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I. Introduction

In *Clinton v. City of New York*,[1] the Supreme Court invalidated the Line Item Veto Act,[2] legislation that for the first time granted the President the power to "cancel" certain spending items and tax benefits from enacted appropriations bills. The Court found that this mechanism violated Article I's procedures governing the enactment of federal legislation.[3] Unremarkably, as the Court explained in its conclusion, a bill must pass both the House of Representatives and the Senate, and then be presented to the President, in precisely the same form, before it becomes law:

> If one paragraph of that text had been omitted at any one of those three stages, [the law] would not have been validly enacted. If the Line Item Veto Act were valid, it would authorize the President to create a different law – one whose text was not voted on by either House of Congress or presented to the President for signature.[4]

In common with the Court's other recent decisions striking down innovative governance mechanisms as inconsistent with specific checks and balances designed to preserve the separation of powers,[5] commentators undoubtedly

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1. 118 S. Ct. 2091 (1998).

2. Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified at 2 U.S.C. §§ 691-692 (Supp. II 1996)).

3. *See* Clinton v. City of New York, 118 S. Ct. 2091, 2108 (1998).

4. *Id.*, *see* U.S. CONST. art. I, § 7, cl. 2 (Presentment Clause).

5. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225-30, 239-40 (1995); Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 265-77 (1991); Bowsher v. Synar, 478 U.S. 714, 721-34 (1986); INS v. Chadha, 462 U.S. 919,

will assail the Court's latest opinion for its narrow formalism.[6] Indeed, even Justice Scalia took issue with the majority for its unreflective formalism, suggesting instead that the statute raised nondelegation concerns that required a less rigid constitutional analysis.[7]

This essay focuses on one narrow aspect of the controversy surrounding the line item veto that has gone largely unnoticed to date – namely, the similarity between the President's exercise of that authority and the widely accepted power of the courts to sever unconstitutional provisions from previously enacted legislation. Courts routinely sever invalidated provisions from statutes even without an express delegation of authority to do so. In effect, the judiciary has asserted a limited line item veto power over legislation. Naturally, the two techniques of postenactment statutory "editing" without formally amending the legislation have different origins and applications, but they also share striking commonalities that cast serious doubt on the majority's Presentment Clause analysis.

II. Severability in the Courts

Severability of unconstitutional provisions has a long tradition and powerful justifications.[8] Judicial restraint counsels against striking down an

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944-59 (1983); Buckley v. Valeo, 424 U.S. 1, 118-41 (1976) (per curiam). Not all of the Court's recent separation-of-powers decisions had this character; several of them seemingly support a turn toward functionalism. *See* Freytag v. Commissioner, 501 U.S. 868, 882-92 (1991); Mistretta v. United States, 488 U.S. 361, 380-412 (1989); Morrison v. Olson, 487 U.S. 654, 670-97 (1988); CFTC v. Schor, 478 U.S. 833, 847-58 (1986); *see also* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732-44 (1996); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 112-14 (1995).

6. *See The Supreme Court, 1997 Term – Leading Cases*, 112 HARV. L. REV. 122, 127-32 (1998). For some of the recent and generally critical commentary about the Act but predating the Court's ultimate decision on the merits, see generally Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297 (1998); Michael J. Gerhardt, *The Bottom Line on the Line-Item Veto Act of 1996*, 6 CORNELL J.L. & PUB. POL'Y 233 (1997); Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659 (1997); Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79 (1997).

7. *See Clinton*, 118 S. Ct. at 2118 (Scalia, J., concurring in part and dissenting in part) ("[T]he doctrine of unconstitutional delegation, which *is* at issue here, is preeminently *not* a doctrine of technicalities. The title of the Line Item Veto Act . . . has succeeded in faking out the Supreme Court.").

8. For example, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court held only one section of the original Judiciary Act unconstitutional without suggesting that this rendered the remainder of the Act inoperative. *See id.* at 176-78; *see also* Bank of Hamilton v. Lessee of Dudley, 27 U.S. (2 Pet.) 492, 526 (1829) (Marshall, C.J.) ("If any part of the act be unconstitutional, the provisions of that part may be disregarded, while full effect will be given

entire piece of legislation on the basis of some constitutional infirmity in a minor provision. As the Supreme Court has emphasized, "a court should refrain from invalidating more of the statute than is necessary "[9] In some instances, of course, a statute cannot or should not remain in force after a court has invalidated one of its central provisions, and the Supreme Court has offered various tests to decide the centrality of an invalidated provision.[10] Nor has the judiciary limited itself to "editing" statutes containing unconstitutional provisions. For instance, courts sometimes sever portions of agency rules invalidated on constitutional or, more typically, statutory grounds rather than strike down a whole set of regulations promulgated during the same rulemaking proceeding.[11]

Although severability was originally a judicial invention, legislatures now frequently include severability clauses (sometimes referred to as "savings" clauses) in statutes.[12] In fact, Congress occasionally even includes a "fallback" provision as a contingency designed to replace a particular section of uncertain constitutionality if a court invalidates and then severs that section.[13] Less frequently, Congress may include an "inseverability" clause in an

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to such as are not repugnant to the constitution "); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 106-28 (1937) (canvassing origins of this doctrine).

9. Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion); *see* Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam); El Paso & N.E. Ry. v. Gutierrez, 215 U.S. 87, 96 (1909) ("[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid."); People *ex rel.* Alpha Portland Cement Co. v. Knapp, 129 N.E. 202, 208 (N.Y. 1920) (Cardozo, J.) ("Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert."); 2 NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION ch. 44 (5th ed. 1993); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1950-54 (1997).

10. *See infra* notes 20-26 and accompanying text.

11. *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294-95 (1988); Davis County Solid Waste Management & Energy Recovery Special Serv. Dist. v. EPA, 108 F.3d 1454, 1459-60 (D.C. Cir. 1997); *see also In re* Reyes, 910 F.2d 611, 613-14 (9th Cir. 1990) (refusing to sever invalid section of executive order).

12. For a recent example of such a clause, see the Americans with Disabilities Act, Pub. L. No. 101-336, § 514, 104 Stat. 327, 378 (1990) (codified at 42 U.S.C. § 12213 (1994)) ("Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.").

13. *See* Bowsher v. Synar, 478 U.S. 714, 718-19, 735-36 (1986) (giving effect to fallback provision in Gramm-Rudman-Hollings Act); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1495-96 (1992) (discussing operation of fallback provision in legislation to implement trade pact); *see also* Heckler v. Mathews, 465 U.S. 728,

effort to prevent the courts from sustaining a piece of controversial legislation in the event that they invalidate one central provision.[14]

Oddly enough, courts do not invariably honor either of these explicit legislative commands. Generally, courts will abide by severability clauses when they appear in a statute, though that may simply reflect their tendency to sever invalidated provisions whether or not Congress included an express severability clause at the time of enactment.[15] The absence of such a clause will not, however, prevent a judge from severing an unconstitutional provision from a statute.[16] Courts freely imply a legislative preference for severability in order to save the remainder of an enactment. Indeed, they occasionally sever invalidated provisions even in the face of inseverability clauses.[17]

One of the most important recent applications of the doctrine favoring severability arose after the Supreme Court invalidated the legislative veto in *INS v. Chadha*.[18] Because similar provisions appeared in almost 200 other statutes, the Court recognized the importance of the severability issue,[19] and

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734 (1984) (describing severability clause that also directed courts to invalidate rather than expand benefits provided under that subsection if they held it unconstitutionally underinclusive).

14. *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 167-68 (1997); Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 903 & n.4, 907 (1997).

15. *See* INS v. Chadha, 462 U.S. 919, 931-35 (1983) (holding provision severable because nothing in legislative history overcame presumption of severability created by inclusion of express severability clause and because what remained of statute was fully operative); Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (noting that severability clause "provides a rule of construction which may sometimes aid in determining [legislative] intent. But it is an aid merely; not an inexorable command.").

16. *See* New York v. United States, 505 U.S. 144, 186-87 (1992); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) ("In the absence of a severability clause, Congress' silence is just that – silence – and does not raise a presumption against severability."); United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) (noting that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause").

17. *See* Friedman, *supra* note 14, at 907-08; *see also id.* at 910-18 (criticizing tendency of courts to accord comparable treatment to severability and inseverability clauses, and arguing that courts generally should treat latter as mandatory).

18. 462 U.S. 919 (1983).

19. *See* INS v. Chadha, 462 U.S. 919, 977 (1983) (White, J., dissenting) (noting that almost 200 laws included legislative veto provisions). The Court in *Chadha* severed that particular veto. *See id.* at 931-35. *But see id.* at 1014-16 (Rehnquist, J., dissenting) (disagreeing that Congress would have given agency power to suspend deportations without legislative veto as check on exercise of this discretion); *id.* at 1014 (Rehnquist, J., dissenting) ("I do not believe we should expand the statute in this way without some clear indication that Congress intended such an expansion."); *id.* at 979 n.16 (White, J., dissenting) (concluding, with regard to severability question, that "the Court's rewriting of the Act flouts the will of Congress"); Note, *The*

it soon had to face this question in subsequent cases. In *Alaska Airlines, Inc. v. Brock*,[20] the Supreme Court attempted to clarify its approach to severability:

> [The] relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. Some delegations of power to the Executive or to an independent agency may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism. The final test, for legislative vetoes as well as for other provisions, is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.[21]

Of course, the statute minus the severed provision was *not* in fact the legislation that Congress enacted,[22] whatever one might think of the odds that this alternative version would have fared as well in the legislative process. The statute at issue in *Alaska Airlines* did not include a severability clause, though it amended an earlier statute that contained such a clause.[23] The Court did not trouble itself with the question of whether Congress had included a contingency plan in the event that a court invalidated one provision; instead, it reaffirmed a willingness to sever invalidated provisions even in those cases in which Congress had failed to include a severability provision.[24]

Aftermath of Chadha*: The Impact of the Severability Doctrine on the Management of Intergovernmental Relations*, 71 VA. L. REV. 1211, 1216-18 (1985) (same).

20. 480 U.S. 678 (1987).

21. *Alaska Airlines*, 480 U.S. at 685 (footnote omitted); *see* Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

22. *See* Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550, 1560 (D.C. Cir. 1985) (conceding that Congress did not enact legislation without severed provision), *aff'd sub nom.* Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987); *see also* United States v. National Treasury Employees' Union, 513 U.S. 454, 479 (1995) (noting Court's "obligation to avoid judicial legislation" and leaving "to Congress the task of drafting a narrower statute"); Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936) (suggesting that, in absence of separability clause, "the rule is against mutilation of a statute"); Hill v. Wallace, 259 U.S. 44, 70-71 (1922) (warning that severability clause does not authorize judicial amendment of statute); American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985) ("[E]ven the broadest severability clause does not permit a federal court to rewrite as opposed to excise. Rewriting is work for the legislature "), *aff'd mem.*, 475 U.S. 1001 (1986).

23. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.); *see also* Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1504, 72 Stat. 731, 811 (severability clause).

24. *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686-87 & n.8 (1987).

The *Alaska Airlines* test requires a counterfactual inquiry,[25] asking whether the invalidated provision was essential to the legislative compromise that led to the bill's enactment – in which case it should not be severed, perhaps even in the face of explicit directions from Congress to the contrary – or else mere boilerplate whose initial exclusion would not have altered the likelihood for passage of the remainder of the legislation. Only rarely have the courts declined to sever a legislative veto and invalidated the entire legislation.[26] In a different context, Justice Blackmun went so far as to suggest severing a problematic feature from a distinct enactment not before the Court in order to keep the statute under consideration intact, even though that law contained an explicit severability and fallback provision.[27] The majority in that case declined, however, to "perform th[is] type of creative and imaginative statutory surgery "[28] The failure to abide by explicit severability or inseverability clauses, when Congress has included them, seems difficult to defend. The rule favoring severability in the absence of any legislative guidance makes more sense as it reflects judicial restraint and deference to as much of the legislature's will as comports with the Constitution, but one must not forget that this practice effectively leaves in place a statute that differs from the legislation that emerged after bicameral consideration and presentment to the President.

In commenting on *Chadha* fifteen years ago, Professor Tribe noted the irony that severance of the legislative veto had created new legislation "by

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25. *Cf.* Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (characterizing those methods of statutory interpretation as "imaginative reconstruction").

26. *See* City of New Haven v. United States, 809 F.2d 900, 905-09 (D.C. Cir. 1987) (declining to sever legislative veto from Impoundment Control Act of 1974); EEOC v. CBS, Inc., 743 F.2d 969, 971-74 (2d Cir. 1984) (declining to sever legislative veto from Reorganization Act of 1977). Similarly, in other contexts, courts have declined to sever only infrequently. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 n.40 (1982) (plurality opinion); Planned Parenthood v. Danforth, 428 U.S. 52, 83 (1976); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 362 (1935).

27. *See* Bowsher v. Synar, 478 U.S. 714, 783-87 (1986) (Blackmun, J., dissenting) (proposing invalidation of provision in law first establishing General Accounting Office, which allowed Congress to remove Comptroller General for cause, rather than invalidating and severing portion of Gramm-Rudman-Hollings Act that authorized Comptroller to demand that President issue sequestration orders when budget deficit exceeded certain thresholds).

28. *Id.* at 736; *see also* Reno v. ACLU, 521 U.S. 844, 883 (1997) (explaining that severability clause did not authorize broad "textual surgery"). *But cf.* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 316-24 (1979) (defending power of courts to remedy unconstitutionally underinclusive benefits statutes by expanding their coverage rather than invalidating them, even though this involves courts in form of legislating).

judicial fiat" without satisfying Article I's bicameralism and presentment requirements.[29] He did not, however, thereby mean to question the constitutionality of the judiciary's power to sever invalidated provisions from a statute, instead suggesting weakness in the Court's formalism.[30] *Clinton v. City of New York* did not itself raise a severability question, but one can make the same point even more forcefully about the majority's narrow conception of Article I of the Constitution. Although commentators have criticized the Supreme Court's approach to deciding the severability of particular provisions,[31] apparently no one has suggested that the judiciary's assertion of that power violates Article I's "finely wrought" procedures for legislating.[32]

III. Severability in the White House

If judicial editing of validly enacted statutes passes constitutional muster, even in the absence of a legislative delegation of authority to do so, what differentiates the President's use of a severability power when Congress clearly has delegated that authority? None of the Supreme Court or lower court opinions resolving the different challenges to the Line Item Veto Act addressed this analogy [33] Indeed, none of the briefs filed with the Supreme

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29. *See* Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 22-23 (1984).

30. *See id.* at 25-26.

31. *See* Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 67-82 (1995) (criticizing application of atextual approach to severability borrowed from contract law); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 205-06, 211 (1993) (criticizing *Alaska Airlines* test as unduly speculative and departing from Supreme Court's growing emphasis on textualism in statutory interpretation).

32. *See* INS v. Chadha, 462 U.S. 919, 951 (1983). The primary problem in *Chadha*, of course, was that Congress retained for itself a role in the execution of the laws, a function that the majority considered improper for a body only designed to operate in a legislative capacity. *See id.* at 951-59; *id.* at 953-54 n.16 ("Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto."). The Court did not, however, cast any doubt on the authority of Congress to delegate to the Attorney General the power to waive statutory deportation requirements in appropriate cases. *See id.* ("Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to [bicameralism and presentment requirements] for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it. "); *see also id.* at 984-89 (White, J., dissenting) (same).

33. *See* City of New York v. Clinton, 985 F Supp. 168 (D.D.C.), *aff'd*, 118 S. Ct. 2091, 2108 n.43 (1998) (finding it unnecessary to determine whether provisions in Line Item Veto Act held unconstitutional were severable, and noting that Congress considered but failed to include severability clause in final legislation); Byrd v. Raines, 956 F Supp. 25 (D.D.C.), *vacated*, 521 U.S. 811, 820-30 (1997) (vacating judgment of district court for lack of standing).

Court suggested it, even though the parties had briefed the severability issue because of the possibility that the Court would invalidate only the President's power to cancel some tax benefits and leave him the veto power over certain spending items.[34] Only a single recent commentator has hinted at the analogy, and he did so without any real elaboration.[35] Perhaps no one fully anticipated the extreme formalism adopted by the majority, especially in the wake of some of the Supreme Court's recent separation-of-powers decisions seemingly endorsing a more functional approach.[36]

In any event, it seems implausible to argue that legislation which successfully ran the gauntlet of Article I's bicameralism and presentment requirements must remain forever unchanged absent a second full legislative round designed to amend the original handiwork of Congress. The courts have, in effect, selectively and judiciously edited portions out of the United States Code for decades without drawing any strong objection, notwithstanding the fact that neither the Constitution nor any statute invites the judicial branch to participate in the legislative process in this manner. The decision to deny the President an equal power when Congress saw fit to grant that authority must rest, if at all, on some other foundation.

This analogy does not mean the two forms of editing are identical in all important respects. On the contrary, courts usually sever only when legislation passed by the other two branches of government suffers from some constitutional infirmity, and they do so only at the behest of a litigant, though "unconstitutionality is not the only reason an invalid clause or provision may be severed from a statute."[37] In effect, Congress never had the power to

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34. *See* Brief for the Appellant, Clinton v. City of New York, 118 S. Ct. 2091 (1998) (No. 97-1374), *available in* 1998 WL 263832, at *48 n.28; Amicus Brief for Hon. Henry J. Waxman et al. in Support of Appellees, *id.*, *available in* 1998 WL 283208, at *17-*25; *see also* Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771, 794-97 (1997) (arguing that statute's grant of cancellation authority only for bills "signed" by President (but not those enacted after congressional override of Presidential veto) unconstitutionally burdened President's choice in exercising general veto power, but concluding that this aspect of statute was severable from remainder).

35. *See* Gordon T. Butler, *The Line Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, but a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 39-40 (1997) (citing J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 477-78 (1990)).

36. *See supra* note 5.

37 Carolyn McNiven, Comment, *Using Severability Clauses to Solve the Attainment Deadline Dilemma in Environmental Statutes*, 80 CAL. L. REV. 1255, 1286 n.149 (1992); *see id.* at 1293-94 (advocating that courts make use of express severability clauses to edit out of statutes provisions that have become obsolete). For instance, courts also may decline to enforce a statutory provision on sub-constitutional grounds, as happens when an older provision conflicts with a more recent enactment. *See* Watt v. Alaska, 451 U.S. 259, 266-67 (1981)

consider such a provision, so its subsequent deletion by the courts reestablishes an equilibrium. In addition, judicial severance amounts to statutory editing only in a figurative sense. A court does not actually delete anything from the United States Code; it only declines to enforce any statutory provisions that conflict with the Constitution.[38] Of course, the President's cancellation authority operated in a similar fashion.[39]

In contrast, when the President cancels a spending item or tax benefit in an appropriations bill, he does so on policy grounds, limited only by the substantive standards provided by Congress to constrain the exercise of this discretion. Similarly, on a few occasions, Congress has delegated to agencies the power to issue regulations altering express statutory requirements.[40] Professor Sargentich persuasively distinguished the line item veto from those delegations by noting that, in contrast to an agency's interpretation of its enabling statute that it can later and sometimes dramatically revise, the President cannot undo a cancellation unilaterally, but must await new legislation if he wishes to reinstate the item.[41] One could, however, make the same point about judicial invalidation and severance – as distinguished from interpretations of statutes that they may revisit and revise, it is not clear that courts could "unsever" a particular provision if they later harbored second-thoughts about the decision to invalidate it.[42] In either case, if the President

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(recognizing "the maxim of construction that the more recent of two irreconcilably conflicting statutes governs," but straining to reconcile statutes because of canon disfavoring implied repeals). Moreover, some severability clauses apply only to provisions held "unconstitutional," 42 U.S.C. § 12213 (1994), but others apply more broadly to provisions held "invalid," 2 U.S.C. § 1438 (Supp. II 1996).

38. *See* Shepherd v. City of Wheeling, 4 S.E. 635, 637 (W Va. 1887); 39 Op. Att'y Gen. 22, 22-23 (1937) (explaining "that the courts have no real power to repeal or abolish a statute, and that notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books"); Nagle, *supra* note 31, at 228-29.

39. *See Clinton*, 118 S. Ct. at 2120 (Breyer, J., dissenting) ("When the President 'canceled' the two appropriations measures now before us, he did not *repeal* any law nor did he *amend* any law. He simply *followed* the law, leaving the statutes, as they are literally written, intact.").

40. *See* 26 U.S.C. § 163(i)(5)(A) (1994) (allowing IRS to issue rules "providing for modifications to the provisions" concerning tax treatment of high yield discount obligations); 47 U.S.C. § 203(b)(2) (1994) (authorizing FCC to "modify any [tariff filing] requirement made by this section"); *see also* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 882 n.32, 931 & n.217 (discussing delegations to agencies of power to waive otherwise applicable statutory requirements in particular cases).

41. *See* Sargentich, *supra* note 6, at 109-12.

42. *Cf.* William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1906 (1993) (suggesting that certain "statutes that were unconstitutional under the rule enunciated in the invalidating decision should not be revived when the invalidating decision is overturned"). The authors argued that

or the judiciary has a change of heart about the merits of, respectively, a cancellation or severability decision, it appears that only Congress enjoys the power to reinstate the provision in question.

In order to draw an even closer parallel, one might ask whether a President could simply assert the power to sever those provisions from legislation that the President deemed unconstitutional. When signing bills into law, Presidents sometimes express doubts about the constitutionality of some aspect of the legislation, and they may resist complying with those provisions or else direct the Department of Justice not to defend against another litigant's judicial challenge to the statute.[43] Although some scholars have suggested that the President might be able to justify asserting an inherent item veto (or "unbundling") power even over provisions of undoubted constitutionality, to counteract expansions in the size and scope of congressionally presented "bills,"[44] the President probably could not unilaterally assert the power to cancel or selectively sever items from duly enacted legislation absent a congressional delegation of such a power.[45] Yet the courts have done precisely

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this issue remains open among the federal courts, explaining that the Supreme Court has assumed without deciding that statutes previously held unconstitutional are revived automatically once it overrules its constitutional holding. *See id.* at 1908-12. The state courts have made this point more clearly. *See id.* at 1912-15. In contrast, when Congress repeals legislation that itself had repealed earlier legislation, it does not thereby resurrect the earlier enactment. *See* 1 U.S.C. § 108 (1994); *see also* Bender v. United States, 93 F.2d 814, 816 (3d Cir. 1937) (explaining that this provision altered "the common-law rule that the repeal of a repealing act revived the former act").

43. *See* INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (explaining that "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds"); Walter E. Dellinger, III, *Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva*, 48 ARK. L. REV. 313, 323-31 (1995) (listing examples); Kristy L. Carroll, Comment, *Whose Statute Is It Anyway?· Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475, 494 & n.105 (1997) (noting that President Reagan used signing statements on at least two occasions to "sever[] provisions from laws that he said were unconstitutional"); *id.* at 497 & n.122 (discussing same for President Bush). For an analysis of claims that the President has an independent obligation to enforce constitutional limits on legislation, see Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Christine E. Burgess, Note, *When May a President Refuse to Enforce the Law?*, 72 TEX. L. REV. 631 (1994).

44. *See* J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J.L. & POL. 39, 47-54 (1992); *see also* Sidak & Smith, *supra* note 35, at 476-77 (suggesting that President could rely on severability clause to justify exercising inherent veto to excise unconstitutional provisions bundled into bill: "Through this [severability] language Congress would define the seams along which the various bills in an omnibus measure were sewn together.").

45. *See* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1124 (9th Cir. 1988) ("The 'line-item veto' does not exist in the federal Constitution, and the executive branch cannot bring a

that in severing invalidated provisions from statutes which fail to include an explicit severability clause.

In some respects, cancellation by the President has a less dramatic effect on the content of legislative enactments than does judicial severability First, the cancellation generally affects provisions with a more limited time horizon, typically only for the fiscal year covered by the appropriations bill, whereas judicial severance of an invalidated portion of a statute has a longer-term impact. Second, the President has a short window of opportunity within which to exercise the line item veto, whereas judicial invalidation may occur years or decades later, long after the original impetus for the legislation has dissipated. Finally, Congress remains free to pass legislation disapproving the President's exercise of the line item veto and reinstating the canceled item, though in practice this will require mustering a two-thirds majority, whereas Congress cannot resurrect an unconstitutional provision severed by a court.[46]

Although significant distinctions remain between these two forms of postenactment editing of legislation, the Executive cancellation power granted by Congress broadly resembles the judiciary's approach to severability In this respect, Justices Scalia and Breyer, joined in their separate opinions by Justice O'Connor, correctly recast the issue as one concerning the eminently more forgiving nondelegation doctrine.[47] When legislation includes a severability clause, judicial severance of an invalid provision from the remainder of the statute essentially enforces a properly enacted legislative response to an anticipated postenactment contingency [48] The Line Item Veto Act gave the President what amounted to an express severability power.

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de facto 'line-item veto' into existence by promulgating orders to suspend parts of statutes which the President has signed into law."), *withdrawn in part on other grounds*, 893 F.2d 205, 208 (9th Cir. 1989) (en banc) (per curiam); *cf.* Train v. City of New York, 420 U.S. 35, 42-49 (1975) (invalidating on statutory grounds President Nixon's impoundment of EPA appropriations intended for states and localities).

46. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 529-36 (1997) (invalidating Religious Freedom Restoration Act of 1993 as improper effort to override Court's less protective recent interpretations of Free Exercise Clause of First Amendment). Congress can, however, attempt to rescind the statute if the absence of the severed provision renders the remainder unacceptable, recraft the invalidated provision to skirt the constitutional infirmity and reinsert it in the statute, or initiate an amendment to the Constitution to overrule the Court's invalidation.

47. *See* Clinton v. City of New York, 118 S. Ct. 2091, 2115-18 (1998) (Scalia, J., concurring in part and dissenting in part); *id.* at 2123-31 (Breyer, J., dissenting); *see also* Loving v. United States, 517 U.S. 748, 771-74 (1996) (upholding delegation of rulemaking authority to military to prescribe aggravating factors in court-martial capital cases). *But see* Bernard W. Bell, *The Nondelegation Doctrine, the Rules/Standards Dilemma, and the Line Item Veto*, 44 VILL. L. REV. (forthcoming 1999) (criticizing this approach).

48. *See* Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1208 n.87 (1986). It does so even more clearly when Congress

IV Conclusion

In short, if the majority in *Clinton v. City of New York* had paid closer attention to the judiciary's well-established role in editing legislation, sometimes long after enactment, it might have avoided premising its decision on the seemingly untenable Presentment Clause grounds that it did. If severance does not amount to "legislating" by the courts, even when Congress has not expressly delegated that power, then cancellation by the President, pursuant to an express delegation from Congress, also does not merit that characterization and the concomitant requirement for satisfying the commands of Article I. The Line Item Veto Act may well suffer from some other constitutional infirmity, but not the one that the Court identified in this case.

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coupled a severability clause with a fallback provision designed to replace a particular section of the statute in the event of its severance. *See supra* note 13 and accompanying text.

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