THE COURTS POWER TO DETERMINE A LEGISLATION PARTIAL UNCONSTITUTIONALITY (UNITED STATES AS A CASE STUDY)

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Abstract:
(United States model)
It's common knowledge that a judicial body handles the oversight of a law's constitutionality to check if it aligns with the constitution's provisions. Most countries adopt this approach. Yet, the courts' authority to decide on a law's unconstitutionality sparks debate. The United States, with one of the oldest most prosperous and influential systems, faces issues with this power in practice. These problems relate to its application and the principle of separating powers.
When courts review a law's constitutionality, they don't aim to scrap the entire law if it's unconstitutional. Instead, they consider a claim about the law's unconstitutionality in a "defensive form." This claim might target the whole law or just parts of it. In the latter case, if the court finds a specific section unconstitutional, it can nullify that part through "severability." The rest of the law remains intact. However, this "partial unconstitutionality" approach has its own set of problems. For example, it borrows from contract law, which differs from constitutional law in many ways.
Key words: *Unconstitutionality, Severability, Court, Legislation, Power, partial.*

INTRODUCTION:

In the United States, lawmakers often thought courts would throw out(1) laws they saw as unconstitutional. Back in colonial times, each colony had its own charter, which acted like a constitution for the people who settled there. The common belief at that time was that colonial laws breaking the charter didn't count. This also applied to laws that went against key documents of the British constitution, like the Magna Cart.(2)
Based on the information provided, the court's ability to overturn a state law that goes beyond the limits set by that law is seen as a American development.
This approach is typical of how judges interpret and apply the law. This new idea, which started in state institutions, reached new heights when the Supreme Court of the United States was created. (3)It was the first court in history to claim the power to decide if a national law was valid even though neither federal nor state constitutions gave this right.(4) Even so, this practice became a rule that looked a lot like "judges making laws."
As the specific right came into existence, the issue evolved into the concept of "severability," indicating that it's feasible to distinguish an unconstitutional provision from the constitutional one, and only the unconstitutional part is deemed invalid, not the whole law. Consequently, only the valid part is enforced. Nonetheless, this method has a caveat: if the valid part is intricately intertwined with the invalid part, making separation impossible, the courts may conclude that the entire law is invalid. This situation creates a paradox.

Section One: The courts capacity to declare laws unconstitutional

The courts in the United States have a peculiar ability to rule against the Constitution. While it's been a source of fierce opposition since its inception 100 years ago, this power may gradually become more robust and resilient before becoming permanently authoritarian.(5)

The United States holds the belief that the aforementioned power is being unfairly employed to safeguard capital and prevent fair working conditions and economic freedom. On the flip side, a significant number of jurists advocate for the utilization of this authority, which is founded on reversal to historical precedent [6] and financial objectives. This represents an affirmation of government principles established by those who supported the Federalist Party in the 1930s.

1. Arguments for the courts power

Historical arguments:

This power is necessary not only for the protection of fundamental persons and property rights [7] from arbitrary and unjust acts by those in the popular majority but also to enforce constitutional immunities and privileges as laid out in various Constitutional charters.

Two historical factors contribute to this argument:

(a)- Despite the British rule's injustices in the American colonies that led to the US War of Independence, fear of oppressive and tyrannical government action was present.[8]

(b)- The French Revolution's excesses resulted in a disgusting feeling towards the idea of democratic governance.

Senator Beveridge's Life of John Marshall provides a detailed and vivid portrayal of American political feeling during and after the American and French Revolutions.

The Federalists capitalized on the situation to become conservative and apprehensive of public government, while the Jeffersonian party supported its idealized model. They both agreed that the expected tyranny of government must be tested before state and federal bills of rights were approved.

Additionally, With John Marshall as the judicial overseer, Jefferson advocated for the preservation of constitutional guarantees through courts' power to strike down any law that violates them, while the Jeffersonian party maintained that the safeguards should be left to individual states and people rather than their federal judges.[9]

Political arguments:

The federal government's sovereignty and the preservation of the Union are at stake in the exercise of power by the federal courts, which also aim to ensure a consistent and uniform interpretation of laws and regulations.

This stance was the central point of contention in John Marshall's constitutional ruling, and it was this Federalist who safeguarded unity while rejecting some states' nullity rights and liberated them from the federal constitution and laws[10] to establish the individual state.

The political theory:

That the exercise of power is essential to ensure the effectiveness of government through checks and balances,[11] as per the Constitution. This theory requires the judiciary to achieve executive and legislative objectives by invalidating any actions that conflict with their interpretation of the constitution.

The analytical theory:

A statute that is unconstitutional is not considered law, and since the judiciary has the power to establish and enforce laws, it must also be capable of determining the legality of claims made under the constitution.

2. Opposing arguments to the courts power

The necessity of power to safeguard fundamental human rights related to individuals and property from the oppressive actions of the majority has diminished. This shift arises from the fact that these rights are no longer at risk from a reckless majority. The concern regarding the unpredictability of the populace that was prevalent a century ago is now deemed unwarranted, particularly in light of the advancements in education, culture, and the overall experience of contemporary voters.[12]

Efforts such as Initiative, referendum, and recall have been made to preserve judicial privilege. The courts of today are said to be responsible for protecting property rights rather than safeguarding human rights, and it is believed that a legislature that represents the electorate is more secure than non-representing courts that attempt to declare the present will of their

electors. It is not about legal issues, but rather a political issue that remains relevant from the old feud between Federalists and Jeffersonian Democrats.

Federal supremacy in the United States is not favored, and the ongoing conflict involves the balance between federal government sovereignty and state rights, which was previously acknowledged by the Civil War logic. The question has a contemporary significance due to the federal government's infiltration of state privileges over the past decade, particularly during 1917-1918.[13]

Historical arguments:

The current European model of parliamentary government,[14] which includes a responsible ministry, is now more democratic and efficient[15] than the oversight and balances approach. It should be noted that the power to declare laws unconstitutional primarily exercised by the courts is not a fundamental right to government,[16] as most free governments, such as England and France, do not have it but instead uphold the liberties and welfare of their nationals under this power.

Despite the absence of an express provision[17] giving courts the power to declare laws unconstitutional, they have always been assumed to hold such authority (usurped power) but has not been formally granted to them.

The analytical theory:

The Constitution is not the responsibility of the courts. Each official of the State swears to follow the Constitution, and is answerable only directly to the people, not to other branches of government. Today, the populace has exercised sufficient authority over all their representatives, eliminating the need for judicial intervention to safeguard them from unjust or imprudent actions by legislators.

If the government is truly democratic or representative, courts should not have this power as it goes against the legislative branch of a state. They are only accountable to the people for the proper execution of their representative function.

The practical theory:

The ability of courts to invalidate laws doesn't work in practice, primarily because:

(a)- The diminution of power by courts in deciding questions of legislative policy, especially when exercised under the Due Process Clause of the Fourteenth Amendment.

These constitutional questions usually raise issues of "appropriateness," which are ultimately questions of pure legislative policy.[18] Pure legislative powers, such as the right to block legislative acts, were never intended to be exercised by courts over the legislature itself.

(b) - The Court may lose its popularity among the people due to occasional erroneous rulings aimed at hindering the exercise of this power and the adaptation of the Basic Law to outdated economic and political views. As a result, the Court may be plunged into political turmoil, its independence may be weakened, and public confidence in the Court and its working efficiency may be reduced.[19]

(c)- Many good substantive laws are unconstitutional for purely technical reasons not directly related to the public order or public welfare. The repeal of good laws for such reasons is undesirable and undermines the effectiveness of government.

(d)- The exercise of this power would result in delay and increased cost in the effective implementation of laws. It must be noted that no law is deemed valid upon passing the legislature but has to be tested for constitutionality by the courts for many years before it can be effectively implemented. Such delay, cost and expense would therefore be disproportionate to the efficiency of the government.

(e)- Obscuring the Constitution with unnecessary language.[20] When a new law needs to be passed, no matter how important it may be, in order to preserve the constitutionality of the bill, it is becoming increasingly common to first pass a constitutional amendment, which the law permits. And even if the law sometimes fails because the constitutional amendment was poorly drafted or because the courts have interpreted it differently than the framers intended, it is becoming increasingly common to incorporate purely legislative matters into the Constitution itself, while excluding them from the jurisdiction of the courts.

Influenced by the ideas of Montesquieu's on the Spirit of the Laws, the principle of separation of powers was introduced to maintain the balance between the three branches of government, executive, legislative and judicial[21] and to make the separation of each branch absolute.

In his realm, this kind of separation in personnel affairs is rarely final, and rarely does one power not cede to the other a part of what it has been given, so that there remains a connection that impedes the development of the state.

One of the powers sometimes they mix, and may be strong and flourishing in one country and weak in another, so that the same violence does not necessarily prevail or disappear.

An entirely new school of thought emerged that gave the judiciary superiority over the legislature.

Sometimes laws were passed that clearly contradicted the Basic Law (Constitution) or even the Charters (e.g. Declaration of the Rights of Man and of the People), which was considered an attack.

Attempts were made to give judges the right to decide the law, and of course the right of the courts to decide the constitutionality of laws.

3. Restrictions on the Courts Power

If the principles these courts are seeking to establish are sound, then courts will be able to determine, at least passively, which matters are of sufficient public importance to justify striking down laws, independent of any specific constitutional limitations, and then act on those underlying purposes.

For example, it is agreed that taxes should be used only for public purposes, since the purposes of government and the methods of achieving those purposes cannot be abolished, and that governments must be obliged to provide for the methods and means by which they are to be used in this regard. If these issues were left to the ultimate decision of the judiciary, it would mean a significant expansion of judicial powers.[22]

Some courts have derived other limitations on legislative power from the Constitution's division of government power among the legislative, judicial, and executive branches and its delegation of authority to officials in each branch.

Each of these provisions recognizes that the legislature is exempt from exercising judicial or executive power because those powers are vested in other authorities.

It is argued that Parliament cannot exercise legislative power under the above provisions, but this is admitted because the Government does not recognize any other power than the judicial and executive powers from which Parliament is excluded.

However, another argument is made that the power of the Legislature is weaker than the power to make such laws as it deems necessary and to impose restrictions not implied by any particular constitutional impediment but arising from principles of justice or the nature of a free government.

If these limitations are based at all on the meaning of legislative power, they would not be inconsistent with the principles on which they are imposed, based on the provisions of the Constitution, but legislative power clearly means the power to make laws, which have no bearing on the subject or character of the law.

Thus, the limitations impugned are clearly outside the scope of the provisions of the Constitution and must be such as to fall within the scope of cases where the judiciary has no power to declare an act invalid unless it violates the provisions of the Constitution, but this does not mean that:

a- No act of the legislature shall be considered invalid unless expressly prohibited by a provision of the Constitution.

An implied prohibition may be as clear as an express prohibition[23] and must be enforceable in that case, but in such cases reference must be made to the provision containing the "implied" prohibition and its results must be derived only on the basis of a fair construction of the language used.

b- All reasonable limitations on the legislative power are provided for in the Federal Constitution and in the Constitutions of the States and there may be other limitations of great importance.

Therefore, these limitations on the legislative power should be given due emphasis by incorporating the necessary limitations in the Constitution.

c- The legislature must not commit law-breaking that are prohibited by the Constitution. General constitutional laws are rarely passed, and some laws often seem unfair to some people.
In such cases, the legislature has the power to remedy violations caused by laws that are not prohibited by the Constitution. These are violations for which the courts cannot accept claims for compensation.
The arguments in its favor can be reduced to:
It is impossible to find a sufficient basis for the power of the judiciary to annul the acts of the legislature, that is, to refer the acts of the legislature to the judiciary, without violating the written constitution.
For example, in England there is no such principle, but it started with the emergence of a purely American principle, derived entirely from the written constitution, from the fact that the written constitution constitutes the higher law and therefore all conflicting legislation is invalid.
The task of the judiciary here is to interpret the legislative and the higher law (the constitution) and to declare the primacy of the latter in case of conflict.
Thus, the power of the judiciary to overturn the acts of the legislature, whose power is derived entirely from the written constitution, has no basis and cannot be extended to the source from which it originates.
It tries to maintain the rules that dictate the requirements of human law because mistakes in law and its application can have consequences and laws should be wise and just.
However, even though the judiciary can declare the acts of the legislature invalid if they conflict with fundamental principles not expressed in the written constitution, they cannot be invalid in any case unless they conflict with the decisions of the written constitution.

4. Views on the courts power

Morris:
The oversight of legislative power may have consequences, but the dangers must also be considered.
The control of legislative power does not mean that only the parties in the courts are bound by its decision.[24]

Roger Sherman:
"Congress's power to repeal state laws is unnecessary, since state courts will not enforce laws that conflict with federal authority…"

James Madison:
"I support this negative tendency, for each state will examine harmful laws before they are enacted, and national courts will overturn them."

Governor Morris:
"Negative legislation was unnecessary, because laws that needed to be repealed were repealed by the jurisdiction of the judiciary."

Luther Martin:
"The inclusion of judges in the Federal Law Review Board was improper because, as regards the constitutionality of laws, this point is placed before the judges in their proper official character, and in this character or character, they have a negative view of the laws."

George Mason:
"Judges should not sit on such a council because it would negatively impact their interpretive power, and could potentially strike down unconstitutional laws".

James Wilson:
"I prefer the council, but I acknowledge the caveat that judges have the opportunity to defend constitutional rights as opponents of the law".[25]
If any law contradicts the powers given to Parliament by this document, the judges, based on their independence and the special powers given to the government, shall declare the law invalid.
This is intended to ensure that the authority of the Constitution remains and that anything Parliament enacts in violation of the Constitution will have no legal force. It is the job of the judges to exercise this power.

Oliver Ellsworth:

The Constitution determines the scope of the government's power, and if the legislature exceeds that limit, the judiciary must conduct constitutional review.

If the United States exceeds its power and enacts a law not authorized by the Constitution, that law will be invalid.

And the nation's judiciary and judges, who must be independent to ensure their integrity, will also declare it invalid.

John Marshall:

“If the government of the United States should enact a law not justified by any of the above powers, the judges would find it to be in violation of the Constitution, of which they are the protector.

They would not consider such a law to be within their jurisdiction and would declare it to be invalid”.[26]

William Duffy:

"All members will agree that positive restrictions should be enforced and negative restrictions should not be ignored or violated. Without judicial power, the precepts of the Constitution may be ignored and the positive provisions ignored or violated”.

Section Two: Partial unconstitutionality of laws (severability principle)

Although courts often declare laws unconstitutional, in most cases only parts of the law are unconstitutional. Thus, the problem of partial unconstitutionality remains widespread and persistent.

However, the only jurisprudential tool to solve this problem, the principle of severability,[27] is deeply flawed, even though this principle of severability is essential to any practical system of legal review.

A court faced with a partially unconstitutional statute must strike down and invalidate the unconstitutional provision or application in order to allow the rest of the Constitution to survive, and the statute must be invalid as a whole,[28] regardless of the termination or deletion of severability.

1. The legal definition of the severability principle

Severability doctrine is a legal principle of legal innovation in the constitutional law field. The main purpose of this principle is to separate those parts of legal acts that are considered invalid from the outset from those parts that are considered valid. The word "separable" or severe’ "weighty" comes from the Latin "salvatorious", which means "to isolate" or "to separate".

The Merriam-Webster Dictionary defines it as "… the invalidation of some section or clause in a document (which) does not affect the validity of the remaining parts”.

The Oxford English Dictionary defines severability as: “a provision of a contract, statute, or other legal document that contains an exemption from one or more provisions," and similarly, various law dictionaries define "severability" as "something that is separate from something else to which it is attached that can be separated, yet still remain whole and independent."[29]

Author Cooley, in his book “Constitutional Restriction”, states that if the valid and invalid provisions are so closely connected that they cannot be separated from one another, the invalidity of that part must result in the invalidity of the whole law.

On the other hand, if they are so different and separate that, after separating the invalid ones, a complete code remains independent of the rest, the code will be upheld even if the rest becomes unenforceable.[30]

Crawford, in his book “Legal Construction”, states that even if there are separate valid and invalid provisions, if they are part of a uniform rule intended to be valid as a whole, the invalidity of a part will result in the invalidity of the whole.[31]

The principle of severability determines whether a law that is partially unconstitutional can be separated into valid and invalid sections. It serves as a mechanism for implementing the Supreme Court's overarching strategy regarding constitutional remedies, which aims to "restrict the

resolution of the issue" when the constitutional violation does not pertain to every claim or provision within the law.

The court may, when deemed suitable, restrict its examination to instances where the law is applied unconstitutionally, while allowing other legitimate claims to proceed or excising the problematic sections while preserving the remainder. This approach of partial invalidation, as opposed to complete nullification (which may be contentious), is known as "severability" of the text.[32]

The principle recognizes the legislative intent[33] as a constraint on the circumstances under which courts may "restrict the resolution of the issue." If the legislature had not passed the unconstitutional law along with its problematic provisions or applications, the principle urges the courts to nullify the entire statute.

The development of the doctrinal test, along with the fundamentally contrasting nature of the issue, indicates that the necessary examination of legislative intent is distinct from interpretive inquiries aimed at uncovering the explicit language used by the legislature in its laws. The doctrine of severability focuses on the potential actions of the legislature rather than its actual actions.

2. The origin of the term (principle)

The origins of severability-based judicial review can be linked to the landmark case of Marbury v. Madison[34] yet this concept is now considered antiquated. Furthermore, the common perception regarding the unique role of severability as a contemporary legal principle is misguided; rather than serving to preserve legislation, it often functions to dismantle it.

The concept of severability finds its roots in contract law, where it is articulated as the principle that states, "if certain portions of a contract are deemed illegal or unenforceable, the remaining sections of the contract will still be valid."

Nonetheless, this principle is not without its limitations, as specific constraints are placed upon it. These limitations indicate that if the essential principles and intentions of the original contract are altered, or if the contract undergoes modifications, restructuring, rearrangement, amendments, or cancellations that do not preserve its fundamental meaning and subsequent interpretation, then the doctrine of severability will not be applicable to that particular contract.[35]

In 1876, the Supreme Court of the United States addressed its inaugural case regarding segregation, which soon transformed into a debate over the validity of a law passed by Congress. This case primarily focused on the implications of the Fifteenth Amendment to the U.S. Constitution, which guaranteed that male citizens of the United States could not be denied the right to vote based on their race, color, or prior status as slaves.

The core question(s) in this case revolved around whether the U.S. Congress passed the contested statute with an awareness that it could later be ignored. The Court determined that while the Fifteenth Amendment does not explicitly confer the right to vote, it does prohibit voting discrimination based on race.

Furthermore, the Justices concluded that Section 3 of the Enforcement Act of 1870 did not explicitly endorse the language of the Fifteenth Amendment concerning race, color, and slavery. As a result, this section invalidated the provisions of the statute, leading the Court to declare the statute itself as invalid.

3. The reflection of the principle in various Western legal frameworks

The review decisions made by constitutional courts in Italy, Germany, and Austria indicate a growing trend in the number of laws deemed unconstitutional. Nevertheless, the nature of these unconstitutionality rulings varies among the countries. In both Italy and Germany, the observed increase is primarily linked to a rise in comprehensive judgments, suggesting that courts in these nations are more frequently opting to annul entire legal provisions rather than merely striking down specific sections.

The Austrian court tends to be more hesitant in declaring a law unconstitutional if it has conducted only a partial review. This means that the Austrian Constitutional Court is more inclined to invalidate specific sections of legislation while leaving others intact, often without providing a comprehensive rationale.

Interestingly, this tendency appears to correlate with varying levels of public trust in the judiciary across different countries. In contrast to Austria, public confidence in the courts of Germany and Italy is notably higher, which may contribute to a more decisive approach in their judicial decision-making processes.[36]

In the United States, the ongoing discussion surrounding this principle is primarily driven by practical considerations, particularly in an era dominated by legal frameworks.

During the late twentieth century, legislation emerged as the predominant source of law, characterized by lengthy, renewable statutes that often encompass multiple topics, some of which may not be directly related. This complexity has led to challenges regarding the separation of issues that are embedded within certain legislative texts.

Congress has taken steps to implement extensive and versatile legislation, while also witnessing a significant growth in state laws (USA), which nearly tripled in number from 1964 to 1988. This development ensures that the principle of separation will continue to hold substantial practical importance in the foreseeable future.

The court has the option to amend the law to align it with constitutional standards; however, this presents a clear challenge to the principle of separation of powers, as legislative supremacy is a core tenet of American constitutional law.

"The deep premise of the American political system" is that the legislature, operating within the boundaries set by the Constitution, possesses the power to establish legal regulations. Any legislative modifications intended to impose constraints on other governmental entities within the system would violate this core tenet.

If the court were to alter the provisions of a statute, even with the aim of ensuring its constitutionality, it would contradict this foundational principle. The judiciary lacks the constitutional authority to revise legislation.

4. Challenges associated with implementing the principle

The inquiry into how much of an unconstitutional law or its components can be invalidated appears straightforward, yet it generates significant concern. In fact, the prevailing legal principles regarding the segregation of unconstitutional statutes have been subject to scrutiny, with critics arguing that the doctrine of separation lacks the necessary rigidity.

Critics have deemed the doctrine overly inflexible, arguing that it promotes an unwarranted expansion of judicial authority and fosters judicial compromises. Additionally, they have pointed out the doctrine's dependence on legislative intent, highlighting its inability to disregard such intent, along with its disproportionate focus on political matters and the absence of a coherent rationale for this focus.

While there has been a recent surge in scholarly interest regarding this issue, critiques of the separation doctrine are not a novel phenomenon; Max Radin articulated its shortcomings as early as 1942, and Robert Stern provided a significant critique nearly sixty years[37] prior to Radin.

Since the mid-nineteenth century, when the topic gained significant attention, courts have examined the principle of separation by focusing on the severability of legal provisions through a contractual lens. In assessing the severability of provisions deemed unconstitutional, courts have largely employed the same criteria that they utilize for evaluating the severability of terms found to be illegal in contracts.[38]

In contract law, the principle of severability hinges on the intentions of the parties involved in the agreement. A court may choose to remove an illegal provision while upholding the rest of the contract if it determines that the provision was not a fundamental component of the overall agreement.

This assessment occurs when the court believes that the parties would have still proceeded with the contract even in the absence of the illegal term. Given that severability is rooted in the parties' intentions, courts may consider external evidence, such as the negotiation history, to ascertain whether the parties regarded the illegal term as essential to their agreement.

The court has the authority to decline enforcement of the entire statute, encompassing both its constitutional and unconstitutional elements. This approach also brings forth issues related to the

separation of powers. Similar to the fact that the court is unable to amend legislation, it is also not in a position to disregard it. By choosing not to enforce the constitutional aspects of the law alongside its unconstitutional components, the court would be failing in its duty to uphold the law as far as the constitution allows.

The Supreme Court has articulated that when a piece of legislation includes provisions that are acceptable and can be separated from those deemed unconstitutional, it is the responsibility of the court to make that determination and to uphold the valid sections to the appropriate degree.

The courts have indeed embraced a contractual perspective, where the assessment of an unconstitutional provision hinges on its significance within the "legislative transaction." This significance is influenced by the intentions of the "parties" involved in the "transaction," specifically the legislators who enacted the law.

Should the court determine that the provision was not essential to the legislative discussions—indicating that the law would have been enacted even without it—it will invalidate the unconstitutional provision while upholding the rest of the law.

On the other hand, if the court concludes that the provision was critical to the legislative negotiations and that the law would not have been passed without it, the court will affirm the provision's validity and reject the enforcement of the entire law.

The court is able to ascertain the legislators' intent in this matter by examining the language of the law. Similar to contractual agreements, [39] the law may contain a severability clause, which indicates that the invalidation of any specific provision does not impact the validity of the remaining provisions. This clause plays a crucial role in the court's determination concerning the law's severability.

The Supreme Court has observed that the final assessment of divisibility is seldom contingent upon whether a 'severability clause' exists. Instead, the court emphasizes that the severability of a statutory provision is fundamentally rooted in the legislature's intent. Consequently, the court may look beyond the statutory text and consider extrinsic evidence, such as the legislative history, to ascertain whether the legislature genuinely intended for the provision to be severable.[40]

CONCLUSION:

Judicial review operates under significant regulations of judicial oversight that restrict the Supreme Court and state courts from broadening their authority. The Supreme Court is only permitted to consider real cases or conflicts between parties that claim substantial legal rights.

Consequently, the court is prohibited from providing advisory opinions or commenting on legislative matters. Furthermore, the party initiating the case must possess standing, or a vested interest, to contest the statute in question.

The fundamental principle of judicial restraint is the assumption that laws are inherently valid. This principle implies that judges operate under the belief that lawmakers do not aim to contravene the constitution. Consequently, the responsibility to demonstrate unconstitutionality lies with the party challenging the law.

Furthermore, if a court is able to interpret a contested statute in a manner that preserves its original intent without altering the language, or if it can adjudicate a case based on constitutional grounds, it refrains from evaluating the intentions or soundness of the legislators' decisions. A law will not be deemed invalid merely because it is perceived as unwise or undemocratic.

The authority to deem a law unconstitutional and render it "null and void" effectively allows for the annulment of such laws, similar to how a contract can be voided, thereby eliminating its enforceability. Some critics argue that this concept is merely a fabrication attributed to John Marshall, who is often credited with establishing the judiciary's ability to invalidate unconstitutional legislation, a power he did not explicitly label as "judicial review."

The concept of partial unconstitutionality is addressed through the principle of severability, which originates from contract law. However, unlike contracts that only create obligations between the parties involved, laws extend their influence beyond the legislative authority, affecting individuals more broadly.

Additionally, while a written contract serves as evidence of the agreement, it does not constitute the contract itself. This distinction highlights that laws function as "political documents" rather than mere contracts. Consequently, applying the principle of severability can be particularly challenging in practice, as it requires careful consideration of legislative intent while also safeguarding individual rights and maintaining the stability of legal frameworks.

Footnotes:

1- During the debates surrounding the ratification process, both Federalists and Anti-Federalists believed that the judiciary would possess the power to invalidate laws deemed unconstitutional. A notable illustration of this perspective can be found in Federalist Paper No. 78, authored by Alexander Hamilton, see *http://tenthamendmentcenter.com/2012/04/16/did-the-founders-expect-the-courts-to-declare-laws-unconstitutional/*

2- Charles H. Burr, Unconstitutional Laws and the Federal Judicial Power, *University of Pennsylvania Law Review and American Law Register*, Vol.60, Nº.9, June 1912, p.624.

- See also Omar El-Abdallah, Supervision of the Constitutionality of Laws (A Comparative Study), *Damascus University Journal*, Volume 17, Issue 2, 2001, pp.11-12.

3- For more details about the court, see Mohammed Lamine Laadjel Adjel, The Limits of Constitutional Oversight: An Approach in Comparative Systems, *Journal of Judicial Reasoning*, Biskra, Issue 4, March 2008, pp.145-146.

4- The author asserts that these perspectives are entirely misguided and lacking in basis. In fact, he argues that the authority to deem state laws and congressional acts unconstitutional was explicitly conferred by the framers of the Constitution, as outlined in the document itself, to serve the interests of the federal judiciary, see Charles H., Op.Cit.

- The Constitution does not explicitly mention the power of judicial review; instead, the ability to declare laws unconstitutional is derived from implied powers found within Articles III and VI of the United States Constitution.

5- Warren H. Pillsbury, Power of the Courts to Declare Laws Unconstitutional *California Law Review*, Vol.11, Nº.5, July, 1923, p.313.

6- The United States was the first to embrace this concept by adopting the jurisprudence of the Supreme Court, which granted it the authority to oversee the constitutionality of laws. Following this example, Switzerland mirrored the United States' approach, leading to the establishment of its own constitution in 1874, see Hacebe Naceur Tahar El-Mouhanna, Supervision of the Constitutionality of Laws: Iraq as a Model, a thesis as part of the requirements for obtaining a Master's degree in Public Law, Arab Open Academy in Denmark, 2008.

7- Article 21, paragraph 03 of the Universal Declaration of Human Rights of 1948.

8- For details see American Revolutionary War (1775–1783), Wikipedia, the free encyclopedia, last edited on March 13th, 2017, at 06:44.

9- When Jefferson won the presidency in 1800 and was an opponent of federalism, he developed a program to control the judiciary, see http://www.mohamah.net/

10- John Marshall (1755-1835) was the fourth Chief Justice of the United States Supreme Court. He increased its authority and shaped the Constitution with his wise interpretations. He established the final right of the Court with regard to the constitutionality of laws. He considered the Constitution a document that stipulates certain powers and a system that should be interpreted broadly, to give the federal government the means of effective action. He opposed the theory of states' rights and was subjected to much criticism. See Wikipedia, the free encyclopedia, last modified on February 26th, 2017 at 01:23.

11- For more details, see Djammam Aziz, The Ineffectiveness of Oversight of the Constitutionality of Laws in Algeria, Master's Thesis, Mouloud Mammeri University, Tizi Zouzouz, 2012, p.41.

- Warren H. Pillsbury, Op.Cit. pp.316-317.**12**

13- An example of this is the federal government's seizure of the regulation of domestic railroad tariffs and the state railroad commissions' exclusion of much of their jurisdiction over these tariffs. Another stage is the distress arising from the increasing complexities of the state-federal jurisdiction dispute, such as the difficulty of drawing the line between interstate commerce and domestic commerce in all its aspects. This is a political, not a legal, question, see Railroad Commission of Texas From, Wikipedia, the free encyclopedia

14- In this regard, the late Henry Morse Stephens, a great professor at the University of California, says that the American government, an earlier form of popular government, was improved by peoples who later achieved political freedom, and the parliamentary character of the government embodies this later development, and is the best practice, and so in parliamentary government, the courts have no power to invalidate laws passed by Parliament.

15- See Issam Ali Debbes, Constitutional Oversight of Independent Regimes, *Journal of the Baghdad College of Economic Sciences*, Issue 24, 2010, p.287.

16- Recent authors have indicated that certain courts in Europe and Canada are beginning to make strides in recognizing this authority in specific instances, although they continue to assert that it remains a matter of entitlement.

17- The concept emerged within the federal government of the United States over two decades following the Constitution's ratification, during a period when Jeffersonian Democrats criticized the judiciary for misinterpreting the framers' intentions.

- The power of the courts to invalidate laws deemed unconstitutional was specifically discussed prior to the Constitution's ratification in Federalist Paper N°.78, published in 1788, in which Alexander Hamilton argued that judicial review was essential for upholding a government constrained by limited powers, see

http://www.libertylawsite.org/2013/01/24/the-constititution-basis-for-judicial-review/#sthash.btpc3SWv.dpf

18- It is undeniable that there have been instances where the courts have upheld conservative interpretations of economic and political philosophy, invoking the principle of "reasonableness" to override the collective will of the populace as demonstrated by their legislative assemblies, despite the fact that both the people and the legislation originate from the same source, Ibid.

19- If the ultimate decision regarding the validity of proposed social legislation were entrusted solely to the legislature and the public, without any judicial intervention, the standing of the courts in the eyes of the populace would be enhanced.

20- Constitutions, particularly in California, have evolved into lengthy and intricate documents, complicating the process of drafting new legislation. This complexity heightens the likelihood that newly proposed laws may inadvertently conflict with the Constitution, leading to potential constitutional challenges based on technical discrepancies, Ibid.

21- For further information, please refer to the paper titled "Overview of Judicial Oversight of the Constitutionality of Laws in Light of the Principle of Separation of Powers," which was presented by the Egyptian Delegation at the World Conference on Constitutional Justice held in Rio de Janeiro, Brazil, from January 16 to 18, 2011.

22- Charles A. Kent, Power of Judiciary to Declare a Law Unconstitutional, Hein Online -- 20 Am. L. Reg. 730, January to December 1872, pp.731-732.

23- The United States Constitution does not clearly grant the power of judicial review, nor does it explicitly deny it. In contrast, the Virginia Constitution of 1776 articulates that any suspension or enforcement of laws by any authority, without the approval of the people's representatives, is detrimental to their rights and should not be permitted, see *https://en.wikipedia.org/wiki/Judicial_review_in_the_United_States#cite_note-11*

24- See in this regard, Maurice Duverger - translated by Dr.George Saad, *Political Institutions and Constitutional Law: Major Political Systems*, First Edition, 1992, p.110, quoted from The Balance of Powers in Contemporary Constitutional Systems, p.38.

25- Randy Barnett, More evidence that the "judicial power" included the power to nullify unconstitutional laws, Washington Post, June 5th, 2015.

- The Federal Constitution of 1787 did not regulate the conflict of federal laws with the Federal Constitution, see Omar El-Abdallah, Op.Cit., p.11.

26- The restrictions on the Constitution were contentious, as they placed the onus of addressing any laws or regulations enacted by Congress, or actions taken by the President or other officials that contradicted or lacked justification under the Constitution, solely on the judges. These judges, appointed by Congress, were required to adhere to the Constitution as mandated by each state.

27- In civil law, the concept pertains to contracts and refers to the enforceability or legitimacy of the remaining provisions of a contract, even when certain conditions are deemed invalid. This principle is often described as the severability of the contract or the notion of a severable contract.

28- Kevin C. Walsh, partial unconstitutionality, *New York University Law Review*, Vol.85, 2010, p.738.

- There are questions regarding the potential for the entire law to be invalidated and the court's power to isolate or "remove" the unconstitutional sections, allowing the rest of the law to remain intact. Additionally, there is concern that the presence of the invalid portion could render the law

unenforceable., see Mark L. Movsesian, *Severability in Statutes and Contracts*, St. John's University, Faculty Publications, New York, 1995, p.41

29- Shantanu Basu, octrine of Severability in Law, slideshare forum, pp.01-02, on: https://fr.slideshare.net/shantanu_leo/doctrine-of-severability-in-law

30- See the Indian Contract Act, 1872 which includes a definition of severability.

31- The principle of severability asserts that if a portion of a statute conflicts with constitutional provisions, particularly those concerning fundamental rights as outlined in the Indian Constitution, that specific part can be removed while the remaining sections of the statute continue to hold validity.

Conversely, the principle of eclipse posits that a law infringing upon fundamental rights is not inherently void or valid from the outset; rather, it becomes enforceable only under certain conditions. These laws remain on the statute books and are applicable to prior transactions, but this principle does not extend to laws enacted after the constitution was established.

32- Kevin C. Walsh, partial, Op.Cit., p.744.

33- The principle is based on three foundations: relief, hypothetical legislative intent and contractual relief.

34- Marbury v. Madison is a landmark ruling by the United States Supreme Court, issued on February 1st, 1803, and is widely regarded as one of the Court's most significant decisions.

Its importance lies not in the specific case outcome, but in the foundational principles it set forth, particularly the authority of the judiciary to assess the compatibility of legislative acts with the Constitution. This ruling established the precedent that courts have the power to invalidate laws that are found to be unconstitutional, thereby granting the Supreme Court a pivotal role as the first constitutional court in history.

35- The concept of severability as recognized globally can be traced back to the pivotal case of Nordenfelt v. Maxim Nordenfelt Gun and Ammunition Manufacturing Co., Ltd. In this case, the manufacturer, Nordenfelt, who was engaged in the production of firearms, entered into an agreement to sell his business to the American inventor Sir Hiram Maxim. The terms of their contract stipulated that Nordenfelt would refrain from manufacturing firearms or similar products anywhere in the world and would not engage in any competitive activities against Maxim for a duration of 25 years.

36- Nicola Christine Corkin, Developments in Abstract Judicial Review in Austria, Italy and Germany, Ph.D. thesis, University of Birmingham, 2010, p.11.

37- Mark L. Movsesian, Op.Cit., p.42.

38- There are those who contend that relying on a contractual approach is insufficient for addressing the separation of statutory provisions. In dealing with the severability of these provisions, it is suggested that courts should move away from the contractual method and adopt a textual approach. This would allow the court to remove any unconstitutional provisions while still upholding the remaining parts of the law, see Fred Kameny, are inseverability clauses constitutional, *Albany Law Review*, Vol.68 2005, p.1024, supranote 126

39- Court rulings have established that the categorization of contracts and the relevant legal applications are matters determined by the court with jurisdiction over the subject. This determination is based on the court's interpretation of the intentions of the contracting parties and the underlying truth of their objectives, rather than the labels or terms they may have used in the contract itself.

40- For details see Michael Grose, *Construction Law in the United Arab Emirates and the Gulf*, First Edition, John Wiley & Sons, Ltd. Publishing, 2016, p.259.