

Insulating State Legislation From Constitutional Challenge (includes text participants wrote in blank lines on the worksheets.)

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Any type of important or controversial state legislation is likely to face constitutional challenges. Yet state legislators have many tools at their disposal that can thwart litigants and judges who seek to nullify hard-won legislation in court. This session will discuss four of the most powerful statutory provisions that can help bulletproof state laws from judicial invalidation: (1) The Severability Clause. (2) The Saving-Construction Clause. (3) Fallback Provisions. (4) Non-severability.

I. The Severability Clause.

Two types of severability: (1) Severability of provisions, and (2) Severability of applications. A well-crafted severability clause provides explicitly for both types of severability.

Example of severability of applications:

Imagine a state statute providing that: “All those found guilty of murder shall be eligible for capital punishment.”

Application severability requires courts to sever this statute’s application to mentally retarded murderers and juvenile murderers, and leave the remaining constitutional applications in force, rather than nullify the entire statutory provision. Many other examples can be imagined.

Two types of severability clauses: (1) boiler-plate severability clause.
(2) robust severability clause.

Example of a boiler-plate severability clause:

“If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.”

Example of a robust severability clause:

“Every provision in this Act and every application of the provisions in this Act are severable from each other as a matter of state law. If any application of any provision in this Act to any person or group of persons or circumstances is found by

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a court to be invalid, the remainder of this Act and the application of the Act's provisions to all other persons and circumstances may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act invalid in a large or substantial fraction of relevant cases, the remaining valid applications shall be severed and allowed to remain in force."

Why is the ***robust*** severability clause superior to the ***boiler-plate*** severability clause?

- The Supreme Court says that ***legislative intent*** ultimately controls severability, and that severability clauses can be overcome with evidence of "legislative intent." See, e.g., *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686–87 (1987); *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006).
- The use of "boilerplate" severability language is harder for lawyers to equate with legislative intent. See, e.g., Max Radin, *A Short Way With Statutes*, 56 Harv. L. Rev. 388, 419 (1942) ("Are we really to imagine that the legislature had, as it says it had, weighed each paragraph literally and come to the conclusion that it would have enacted that paragraph if all the rest of the statute were invalid?").
- The "robust" severability clause includes a clear and specific declaration of "the legislature's intent."
- The "robust" severability clause mandates severability even in cases of substantial overbreadth (crucial for statutes that implicate free-speech rights or abortion rights).

When including a severability clause, it is important to:

- Include the severability clause in the ***enacted legislation***, rather than relying on an overarching severability clause codified elsewhere in the state's statutes.
- Remember to provide for severability of ***applications*** as well as ***provisions***.
- Include a specific and clear declaration of ***legislative intent***.
- Declare that provisions and applications are severable "as a matter of state law."

Strengths:

- Prevents courts from totally invalidating statutory provisions.
- Allows statutes to take effect to the full extent permitted by the Constitution.
- Most useful for:
 - Laws likely to face First Amendment challenges.
 - Gun-control laws.
 - Abortion regulations.

Weaknesses:

- Courts sometimes don't enforce them. Need extra-strong, robust language.
- Doesn't help with equal-protection or void-for-vagueness challenges.

II. The Saving Construction Clause.

Saving-construction clause serves a function similar to severability of applications. Both require reviewing courts to enforce statutes to the full extent permitted by the Constitution.

Example:

“This statute shall be construed, as a matter of state law, to be enforceable up to but no further than the maximum possible extent consistent with federal law and constitutional requirements, even if that construction is not readily apparent, as such constructions are authorized only to the extent necessary to save the statute from judicial invalidation.”

When drafting a saving-construction clause, it is important to:

- Instruct courts to avoid constitutional violations “even if that construction is not readily apparent.”
- Instruct courts to interpret the statute to avoid only actual constitutional violations, not potential constitutional violations/questions.

Strengths:

- Prevents courts from invalidating the statute. By definition, the statute is constitutional and extends no further than constitutional boundaries.
- Allows the statute to be automatically reinstated to its full effect if an unfavorable judicial precedent is overruled.
- Broader scope than an application-severability clause.
- Most useful for:
 - Laws likely to face First Amendment challenges.
 - Regulations of obscenity or indecency.
 - Photo-ID laws.
 - Abortion regulations.
 - Campaign-finance regulations.
 - State immigration laws.
 - State laws that may be subject to any type of federal preemption.

Weaknesses:

- Empowers courts to effectively re-write the statute in the name of avoiding a constitutional violation. But often this will be preferable to judicial invalidation.

III. Fallback provisions.

Fallback provisions represent the legislature's "back-up plan" in case a court rules a statutory provision unconstitutional.

Examples:

"If any court concludes that these campaign-contribution limits are set too low to comply with the First Amendment, then campaign contributions shall be set at the lowest dollar figure consistent with the Constitution."

"If any court concludes that the individual mandate in the Affordable Care Act violates the Constitution, then individuals shall receive tax credits to purchase health insurance."

"If death by lethal injection is ruled unconstitutional by any court, then executions shall be carried out by firing squad until the court ruling is reversed on appeal."

"If any court finds any provision of this statute void for vagueness, then the Attorney General shall be authorized to issue a new construction of the disputed statutory language that avoids the constitutional vagueness problem."

When drafting a fallback provision, it is important to:

- Avoid provisions that appear to *punish* a litigant for seeking to vindicate his constitutional rights, or a court for deciding to strike down the original law.

Strengths:

- Empowers legislatures to respond in advance to an adverse judicial ruling without needing to address the issue in a future legislative session.
- Can deter litigants from challenging the statute or deter courts from invalidating it.
- Can sometimes deprive litigants of standing to challenge the law.
- Most useful for:
 - Campaign-finance restrictions.
 - Complex legislation that will be hard to pass again (health-care reform).
 - Statutes specifying methods of execution.
 - Abortion regulations.
 - Tort reform.
 - Statutes that may be challenged as unconstitutionally vague.
 - Statutes that may be challenged on equal-protection grounds.

Weaknesses:

- May be hard for a legislature to reach agreement on the proper "fallback" law.
- There is risk that a court might strike down the "fallback" provision as punitive.
- May embolden a court to strike down the original statute, if it draws reassurance from the "fallback" plan.

IV. Nonseverability.

Examples:

“If any provision of this section or its application to any person or circumstance is held invalid, the entire section is invalid. The provisions of this section are nonseverable to achieve this purpose. It is the legislature’s specific intent and priority that this non-severability requirement be enforced.”

“If any provision or section of this Act, or their application to any person or circumstance is held invalid, the entire Act is invalid. The provisions of this Act are nonseverable to achieve this purpose. It is the legislature’s specific intent and priority that this non-severability requirement be enforced.”

It is also possible to mix severability and non-severability together:

- The *applications* of a *provision* may be severable, while the *provisions* in a *section or Act* are non-severable (or vice versa).
- The *subsections* in a *section* may be non-severable, while the *sections* in the *Act* are severable (or vice versa).
- Other variations are possible.

When drafting a nonseverability clause, it is important to:

- Be careful to include only the provisions that you want to stand or fall together.
- Be sure to include a clear statement of *legislative intent*.

Strengths:

- Can deter *litigants* from *challenging* a statutory provision.
- Can deter *judges* from *invalidating* a statutory provision.
- Nonseverability clause can’t be ruled unconstitutional (unlike fallback provisions).
- Most useful for:
 - Funding restrictions in legislation establishing government programs.
 - Compromise legislation that contains something for each side.
 - Efforts to defund Planned Parenthood.
 - Poison pills (Senator Helms and campaign-finance reform.)

Weaknesses:

- Need to draft very carefully.
- This is a somewhat risky device. A court might nullify or invalidate a provision or application that no one expected it to invalidate, which will bring down all non-severable provisions and applications with it.

V. Exercises:

(1) *Randall v. Sorrell*, 548 U.S. 230 (2006), nullified Vermont's campaign-contribution limits as unconstitutionally low. Vermont's law had allowed only a single maximum contribution over a two-year election cycle, and which prohibit state political parties from contributing more than \$400 to their gubernatorial candidate.

Vermont could have helped protect its law with a *fallback* or a *saving construction clause*. Draft a provision here:

(2) *District of Columbia v. Heller*, 554 U.S. 570 (2008), invalidated the District of Columbia's blanket prohibition on handguns under the Second Amendment.

The District of Columbia could have helped protect its law with a *application severability clause* as well as a *saving clause*. Draft a provision here:

(3) *Stenberg v. Carhart*, wiped out a Nebraska statute criminalizing a certain method of late-term abortion on two grounds: (1) Void for vagueness; and (2) Failure to include a health exception.

Nebraska could have helped protect its law with a *severability clause*, a *fallback provision* (“to address void for vagueness”), and a *saving construction*. Draft provisions here:

(4) In 2005, the Texas legislature establishes a “Women’s Health Program,” which provides family-planning assistance to low-income women. The statute includes a provision that explicitly bars entities that perform elective abortions or their affiliates from receiving state grants under this program. Planned Parenthood is threatening a lawsuit, and the Texas House of Representatives refuses to reauthorize the program out of fear that Planned Parenthood will successfully sue to obtain taxpayer dollars.

Texas could protect its statutory funding restrictions with a *non-severability* as well as a *fallback provision*. See SB 1857. Draft a provision here: