**Severability Clauses and the Exercise of Judicial Review**

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Abstract: American elected officials are increasingly including severability clauses within statutes, or clauses that state that the constitutional invalidation of part of a law does not necessitate a facial invalidation of the law but can instead be "severed" from the statute. Despite their prominence, several U.S. Supreme Court opinions argue that the clauses are not binding on the Court, only guiding their decisions. Given these statements, it is unclear what impact severability clauses have on judicial decision-making. This study surveys the legal scholarship on severability clauses and, after pairing it with political science scholarship, derives a series of testable empirical hypotheses. I then test these hypothese on U.S. Supreme Court data over the post-war period. The analysis shows that despite the Court’s rhetoric, severability clauses do have their intended effect on judicial decision-making.

**Introduction**

Within the separation of powers, judicial review is the strongest tool the U.S. Supreme Court has to influence public policy. With the ability to completely invalidate statutes by declaring them inconsistent with the constitution, such a power gives the constitutional court the de jure final say on any given piece of legislation. Of course, such a strong power draws the attention of Congress, who does not want judicial review exercised arbitrarily. Indeed, Congress has many tools at its disposal to influence the Court’s use of judicial review, particularly those tools that could punish the Court for making an unpopular decision (Whittington 2007, Ura and Wohlfath 2010, Harvey 2013). And indeed, there is plenty of evidence that shows that such tools do influence judicial decision-making (Clark 2009, McGuire 2004).

But Congress does not only threaten ex post retaliation when evaluating the possibility of judicial review. Legislators also anticipate judicial review when crafting legislation, adding in provisions that guide the decision-making of the courts when reviewing the constitutionality of a statute. One of the most prominent provisions added to statutes are severability clauses, which instruct courts to “sever” any unconstitutional provision from a statute so that the remainder still carries the full force of law. Such provisions are necessary in the eyes of legislators because the Court sometimes invalidates entire laws due to the unconstitutionality of a single provision. Such an outcome would frustrate Congress’ ability to make policy, thereby prompting legislatures to include them in legislation that may come before the Court.

Severability clauses have garnered a significant amount of scholarly attention in the legal community. Legal scholars debate whether severability clauses actually influence the decisions of the Court, as no appreciable trend can be found in its decisions. Indeed, the Court’s own regard for these clauses seem to be inconsistent. The current jurisprudence from the Court, stated in *Alaska Airlines v. Brock* (1987), is “the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.” But just two decades earlier in *United States v. Jackson* (1968), however, the Court frankly stated that “the ultimate determination of severability will rarely turn on the presence or absence of such a clause.” While such evidence is suggestive that severability clauses do not influence judicial decision-making, there has yet to be statistical analysis of such claims; this makes the subject ripe for study by empirically-oriented scholars.

This paper analyzes the effect of severability clauses on judicial decision-making. I begin by examining the legal scholarship on severability doctrine and severability clauses. I next analyze the extant scholarship to develop a series of hypotheses about severability clauses. I then test these hypotheses on U.S. Supreme Court constitutional decisions on important federal statutes from 1949-2011. The analysis reveals that severability clauses work as intended: the Court is less likely to find provisions of a statute inseverable from other unconstitutional provisions when that statute contains a severability clause.

**The Jurisprudence of Severability and Severability Clauses**

Anytime a court decides to exercise judicial review to strike a government action as unconstitutional, the court must also answer related questions of facial validity and severability. Given that a government action is unconstitutional, a court must decide whether the law authorizing the government action is otherwise constitutional (Lindquist and Corley 2011). If so, then the authorizing statute or decree is only unconstitutional as applied in the particular instance of the challenged action and still carries the full force of law in all other applications after the decision. For example, Title III of the Voting Rights Act Amendments of 1970 set the voting age in national, state, and local elections to 18, an act which contradicted many age requirements set by state law. In *Oregon v. Mitchell* (1970), the Supreme Court ruled that while Congress had the authority to set requirements for national elections, it could not set voting age requirements for state and local elections. Thus the Court ruled that Title III was unconstitutional as applied to state and local elections, but allowed the law to continue to be applied to national elections. If the authorizing statute or decree is entirely unconstitutional, however, then the statute is facially invalid and no longer carries the full force of law. In *Marbury v. Madison*, Section 13 of the Judiciary Act of 1789, which enlarged the Court’s original jurisdiction over its constitutional bounds, was facially invalidated and no longer carried the force of law after the decision was issued because there were no constitutionally valid applications of that provision.

A court that rules a statute unconstitutional must also determine whether the offending section of the law is severable from the rest of the law (Metzger 2004). If the offending section is severable, also at times referred to as separable, then the unconstitutional portion no longer carries the full force of the law while the rest does. In *Marbury*, Section 13 of the Judiciary Act was severed from the rest of the Act so that its remaining parts could still function as part of the law. Indeed, the dominant paradigm for the first century of judicial review was that all laws were severable (Nagle 1993). If the offending section is not severable, or inseverable, then the entire law is unconstitutional: this includes those parts of the law that, in absence of the offending section, would otherwise be constitutional. The first instance of this was *Warren v. Mayor & Aldermen of Charlestown,* when the Supreme Judicial Court of Massachusetts invalidated a statute authorizing the annexation of Charlestown to Boston. When the Supreme Judicial Court determined that the annexation was unconstitutional, all subsequent provisions of the law detailing the implications of the annexation were also ruled unconstitutional.

Why might a court choose to strike the entirety of a statute due to a single section being unconstitutional? Chief Justice Shaw, who issued the *Warren* decision, explains:

“that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.”

This deference to legislative intent was subsequently adopted by the U.S. Supreme Court when it first confronted issues of severability in *Champlin Refining Company v. Corporation Commission of Oklahoma* (1932); the Court generally assumes severability “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not”. This approach has changed little in subsequent Supreme Court jurisprudence. In *United States v. Booker*, the Court invalidated a provision of Sentencing Reform Act that created an appellate review process for mandatory prison sentences because it ruled that those sentences themselves were unconstitutional. Not all scholars accept inseverability as judicial deference to the legislature. Noah (2000) views severance as a form of judicial policymaking, comparing the severing of a statute to the line-item veto that the Court ruled as an unconstitutional encroachment of legislative authority in *Clinton v. City of New York* (1998).

Soon after American courts began employing severability doctrine, legislatures adopted strategies for confronting the increasing number of statutes totally invalidated. Of the many possible responses, the most common was the severability clause (Nagle 1993). These clauses specifically state that certain or all provisions within a statute are severable from the rest of the statute. The Budget Control Act of 2011, for example, contained the following severability clause: “If any provision of this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the application of this Act to any other person or circumstance shall not be affected.” These clauses are purportedly included by legislatures to guide courts when faced with uncertain decision environments by specifically stating legislative intent for severability.

Legal scholars have repeatedly criticized the Court’s severability doctrine on a couple of grounds. First, scholars have criticized how the Court approaches severability in a general matter. When approaching matters of severability, the Court does not approach each statute with a blank slate. Instead, the Court generally presumes severability for a statute (Metzger 2004, Gans 2008). This presumption reduces the power of severability clauses, which would also make the Court default to severability. Scholars also criticize how the Court approaches severability clauses. While the text of severability clauses would appear to force the Court to sever unconstitutional provisions from an otherwise constitutional law, the Court has said repeatedly that, while instructive, these clauses were not binding on Court decisions and laws may still be construed as inseverable even in the presence of a severability clause. These statements infuriate many scholars, who see such statements as contravening legislative intent and entering into the realm of judicial policymaking (Nagle 1993, Gans 2008).

Second, scholars have criticized the application of severability in different areas of the law. Stern (1937) noted that the Court might presume severability more often for state laws and national criminal laws. Jona (2008) argues that inseverability might be more common in First Amendment and Equal Protection cases. Such an approach is certainly possible, given the increasing evidence that legal considerations play a large role in some, but not all, cases before the U.S. Supreme Court (Bailey and Maltzman 2011). But the most common view is that there does not appear any systematic application of severability doctrine (Stern 1937, Nagle 1993, Movsesian 1995, Metzger 2004, Gans 2008). Indeed, many of these scholars suggest that severability is just a means by which the justices might pursue other ends, whether jurisprudential, ideological, or otherwise; this viewpoint is consistent with the attitudinal model of U.S. Supreme Court decision-making (Spaeth and Segal 2002).

**Severability Clause as an Empirical Predictor**

While severability doctrine in general, and severability clauses in particular, have garnered much scholarly attention in the legal community, they have not been widely studied by political scientists. This is a shame, as political scientists are uniquely positioned to analyze Supreme Court decisions holistically using statistical analysis to get leverage on many of the questions surrounding severability and severability clauses. The sole study I have found in political science looks at the effect of severability clauses in statutory cases (Maltzman et al 2014). While certainly a useful contribution in its own right, it sidesteps the core questions about the impact of severability doctrine on constitutional law.

What empirical gains are possible when integrating severability doctrine into analyses of judicial decision-making? As just discussed, it is difficult to determine whether the text of an opinion can be taken seriously as influential in judicial decision-making given the possibility that judges merely engage in cheap talk. Any analysis that starts there will inevitably lead to problems of reverse causality: did the presumption of severability in a case lead to the decision that the unconstitutional portion of a law can be severed, or did the court’s determination to strike only part of a statute encourage the court to employ severability doctrine? But scholars can avoid the reverse causality problem by analyzing the effect of severability clauses. No matter how a court interprets the inclusion of a severability clause in a statute, a court’s decision regarding severability cannot retroactively create a severability clause within the text of a law. But this begs a simple question: how do severability clauses influence judicial decision-making?

To begin, one should start with the analysis of why a legislature might include a severability clause in a statute. The clause instructs a court to sever unconstitutional portions from other portions of a law. Ostensibly, the legislature would include these clauses if it believed that a court would be more likely to sever legislative provisions than it would had the clause not been included in the statute. This leads to a clear hypothesis:

*Severability Hypothesis*: a court should be more likely to sever an unconstitutional provision of a statute when that statute includes a severability clause.

Implicit within the decision to include a severability clause is the assumption that it will be relevant in a court case. But why would a legislature believe a law would come under review by a court? It is likely that these clauses are added to statutes that, at least from the legislature’s perspective, are likely to be reviewed by the court due to constitutional deficits within the statute. But if this is true, then these statutes should be more likely to be the subject of constitutional challenges at some point in time. This leads to a hypotheses:

*Constitutional Challenge Hypothesis*: a court should be more likely to hear a challenge to a statute that includes a severability clause.

A legislature would not be alone in recognizing constitutional deficiencies in legislation, however. Savvy political elites could also identify these faults and launch a legal challenge immediately after legislation became final law. A constitutional court, in turn, would also recognize these deficiencies and, wanting to fulfill its role as arbiter of constitutional matters, quickly decide to review the case. While a court might not strike down every law with a severability clause, a court would also be more likely to strike a law with a severability clause than without because of the underlying constitutional problems with statutes that led legislators to add a severability clause in the first place. This leads to a pair of hypotheses.

*Challenge Immediacy Hypothesis*: a court should be more likely to hear a challenge to a statute soon after its passage if that statute includes a severability clause.

*Constitutional Invalidation Hypothesis*: a court should be more likely to strike a statute that includes a severability clause.

Severability clauses might also complicate other forms of judicial decision-making. Suppose for a moment that a lack of a severability clause presumed inseverability for a statute. Were this the case, a judge might be put into a difficult circumstance when deciding the constitutionality of a law without a severability clause. If the judge decided that a particular government action were unconstitutional, the judge would have to strike the entirety of a law because it would be inseverable. This would needlessly frustrate legislative actions, in which a legislature would consistently have to repass legislation. On the other hand, not striking an unconstitutional provision of a law would functionally abdicate one of judge’s main responsibilities. In these circumstances, a judge might prefer to short-circuit severability analysis altogether and instead rule that the statute was only unconstitutional as applied rather than facially unconstitutional. By doing so, a judge would find a balance between legislative deference and constitutional obligation. Statutes with severability clauses, on the other hand, would be more likely to be facially invalidated because inseverability would not be an issue. This leads to an additional hypothesis:

*Facial Validity Hypothesis*: a court should be less likely to find a statute unconstitutional as applied and more likely to be unconstitutional on face for a statute that includes a severability clause.

**Research Methods**

In order to test the above hypotheses, I need to analyze a set of constitutional court decisions reviewing laws both with and without severability clauses. The U.S. Supreme Court provides an excellent test case for two reasons. First, the literature on severability clauses almost exclusively focus on the U.S. Supreme Court, making the Court an ideal place to test my hypotheses. Second, the U.S. Congress regularly includes severability clauses within its statutes, lending enough variation to conduct statistical analysis. For these reasons, I analyze a subset of U.S. Supreme Court decisions from 1949-2011.

Rather than solely focusing on U.S. Supreme Court decisions, however, this analysis draws on a statute-centered approach of previous studies (Hall and Ura 2015, Harvey and Friedman 2009, 2006). The study of judicial review inevitably leads to studying court decisions. Solely studying them in presence of a discretionary docket, however, can lead to a selection bias as strategic interactions may happen at the certiorari stage. This can negatively impact our ability to make inferences, meaning we must go beyond simply looking at decisions and look at the statutes which the decisions are about. Thus, the unit of observation in this analysis are federal statutes. Of course, there are difficulties with looking at all federal statutes. Collection of the data would be a monumental task and would thus limit analysis to a small time period. As a middle ground, I analyze a subset of statutes enacted between 1949 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew (2005).

This results in an unbalanced time-series cross-sectional dataset of 368 statutes over the time period, with writs of certiorari granted to constitutional challenges 148 times and subsequent ruled unconstitutional 54 times. Of these rulings, the Court ruled that the law was unconstitutional as applied 19 times and ruled part of the law as facially invalid 35 times. Additionally, 4 cases had otherwise constitutional provisions of a statute invalidated because they were inseverable from other unconstitutional provisions.

In order to account for potential selection effects, as well as examine interesting relationships at the certiorari stage, I employ a Heckman probit model. The first stage is a model of the Court’s decision to hear a constitutional challenge to an important statute in a given year. The second stage is a model of the Court’s decision to invalidate, in part or in whole, the statute on constitutional grounds. This model allows us to control for potential sample selection bias resulting from the Court’s discretionary docket. In addition, I also present a simple probit model of the first stage on its own to test the substantive hypotheses relevant to the first stage.

Potential section effects are not only problems at the certiorari stage, however. The decision to invalidate a law either as applied or on face is a decision that comes after deciding whether to strike at all; the sample of cases that are available to study the differences between as applied and on face invalidations, then, are subject to selection bias (Lindquist and Corley 2011). Similarly, the decision whether a provision of a statute is inseverable from an unconstitutional provision of a statute is also a decision that is made only after deciding that there is an unconstitutional provision in the first place. To account for these potential selection effects, I estimate two different three-stage Heckman selection models using the cmp package developed for Stata by Roodman (2011). The first two stages of the models are described above. In one model, the third stage is whether a provision of a statute is invalidated because it was inseverable from an unconstitutional provision; a one indicates that a provision was found to be inseverable. In the other model, the third stage is whether a provision of a statute is invalidated as applied or on face; a one indicates that the statute was invalidated on face. Estimation of these models allows me to best test my hypotheses in the face of selection effects.[[1]](#footnote-1) Additionally, I estimate a Heckman probit model of just the first and second stages on its own to test the substantive hypotheses relevant to the second stage. In all models, standard errors are clustered by statute.

The crucial independent variable in this analysis is the presence of a severability clause in a statute. This is measured a dummy variable if a statute contains a severability clause. This includes both general severability clauses, like the one contained in the Balanced Budget Control Act of 2011. It also includes more specific severability clauses that may only pertain to specific sections within statutes. This variable is included in both stages of the analysis, as there are relevant hypotheses about severability clauses at both the certiorari stage and the decision stage. Of the 368 statutes in the sample, 102 have severability clauses.

At the certiorari stage, I also include cubic polynomials to control for duration dependence (Carter and Signorino 2010). Inclusion of these variables is helpful for multiple reasons, both theoretical and methodological. Theoretically, including these variables and interacting them with other substantive variables allows me to estimate a nonproportional hazards model. This will be useful for testing the Challenge Immediacy Hypothesis, which suggests that statutes with severability clauses will be more likely to be reviewed by the Court immediately after passage than those without these clauses. Methodologically, these polynomials serve as the necessary instrument to estimate the Heckman model.

At the second stage of the model, I control for the Court’s ideological predispositions. As indicated earlier, many scholars believe that severability doctrine is merely a legal guise for decisions made using entirely different doctrine. To control for the possibility that the Court’s ideological preferences drive this relationship, I include control for the court’s preferences towards striking a law. To measure the court’s ideological preferences, I use a combination of Bailey’s (2013) ideal point estimates of justices’ ideology and the direction of the decision classification from the Supreme Court Database. If striking a statute was consistent with the median member of the court’s ideological predisposition, then the observation is assigned the absolute value of the median member’s ideal point. If not, then the observation is assigned the negative of the absolute value of the median member’s ideal point. All cases where the ideological implications of a decision were unclear were coded as zero. This results in a measure of the court’s attitudes towards the case where positive values indicate the court is ideologically inclined to striking and negative values indicate the court is ideologically opposed to striking.

I also control for additional legal doctrines that may influence decisions to strike laws and, more specifically, to strike laws as applied, facially, and due to inseverability. The Court has been noted to approach decisions in certain areas of constitutional laws different than others. Overbreadth doctrine suggests that the Court is more likely to facially invalidate and find inseverable laws when challenged on free speech grounds, while equal protection doctrine suggests the Court is more likely to facially invalidate and find inseverable federal laws when challenged on due process grounds (Jona 2008, Lindquist and Corley 2011). Therefore, I also control for whether a free speech or due process challenge was brought against the law under review in both the second and third stages of my analysis.

**Analysis**

Table 1 contains the results of the probit models used to examine the Constitutional Challenge and Challenge Immediacy Hypotheses. The first model includes the presence of a severability clause and proportional hazards. The model strongly supports the Constitutional Challenge Hypothesis. Statutes with severability clauses are more likely to be challenged than statutes without severability clauses. The model also supports the use of cubic polynomials as a means of modelling duration dependence within the data. The coefficient t is statistically significant, and a joint Wald test of their coefficients is as well.

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| **Table 1: Probit Model of Constitutional Challenges granted to Important Federal U.S. Statutes by Year, 1949-2011.** |
|  | Model 1 | Model 2 |
| Severability Clause | 0.39\*\*(0.09) | 0.38\*(0.16) |
| Years Since Previous Challenge | -0.06\*\*(0.02) | -0.08\*(003) |
| Years Since Previous Challenge2 | 0.00(0.00) | 0.00(0.00) |
| Years Since Previous Challenge3 | -0.00(0.00) | -0.00(0.00) |
| Severability Clause\*Years Since Previous Challenge | - | 0.02(0.05) |
| Severability Clause\*Years Since Previous Challenge2 | - | -0.00(0.00) |
| Severability Clause\*Years Since Previous Challenge3 | - | 0.00(0.00) |
| Constant | -1.86\*\*(0.09) | 1.84(0.10) |
| N | 12054 | 12054 |
| \*p<0.05, \*\*p<0.01Robust Standard Errors Clustered by Statute are in Parentheses  |

The second model includes nonproportional hazards from interacting the severability variable with the cubic polynomials. While these interaction terms are not statistically significant, they are also not the basis for a test of the Challenge Immediacy Hypothesis. Rather, the Hypothesis suggests that there should be a difference only in those years immediately after the passage of the statute. Figure 1 presents the predicted probability that the Court will grant certiorari to a constitutional challenge of a statute by the presence of a severability clause and the number of years since its initial passage or previous challenge. Challenges to statutes with severability clauses are about twice as likely compared to those without severability clauses. This effect persists over time, but the gap between the two becomes smaller and smaller until at about 25 years post passage they are statistically indistinguishable from each other.[[2]](#footnote-2) Thus, we also find support for the Challenge Immediacy Hypothesis.

**Figure 1: Predicted Probability of the Court granting certiorari for a constitutional challenge, by the presence of a severability clause and Years After Initial Passage or Previous Challenge (90% CI)**

Turning now to the Constitutional Invalidation Hypothesis, Table 2 presents the results of the Heckman probit model.[[3]](#footnote-3) While the severability parameter is statistically significant, it is in the incorrect direction: statutes with severability clauses appear less likely to be struck down, not more. This result does not provide support for the Constitutional Invalidation Hypothesis. Given that this does not conform to my expectation, I treat this statistically significant coefficient as a null result. The strong effect shown by the coefficient, however, indicates that future scholarship should further study what could be driving this result.

While our hypothesis of interest in this model is not supported, many of the control variables perform as expected. When the Court is ideologically predisposed to striking, it is more likely to strike a law; this result is largely consistent with previous research. The Court is also more likely to a law when it is challenged on free speech grounds: the probability of a statute in the sample being invalidated is 24% more likely when challenged in this way. Interestingly, statutes challenged on due process grounds are less likely to be invalidated, not more. While this result goes against the current literature, it is hardly surprising. Due process challenges to statutes are often tacked on to other controversies in order to exhaust the possible litigation strategies. The justices undoubtedly know this and likewise view such challenges with suspicion, according to the results of the model: statutes challenged on due process grounds are 14% less likely to be struck down.

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| **Table 2: Heckman Probit Model of Decision to Invalidate an Important Federal Statute, 1949-2011** |
| Severability Clause | -0.62\*\*(0.19) |
| Court’s Ideological Predisposition to Strike | 0.83\*\*(0.27) |
| Freedom of Speech Challenge | 0.57\*(0.23) |
| Due Process Challenge | -0.36\*(0.18) |
| Constant | 1.50\*(0.66) |
| N Stage 2 | 149 |
| N Stage 1 | 12054 |
| \*p<0.05, \*\*p<0.01Robust Standard Errors Clustered by Statute are in ParenthesesOnly Stage 2 Estimates are Shown to Conserve Space |

Table 3 contains the results of the first three stage Heckman model in which the third stage is whether the Court found a provision of a statute inseverable from another unconstitutional provision. A look at the severability parameter reveals that it is statistically significant and negative. In the sample, a statute with a severability clause is \_\_% less likely to have provisions invalidated because they are inseverable from other unconstitutional provisions of a law. This result supports the Severability Hypothesis. Despite the Court’s rhetoric concerning severability doctrine, it does seem to respect the inclusion of a severability clause within a statute. In contrast, the parameters on the free speech and due process variables are not statistically significant, signifying that there is no evidence that the Court approaches severability any differently in these areas of law.

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| **Table 3: Heckman Probit Model of Decision of the U.S. Supreme Court to Invalidate a Provision of an Important Federal Statute as Inseverable from Other Unconstitutional Provision, 1949-2011** |
| Severability Clause | -0.62\*(0.19) |
| Freedom of Speech Challenge | -0.10(0.30) |
| Due Process Challenge | -0.05(0.23) |
| Constant | 1.31\*\*(0.27) |
| N Stage 3 | 54 |
| N Stage 2 | 149 |
| N Stage 1 | 12054 |
| \*p<0.05, \*\*p<0.01Robust Standard Errors Clustered by Statute are in ParenthesesOnly Stage 3 Estimates are Shown to Conserve Space |

Table 4 contains the results of the second three stage Heckman model in which the third stage is whether the Court invalidated a statute as applied or on face. The severability parameter is incorrectly signed and not statistically significant. There is no evidence to support the Facial Invalidation Hypothesis. The free speech parameter is also not statistically significant. In contrast, the due process parameter is statistically significant: the Court is more likely to invalidate a statute on its face rather than as applied if subject to a due process challenge. This result paints a nuanced picture of the Court’s decision-making on due process claims. The Court seems to be skeptical of due process claims given that they can be added to virtually any constitutional challenge, but once the Court decides that a given government action is unconstitutional on these grounds it will invalidate the law on its face.

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| **Table 4: Heckman Probit Model of Decision of the U.S. Supreme Court to Invalidate a Provision On Face or As Applied, 1949-2011** |
| Severability Clause | -0.42(0.34) |
| Freedom of Speech Challenge | 0.42(0.37) |
| Due Process Challenge | 0.71(0.38) |
| Constant | 1.31\*\*(0.27) |
| N Stage 3 | 54 |
| N Stage 2 | 149 |
| N Stage 1 | 12054 |
| \*p<0.05, \*\*p<0.01Robust Standard Errors Clustered by Statute are in ParenthesesOnly Stage 3 Estimates are Shown to Conserve Space |

Finally, a word about selection effects. While not presented explicitly, all of the models indicate that there are selection effects that would be problematic outside of a Heckman modelling strategy; these results can be found in the replication materials. These results show that failure to account for the certiorari stage and the merits stage of judicial decision-making create inferential problems for scholars. Unfortunately, many prior studies that use Heckman models do not explicitly state whether there is evidence of selection bias, instead employing them only because of the possibility of such bias (Hall and Ura 2015, Harvey and Friedman 2009, but see Lindquist and Corley 2011). In future research, scholars should be more explicit about their findings.

**Discussion**

This study analyzed the effect that severability clauses have on the exercise of judicial review. It found that constitutional challenges to statutes with severability clauses are more likely to be granted certiorari by the U.S. Supreme Court than statutes without them. This is likely due to Congress including these clauses on statutes that it thinks have serious constitutional concerns. Beyond this, the Court also takes these clauses seriously by rarely finding provisions of a statute inseverable when that statute has a severability clause. In contrast, the Court is much more likely to find inseverability when a statute does not have such a clause.

The results of the study indicate that the Court seriously considers severability clauses when making decisions. But this finding begs the question: does Congress include these clauses strategically? Indeed, there is no existing study that systematically analyzes when Congress includes these severance clauses in legislation. The area is ripe for study and will likely yield additional insight into the legislative process.

Additionally, the results of the study also beg questions as to the effects of inseverability clauses. These less common clauses have the opposite function of severability clauses, stating that several, possibly all of the provisions of a statute are inseverable and if one is struck down, all have to be struck down. While these clauses are rarely adopted by Congress, they are more frequently included in state legislation. There is some evidence that these clauses are taken more seriously than severability clauses by American courts, which could lead to different findings (Friedman 1997). When these clauses are included in legislation and what effect they might have on judicial decision-making are open questions that scholars should consider in future research.

This study is not without limitations. There is concern about the generalizability of the findings, given that the research design focuses on statutes that are regarded as important. But the focus on important statutes excludes statutes with moderate to minor importance. In these cases, it is entirely possible that the results would differ and would be an interesting avenue for future research.

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1. One could envision a four-stage Heckman model that could account for all of these processes at once, with the third stage being the decision of whether to strike a statute as applied or on face and the fourth stage, the decision to strike other parts of a statute for being inseverable to an unconstitutional provision, only coming when the Court has decided to strike a statute on face. While theoretically possible, such a model has proven to be intractable in my research attempts. [↑](#footnote-ref-1)
2. This is shown in the replication materials. [↑](#footnote-ref-2)
3. To conserve space, only the relevant stages of the Heckman models will be shown. Results for the prior stages can be found in the replication materials. [↑](#footnote-ref-3)