if we were to find sec. 3 invalid, we would then be faced with the issue of whether secs. 1 and 2 should be upheld as valid in spite of such invalidity of sec. 3, and the determining factor would be

\textsuperscript{68} Id. at 905.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 906.
\textsuperscript{71} Id.
\textsuperscript{72} Id. The court’s opinion, unfortunately, does not specify the grounds on which the claim of invalidity was made, although the context suggests that by invalidity the plaintiffs meant unconstitutionality.
the legislative intent. All that sec. 4 does is to state such legislative intent, and we can perceive no valid reason why the legislature does not have the right to definitely state its intent as to severability. We, therefore, have no hesitancy in upholding the validity of sec. 4.

If this court should determine that sec. 3 of ch. 728 [Laws of 1951] be unconstitutional and void, but that such invalidity does not affect the validity of secs. 1 and 2, and should therefore hold secs. 1 and 2 to be operative immediately, thereby completely ignoring the statement in sec. 4, that if any part of the act is unconstitutional the legislature did not intend any part to be law, the court and not the legislature would be legislating reapportionment.\(^73\)

The majority went on to uphold the statute as a whole.\(^74\) It found that there was no constitutional bar to the referendum provision (because it was permissible for the legislature to make a law operative upon the happening of a contingency)\(^75\) or to postponing the effective date of the redistricting plan until 1954 (because while the legislature’s failure to implement a new plan would constitute a breach of a duty imposed by the state constitution, the breach would not diminish the legislature’s continuing authority to implement a plan at a later date).\(^76\) Justice Thomas E. Fairchild\(^77\) dissented. In his view, the state legislature’s obligation to enact a redistricting plan was unconditional under the state constitution, and therefore it was illegitimate to add “a non-germane and distinct provision.”\(^78\)

He continued:

To give effect to sec. 4 is to say that the legislature, by separate and distinct acts, can by one act provide a proper reapportionment and by another veto it or subject it to a contingency which may result in its not being effective... I think there is an important distinction arising out of the difference in the power exercised in an ordinary legislative act and the power here being attempted to be exercised.\(^79\)

Only one case has been found in which a court explicitly refused

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\(^{73}\) Id. at 909.

\(^{74}\) Id. at 914.

\(^{75}\) Id. at 912.

\(^{76}\) Id. at 912–13


\(^{78}\) Broughton, 52 N.W.2d at 915 (Fairchild, J., dissenting).

\(^{79}\) Id. at 915–16 (Fairchild, J., dissenting).
to honor a statutory inseverability clause. *Stiens v. Fire & Police Pension Ass'n*\(^{80}\) concerned a series of laws intended to shore up police officers’ and firefighters’ pension funds in Colorado. The first law, enacted in 1978, effected a number of financial changes, including an increase in local contributions to the fund, and also provided that none of the benefits of the existing pension scheme would vest in employees hired after the effective date of the act, while providing new employees with transitional benefits pending the creation of a new system.\(^{81}\) The second law, enacted in 1979, created that new system.\(^{82}\) In 1981 the Colorado Supreme Court struck down the provision of the 1978 Act that mandated increased local contributions to cover unfunded pension liabilities,\(^{83}\) since the 1978 Act included an inseverability clause as well, the court also invalidated the requirement with respect to prospective costs attributable to current members, even though that provision was itself constitutional.\(^{84}\) In 1981, the state legislature enacted a third law, to replace the provisions invalidated in *City of Colorado Springs*.\(^{85}\) The plaintiffs in *Stiens* alleged that because the 1978 Act contained both an unconstitutional local funding mandate and an inseverability clause, then not only the prospective funding provisions already invalidated but also the non-vesting provision must fall.\(^{86}\) The court disagreed: it held that whereas the “provisions of the 1978 Act for paying prospective annual current service costs and those for funding the unfunded accrued liabilities of existing pension plans were interwoven parts of a single interim financing scheme[,]” the “non-vesting provisions . . . [were] completely separate from and independent of the portions of the 1978 Act establishing the interim funding scheme.”\(^{87}\) The court noted the presence of the inseverability clause but held that it merely raised a presumption, one that was rebutted by the overall purpose of all three relevant acts:

> The practical effect of unseverability appears contrary to legislative intent as expressed in the legislative declaration of the 1978 Act . . . . Also militating against the presumption of unseverability is the consideration that the legislature

\(^{80}\) 684 P.2d 180 (Colo. 1984).
\(^{81}\) *Id.* at 181.
\(^{82}\) *Id.* at 182.
\(^{84}\) *Id.* at 1129–30.
\(^{85}\) Stiens, 684 P.2d at 182–83.
\(^{86}\) *Id.* at 183.
\(^{87}\) *Id.*
clearly and unequivocally expressed its desire in both the 1979 Act and the 1981 Act that fire fighters and police officers hired after April 7, 1978, be covered by the new system.... We have held that later acts of the General Assembly may be relevant in resolving a severability question.\textsuperscript{88}

Although \textit{Stiens} explicitly endorses the proposition that a court may disregard an inseverability clause, a case from the preceding year, in which such a clause was upheld, may prove more instructive and more likely to hold the key to the paradox of inseverability. \textit{Brookins v. O'Bannon}\textsuperscript{89} concerned the Pennsylvania Welfare Reform Act of 1982, which divided the state’s welfare recipients into two classes: “chronically needy” and “transitionally needy.”\textsuperscript{90} The act provided for increased benefits to the first, more seriously disadvantaged, group to be paid for by reducing benefits to the less seriously disadvantaged.\textsuperscript{91} There was also a five percent increase for families of a certain size, whether they belonged to the chronically needy or the transitionally needy class.\textsuperscript{92} An inseverability clause made the increases for the chronically needy dependent on the economies achieved by reducing benefits to the transitionally needy: if a court suspended Section 10 of the act, which defined the two classes, the increase in benefits for the transitionally needy would be suspended as well.\textsuperscript{93} The Philadelphia Welfare Rights Organization (WRO) brought a § 1983 action, alleging that the inseverability clause infringed the fundamental right of welfare recipients, and of the WRO itself, to petition a court for invalidation of Section 10.\textsuperscript{94} The district court denied the motion for injunctive relief and entered judgment for the defendants.\textsuperscript{95} On appeal, the court described the statute, accurately, as one that redistributed funds to one group of welfare recipients from another, and noted that members of the first group would have no reason to challenge the statute and that members of the second group would not be deterred from doing so (because the five percent increase that some of them would stand to lose in the event of a successful challenge was smaller than the reduction in

\textsuperscript{88} Id. at 185.
\textsuperscript{89} 699 F.2d 648 (3d Cir. 1983).
\textsuperscript{90} Id. at 649.
\textsuperscript{91} Id. at 649–50.
\textsuperscript{92} Id. at 650.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 651.
\textsuperscript{95} Id. at 651–52.
benefits that they would prevent).\textsuperscript{96} As for the rights of the WRO, the court made two arguments. First, it stated that the law would merely force the organization to choose among the conflicting claims of its members,\textsuperscript{97} and that although having to make such a choice might be undesirable, it was "a situation not uncommon to any organization."\textsuperscript{98} Second, and more troubling, the court equated the nonseverability clause with action that the legislature might have taken had Section 10 been overturned. Specifically, it noted that the "members of the legislature could have publicized their intention to repeal section 20(a) if section 10 was challenged successfully."\textsuperscript{99} The court went further:

We are satisfied, therefore, that . . . [s]ection 20(b) does no more than express the legislature's intention to repeal section 20(a) unless section 10 is enforceable. We conclude that this marginal increase in the certainty of repeal does not establish a burden on WRO's right of judicial access, for it has yet to be demonstrated that a constitutional distinction exists between a repeal of section 20(a) after litigation has been commenced against section 10, and a repeal of section 20(a) contingent on litigation against section 10.\textsuperscript{100}

Although the court conceded in a footnote that there was a policy difference "between the repeal of a statute after the legislation has been tested in court and an 'advance repealer' by operation of a nonseverability clause,"\textsuperscript{101} the difference was held not to have constitutional significance.

This was a highly questionable position for the court to take: the power of a legislative body to make legislation contingent on the happening of an event is well-established, but so are the limits to that power, and these limits provide a solution to the inseverability problem. An early formulation of the principle that the operation of laws may be contingent, whereas statutory enactment itself may not, appears in a case quoted in Cooley's \textit{Constitutional Limitations}:

The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law;

\textsuperscript{96} \textit{Id.} at 653–54.
\textsuperscript{97} \textit{Id.} at 655.
\textsuperscript{98} \textit{Id.} at 653 n.10 (quoting Brookins v. O'Bannon, 550 F.Supp. 30, 32 (E.D. Pa. 1982)).
\textsuperscript{99} \textit{Id.} at 655.
\textsuperscript{100} \textit{Id.} (footnote omitted).
\textsuperscript{101} \textit{Id.} at 655 n.16.
an event on which the expediency of the law in the opinion of
the law-makers depends. On this question of expediency, the
legislature must exercise its own judgment definitively and
finally. When a law is made to take effect upon the
happening of such an event, the legislature in effect declare
the law inexpedient if the event should not happen, but
expedient if it should happen. They appeal to no other man
or men to judge for them in relation to its present or future
expediency. They exercise that power themselves, and then
perform the duty which the constitution imposes upon
them.\textsuperscript{102}

In the same discussion, Cooley invokes the standard in arguing
that a legislature cannot delegate the power to approve a law to the
electorate by means of a referendum, except where such a
referendum is expressly authorized by constitutional provision:
“except in those cases where, by the constitution, the people have
expressly reserved to themselves a power of decision, the function of
legislation cannot be exercised by them, even to the extent of
accepting or rejecting a law which has been framed for their
consideration.”\textsuperscript{103} Therefore according to Cooley’s criterion, the
court in \textit{Broughton} erred in upholding the referendum that
determined whether the Wisconsin redistricting plan would go into
effect.

The U.S. Supreme Court enunciated a principle nearly identical
to Cooley’s in \textit{Clinton v. City of New York},\textsuperscript{104} in which the Court
invalidated the Line Item Veto Act. The petitioners argued that the
line-item veto was not an improper delegation of legislative power to
the executive branch; they relied on \textit{Field v. Clark},\textsuperscript{105} in which the
Court upheld the constitutionality of the Tariff Act, and specifically
a provision directing the President to impose import duties on
certain goods if the producing country imposed “reciprocally
unequal and unreasonable”\textsuperscript{106} duties on agricultural goods produced

\textsuperscript{102} Barto v. Himrod, 8 N.Y. 483, 490 (1853), \textit{quoted in} Thomas M. Cooley, \textit{Constitutional
Limitations} 121 (Special ed. 1987). \textit{See also} 16 C.J.S. \textit{Constitutional Law} § 166, at 532
(1984):

In any case, as a general rule, the enactment of the statute itself may not be made
contingent on the action of officers or people; the act must be complete in itself, must be
made law by the legislature, and only its effect and operation may be made dependent on
the contingency.

\textit{Id.}

\textsuperscript{103} Cooley, \textit{supra} note 102, at 120.

\textsuperscript{104} 524 U.S. 417 (1998).

\textsuperscript{105} 143 U.S. 649 (1892).

\textsuperscript{106} Tariff Act, ch. 1244, § 3, 26 Stat. 567, 612 (1890), \textit{quoted in} \textit{Field}, 143 U.S. at 680.
by the United States. The Court distinguished the Line Item Veto Act from the statute at issue in Field, noting that:

[W]henever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress had embodied in the statute. In contrast, whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment.

A legal regime that allows the contingent operation of laws while prohibiting their contingent enactment may seem as if it relies on a fine distinction—a law that is not yet operative might appear to be as much of a nullity as a law that has not been enacted at all—but on reflection it is clear that to permit contingent enactment would distort the presentment process and might open the door to other mischief:

Even if there were an unambiguous definition of a “bill,” congressional use of the presentment process could become more sophisticated. For example, Congress might pass two separate bills but provide that they would only go into effect jointly. Alternatively, for example, Congress could provide for a sunset provision in one bill that would be triggered by the President’s item veto of a provision in an entirely separate bill. Whether such use of conditional enactments and repeals would be constitutional—or even justiciable—indicates the potential complexity of this separation of powers issue. Some commentators will feel that these complexities alone condemn the case for an item veto.

Our initial reaction is that conditional enactment or repeal of legislation raises due process problems because it would undermine prospectivity and notice in the lawmaking process (in the same manner as, but to a lesser degree than, ex post facto laws). We also question whether there is any power delegated to Congress by which it may contingently enact legislation (as opposed to its obvious power to enact legislation that addresses contingent situations).

Cooley’s doctrine therefore seems to offer a legitimate means of identifying invalid inseverability clauses, and it gains support from

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107 Clinton, 524 U.S. at 442.
108 Id. at 444.
Clinton. But it also seems like a branch of the nondelegation tree, which makes it suspect. After all, according to the conventional view, nondelegation is dead: with the rise of the administrative state during the New Deal, it became a practical impossibility to prevent Congress from delegating rulemaking authority to the executive branch. In the words of Justice Blackmun, there has been “a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”110 But the conventional view is not applicable here for two reasons. First, a legislative body that enacts a bill containing an inseverability clause is not delegating authority to the executive but rather to the judiciary: it is difficult to see why this sort of delegation is any more necessary in our “increasingly complex society” than it was in our relatively simple, preindustrial one. Second, the legislature that enacts such a bill is delegating authority in a peculiar way: not to devolve power to another branch but rather to usurp power from it. In other words, when the legislature tells the courts, “Strike down X and Y is repealed automatically,” the legislature’s authority to repeal Y is indeed delegated to the courts, but only in a superficial way; in a more fundamental way, the court’s authority is limited rather than enlarged, because its ability to invalidate X is circumscribed by the condition that the legislature imposed. Therefore, our proposed test is not vulnerable to the usual objections to nondelegation. Nor, it should be noted, does it rest on the broader (and historically more problematic)111 concept of the separation of powers.112

Several other objections can be raised, however, both to the suggestion that there is anything wrong with inseverability in the first place, and, conceding that there might be, to the nondelegation

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111 The concept is problematic with respect to federal constitutional law because the phrase does not appear in the Constitution: the doctrine is “immanent rather than express,” Young, supra note 59, at 1245. Nevertheless, the validity of the concept has been repeatedly reaffirmed by the Supreme Court. See, e.g., INS v. Chadha, 462 U.S. 919, 957–58 (1983) (“To . . . maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.”).

Are Inseverability Clauses Constitutional?

First, it could be argued that as a practical matter, the courts are unlikely to be intimidated by efforts to limit their authority, and will instead call the legislators’ bluff. According to another view, the legislative process is for the most part nonjusticiable, and, in any event, inseverability clauses are no more objectionable than other, widely accepted legislative devices. Third, one could maintain that inseverability clauses are not coercive, because they do not strip the courts of their jurisdiction but merely prescribe consequences if they rule a certain way. A fourth, related argument is that whatever judicial power is circumscribed by inseverability is merely intermediate: the courts retain their power to declare an act unconstitutional as a whole even if they cannot do so in part. The fifth argument, a mirror image of the fourth, is that the legislative power to refrain from passing legislation comprehends the lesser power to pass contingent legislation. And finally, even those who acknowledge that inseverability can be abused might find the nondelegation principle too vague to be workable.

The first argument is practical: perhaps inseverability is not a concern because the courts are unlikely to be intimidated by legislative attempts to bring them to heel. The main problem with this premise is that so far, the courts have been effectively intimidated. Among twenty reported cases in which inseverability clauses were at issue, only in Stiens did the court disregard the clause. We can never predict with any certainty what the judiciary will do, but based on the evidence available, concerns about overbearing legislators and overborne judges do not

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113 In addition to Zobel, Broughton, Brookins, and Kennedy, discussed supra notes 45, 47–50; 62–79; 89–101; 3–11, respectively, see Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 981 (9th Cir. 1991) (“The ordinance contains a nonseverability clause . . . . Thus, if we agree with any of the district court’s grounds for its injunction, we must affirm”); Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 51 (D.D.C. 1999) (“HB399 includes a nonseverability clause ensuring that the compacts could not go into effect without the questionable provisions”); Scinto v. Kollman, 667 F. Supp. 1106, 1109 (D. Md. 1987) (discussing applicability of inseverability clause without questioning its validity); Blake v. Big B, Inc., 613 So. 2d 1265, 1265–66 (Ala. 1993) (discussing applicability of inseverability clause without questioning its validity); Prince George’s County v. Surratt, 564 A.2d 95, 99–100 (Md. Ct. Spec. App. 1989) (upholding a specific inseverability clause contradicting a general severability clause), rev’d, 578 A.2d 745 (Md. 1990); Pension Bd. of Pension Sys. v. Bd. of Managers, 441 S.W.2d 228, 233 (Tex. Civ. App. 1969) (“The provisions of the act are non-severable . . . . The act being invalid in the particulars above discussed, the whole of it must fall”), rev’d on other grounds, 449 S.W.2d 33 (Tex. 1969); Wis. Realtors Ass’n v. Ponto, 233 F. Supp. 2d 1078, 1093 (W.D. Wis. 2002) (“By virtue of the conclusion that section 1 of the Act is unconstitutional, the non-severability clause voids all of the Act’s other campaign finance provisions”).

114 See supra notes 80–88 and accompanying text.
seem unwarranted. On the other hand, just because legislative language seems overbearing does not mean that the courts have in fact been overborne: perhaps they were simply according due deference to the legislative branch. This possibility presents an analytical problem, much like the problem of duress in contracts: even if the terms of a contract seem egregiously weighted in one party’s favor, one cannot be certain that the will of the other party was overborne during the bargaining process. Given two virtually identical contracts between different sets of parties in different circumstances, one contract might have been acceded to under duress, the other entered into freely or even eagerly. But of course the analytical difficulty does not mean that the notion of duress should be discarded in either the contractual or the legislative context. Nor does this analytical difficulty mean that duress applies only to situations where a party has no free will at all—as Justice Holmes put it, “the fact that a choice was made according to interest does not exclude duress.”

It might also be argued that to scrutinize inseverability clauses would violate the general principle that the legislative process is not justiciable. Moreover, to require that inseverability clauses be enacted in good faith ignores the reality that legislators often act in bad faith: they might enact a bill that they know will be vetoed because doing so looks good to their constituents; they might strengthen a bill of which they disapprove (or make it more expensive) because the president or governor lacks an item veto and will be more likely to veto a stronger or more expensive measure; they often engage in log-rolling. In this view, at least poison-pill clauses are no worse than many other legislative devices commonly in use. The response to this objection is that legislators who knowingly enact an unconstitutional bill, overload a bill in the hope of getting it vetoed, or engage in log-rolling, may be deceiving the electorate, doing a disservice to other members, and imposing on the time and patience of the other branches of government, but they are not usurping judicial power. And in any event, the proposal made here is for a narrow bad-faith exception, much like that applicable to severability clauses: “the close scrutiny they often have received represents a narrow exception to the general rule that, when a clause is unambiguous, construction is unnecessary.”

Even in areas that are traditionally nonjusticiable, the principle of

judicial noninterference is not absolute. Justice Souter hinted at this with respect to impeachment in his concurrence to *Nixon v. United States*:\(^{117}\)

One can . . . envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply “a bad guy,” judicial interference might well be appropriate.\(^{118}\)

The third argument, that making a statute inseverable does not amount to jurisdiction stripping, is true as far as it goes: the courts still have the power to choose between upholding a statute and voiding it. But to the extent that some inseverable statutes are said to be instruments of duress, that power is fairly empty. It is really analogous to the power of robbery victims to choose between giving up their money and giving up their lives.\(^{119}\)

We now consider the possibility that the judicial power to sever a statute is merely an intermediate power, and that legislative limits on that power are therefore permissible. This suggestion is untenable, as will be made clear by an analogy to the line-item veto. There is no such veto at the federal level and none could be established without a constitutional amendment,\(^{120}\) but a line-item veto is provided for by the constitutions of forty-three states.\(^{121}\) Surely it would not be permissible for the legislature in one of those forty-three states to pass a bill containing a clause requiring the governor either to sign or veto the bill in its entirety: the legislature could not take away *ad hoc* a plenary power granted to the governor by the state constitution (unless there were a constitutional provision specifically allowing such a no-line-item-veto clause, say by a supermajority vote). It is also safe to assume that proponents of such an attempt would not get very far by arguing that the legislature was not “limiting” the executive power because the line-

\(^{117}\) 506 U.S. 224, 252 (Souter, J., concurring) (1993).

\(^{118}\) *Id.* at 253–54 (Souter, J., concurring) (citation omitted).


item veto was merely an intermediate step, and its elimination left intact the governor's greater power to veto the bill outright.\textsuperscript{122}

A further argument against scrutinizing inseverability clauses is that since the legislature has the power not to enact statutes at all, then \textit{a fortiori} it must have the power to make their enactment conditional: that is, the greater power comprehends the lesser power. As has frequently been noted, however, the “greater power, lesser power” syllogism is not a tool for papering over constitutional defects.\textsuperscript{123} An employer or public accommodation could not, for example, refuse to employ or serve members of a particular race or religion just because it had the greater power not to engage in business at all. It is not at all clear why the greater power, lesser power syllogism should be any more availing in the case of inseverable legislation, if only because the power to enact an inseverable statute is not demonstrably “lesser” than the power to enact a severable one.

Finally, one could find fault with the nondelegation standard described above on the ground that it lacks specificity. To apply the standard, one must determine whether a legislature that enacted an inseverable statute was (permissibly) making a policy judgment that no statute at all is better than an emasculated statute, or rather (impermissibly) strong-arming the judiciary (Type I) or engaging in legislative sabotage (Type II). This amounts to a good-faith test, and, the argument goes, such tests are maddeningly difficult to apply. So it is worth considering some more specific alternatives.

One possibility would be to posit that the legislature has the right to ensure all-or-nothing treatment of the entire statute under review, but not of other, previously enacted statutes. Thus the legislature could enact statute \textit{X} and require that a reviewing court invalidate either all of \textit{X} or none of it. It could not, in this view, specify that the invalidation of \textit{X} would lead to the invalidation of previously enacted statute \textit{Y} as well. But there are several problems with this approach. First, it may be that the contingent

\textsuperscript{122} It is true that line-item-veto authority, where it exists, is conferred by state constitutional law, whereas the judicial authority to sever is not. The point is that neither is a “mere” intermediate power. For a discussion of parallels between the two powers, see Lars Noah, \textit{The Executive Line Item Veto and the Judicial Power to Sever: What’s the Difference?}, \textit{56 Wash. \\& Lee L. Rev.} 235 (1999).

invalidation of statute Y is not tactical but rather legitimate. In
that case, defining an illegitimate inseverability clause as one that
purports to invalidate previously enacted law would be
overinclusive. It is also conceivable that the definition would be
underinclusive. The statute at issue in *Kennedy*, for example,
would not fall under such a definition. The definition also might not
cover other attempts to discourage judicial review that would be
less baldly self-serving but no less reckless: consider, for example,
the possibility that an *in terrorem* clause might be inserted in a
budget or appropriations bill (or, still more recklessly, a bill in the
U.S. Congress to raise the national debt limit). The clause would
not purport to invalidate any previously enacted law, but it would
still sweep very broadly indeed—perhaps broadly enough to
dissuade a court from invalidating a provision of doubtful
constitutionality. Further, the notion that contingent invalidation
of the rest of X is legitimate whereas contingent invalidation of Y is
illegitimate rests on the assumption that there is a bright line
between the rest of X and a jurisdiction’s previously enacted laws—
and that assumption contradicts the fundamental principle of
continual reenactment, according to which a legislature continually

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124 See, e.g., An Act to Clarify, Restrict and Amend the Law Relating to the Operation of
had earlier granted to certain entities the right to conduct bingo games and raffles. While
implementing various revisions in 1983, the General Assembly also wished to ensure that if
the selective grant of rights were ever found unconstitutional, the courts would not cure the
constitutional defect by making the right universal: rather, the General Assembly would
prefer not to grant the right to anyone. Thus Section 5.1 of the 1983 bill provided:

Should the Supreme Court of North Carolina or a federal court having jurisdiction over
North Carolina find and determine in any manner, whether on the merits or by denial of
petition for discretionary review, that the General Assembly may not constitutionally
allow “exempt organizations” as defined herein to conduct bingo or raffles, while denying
that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their
entirety, and no person may conduct bingo or raffles under any circumstances not
permitted by the gambling laws of North Carolina.

Id. At the same time, Section 2 of the bill repealed G.S. 14-292.1 in any event. Because of
this peculiarity, G.S. 14-292.1 is not a pure example of the form “If you, the courts, knock out
X, we, the legislature, will also knock out Y.” (Note however that the General Assembly was
effectively immunizing its repeal of G.S. 14-292.1 from judicial review: if the session law
stood, the previously enacted statute fell; but if the session law fell, the previously enacted
statute fell anyway. Admittedly this is of little practical significance, since there is no reason
to believe that the repeal of G.S. 14-292.1 posed any constitutional problem.) The important
point is that there was nothing untoward in this instance about linking the fate of a bill being
enacted with that of a statute already on the books: there is no evidence that the General
Assembly was trying to hamstring the judiciary, and the linkage was based on a coherent
policy judgment, analogous to that made by Congress in enacting the statute at issue in
Heckler *v.* Matthews, see *supra* note 46 and accompanying text (i.e., limited bingo games and
raffles are better than no bingo games and raffles, which in turn are better than unlimited
bingo games and raffles).

125 See *supra* notes 3–11 and accompanying text.
reenacts every statute that it does not affirmatively repeal. This principle is to some extent a legal fiction, but it has analogues in both contract law and testamentary law, and the principle is so basic that one can scarcely imagine going about the business of lawmaking or statutory interpretation without it. To begin with, the doctrine of continuous reenactment is nothing more than a legislative counterpart to the common-law principle of stare decisis: relevant common law is presumed binding unless overruled; it is not presumed nonbinding unless reaffirmed. Further, the U.S. Supreme Court has periodically suggested that if Congress fails to amend a statute after the Court has interpreted the statute, then the Court’s “interpretation of the Act . . . has legislative approval.”

If congressional silence amounts to reaffirmation of the judicial interpretation of a statute, it is difficult to see how it could fail to amount to reaffirmation of the statute itself. Finally, if the legislature had a positive obligation to reenact every statute periodically, the process would surely either result in legislative paralysis or degenerate into a series of reenactments that were purely pro forma. Alternatively, if the legislature failed in its obligation to reenact old statutes, the courts would face the insurmountable task of deciding just how much the old statutes should be devalued, and on what basis.

The continual-reenactment doctrine may call into question the

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126 According to the dominant school of modern contract theory, a contract is a continually changing abstraction and any written agreement is only evidence of that abstraction at a particular moment. Thus the underlying contractual relationship can be said, like existing statutes, to be continually “reenacted.” This resemblance contradicts claims that statutes and contracts are fundamentally different. See Movsesian, supra note 29, at 45 (noting that “the contracts approach is an inappropriate method for resolving questions about severability of statutory provisions.”). Admittedly, there are problems with likening statutes to contracts, above all the difficulty of defining who the “parties to” a statute are. Most commonly the statute is said to represent a contract between various legislators, but one could also see it as a contract between the legislature as a whole and the executive, or between the legislature and the electorate. See Stephen D. Sencer, Note, Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises, 90 MICH. L. REV. 428, 445 (1991).

127 According to the principle of republication, “A will is treated as if it were executed when its most recent codicil was executed, whether or not the codicil expressly republishes the prior will, unless the effect of so treating it would be inconsistent with the testator's intent.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.4 (1999).

128 The logical complement to accepting continual reenactment is rejecting the principle of desuetude. Under the latter principle, accepted in the civil-law tradition but largely foreign to common law, a statute can fall into disuse if it is unenforced for a long period. See Arthur E. Bonfield, The Abrogation of Penal Statutes by Nonenforcement, 49 IOWA L. REV. 389, 423–24 (1964).

129 United States v. Elgin, Joliet & E. Ry., 298 U.S. 492, 500 (1936). See also Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 VAND. L. REV. 647, 732 (1999) (noting that at least in the early years after this statement, the Court “sometimes equivocated on this . . . point”).
proposed test of inseverability clauses outlined above (i.e., a test based on a jurisprudential boundary between a law subjected to judicial review and other, previously enacted law). But the doctrine is also relevant to inseverability for another, more important reason: it counters the argument that the courts should be deferential toward inseverability clauses and perhaps should not engage in severing at all, because judicial severing of statutes amounts to judicial legislating and therefore encroaches on the power of the legislature. To see why this is so, it is worth stating the argument, which goes something like this: the legislature enacts a given statute, not a collection of individual words or phrases or clauses; if a court strikes some words or phrases or clauses and leaves others standing, then the courts are creating a law that the legislature never enacted; and the courts have no such legislative power. But because of continual reenactment, any act of judicial invalidation creates “a law that the legislature never enacted,” namely the body of existing law with the invalidated statute shorn from it. (True, the act of judicial invalidation simply returns the body of law to the status quo ante. But that is the body of law that the legislature enacted, in its continual-reenactment role, at some time in the past, not at the time when the court strikes down the invalid law.) In other words, if the doctrine of continual reenactment is sound, then one cannot object to judicial severing as somehow violative of legislative prerogatives, unless one objects to all judicial review.

It seems, therefore, that one cannot draw a legitimate distinction between an inseverability clause that purports to invalidate the rest of a given statute and one that purports to invalidate previously enacted statutes. So perhaps the line should be drawn between clauses that invalidate only laws having some connection to the statute at hand and clauses that invalidate laws having no such connection. This formulation is nearer the mark. It resembles a single-subject rule, but a common-law one rather than one created by constitutional provision, statute, or rule of legislative procedure. The problem with this definition is that it too would fail to include the statute at issue in Kennedy: the statute did nothing more than provide for increases in the salary and expenses of state officials, and consequently it would have satisfied even the most stringent single-subject requirement. It bears noting that not only is the

single-subject test inadequate—like the no-ties-to-existing-statutes test outlined above—but the two tests also fail when combined.

Perhaps, then, the goal should be only to prevent *in terrorem* clauses: as already noted, such clauses seem more noxious than poison-pill clauses, because they seek to dissuade the courts from exercising a power that rightly belongs to them. But for *in terrorem* clauses to be unconstitutional and poison-pill clauses constitutional is an impossible result. What if, for example, some legislators believed that a given clause would immunize a statute from judicial review, while at the same time other legislators believed that the same clause would guarantee the extinction of the statute through judicial review?

To rebut the preceding objections is not to suggest that the proposed test will be easy to apply. The legislative process is indeed inherently difficult to police, and that is one reason why the principle of nonjusticiability has proved so robust. It might well be asked how much bad faith (and whose) it will take to invalidate an inseverability clause: bad faith on the part of a bill’s sponsors? On the part of all legislators who voted for the bill? Most legislators who voted for it? Enough legislators to account for the bill’s passage? The question is legitimate and vexing, but it arises in other contexts and is not insoluble. The guiding principle of the dominant school of statutory interpretation is that the courts should give effect to the intent of the legislature, and that task has been especially difficult in the area of voting rights, where motives may be less than honorable and legislators may take pains to disguise them.  

A plausible criterion, admittedly easier to articulate than to apply, would be “but for”: without the presence of an improper motive (*i.e.*, to enact a bill without having made a policy judgment), the bill would not have passed.

By adopting this standard, we are asking a court to decide whether the inseverability clause in question is legitimate given all the facts and circumstances. The evidence will include the usual records of floor and committee debates, statements of the sponsors, and so on. It would be relevant if, for example, a plainly unconstitutional provision and an inseverability clause were inserted simultaneously during the amending process rather than at the moment of initial introduction.

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We recognize the concept of duress in the law of contracts, of wills, and of criminal procedure; there is no reason not to extend it to the legislative context. And just as the courts do not take severability clauses at face value, they need not take inseverability clauses at face value. An inseverability clause should be treated according to the same standard that Justice Brandeis set for severability clauses: as an aid in determining legislative intent, “not an inexorable command.” There is a plausible argument that some inseverability clauses are unconstitutional, and a finding of unconstitutionality would have the virtue of binding the lower courts. But at a minimum, it would be reassuring if the courts would refrain from stating that the presence of an inseverability clause binds the courts unqualifiedly. These statements are generally dictum, but even dictum will, if repeated often enough, by its steady drip erode principles that have never been challenged head on.

In his dissent in *Broughton*, Justice Fairchild quoted from Justice Chase’s celebrated majority opinion in *Calder v. Bull*:

> I cannot subscribe to the omnipotence of a state legislature... There are certain vital principles in our free republican government [ ] which will determine and overrule an apparent and flagrant abuse of legislative power,—as to authorize manifest injustice by positive law,... An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.

One hopes that other judges will also recognize that the setting of conditions under which judicial review may take place tests the

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132 But see Dorf, supra note 28, at 293 (arguing that the courts do take severability clauses at face value, with untoward results: secure in the knowledge that the courts will eventually bail them out by cleansing statutes of their unconstitutional provisions, legislators become indifferent to constitutional infirmities in their bills.) See also White v. Fletcher/Mayo/Assocs., 303 S.E.2d 746, 749 (Ga. 1983) (refusing to apply “blue-pencil” rule in striking unenforceable provisions from employment contracts).

133 Friedman, supra note 29, at 904, 911–12, argues that inseverability clauses should be paid greater deference than severability clauses because the very infrequency of their use suggests that legislatures do not resort to them thoughtlessly. This argument amounts, however, to a plea for judicial deference in an area where judicial deference is already very much the rule. See supra note 113. Friedman also does not consider the possibility that legislatures might act in bad faith.


135 3 U.S. (3 Dall.) 386 (1798).

outermost boundaries of legislative authority. Not only is it the special province of the courts to say what the law is;\textsuperscript{137} they must also be allowed to decide how loudly to speak, and which tools to employ, when they say it.

\textsuperscript{137} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).