

## NOTE

### INSEVERABILITY, RELIGIOUS EXEMPTIONS, AND NEW YORK'S SAME-SEX MARRIAGE LAW

*Christopher W. Dickson*<sup>†</sup>

INTRODUCTION .....	181
I. THE RELIGIOUS EXEMPTIONS .....	186
II. HYPOTHETICAL SOURCES OF INVALIDATION .....	190
III. THE INSEVERABILITY QUAGMIRE .....	192
A. The Legal Landscape .....	192
B. Theoretical Challenges .....	196
C. Practical Challenges .....	198
D. Challenges Posed by the Inseverability Clause in New York's Marriage Equality Act.....	199
IV. POTENTIAL JUDICIAL RESPONSES TO A TRIGGERED INSEVERABILITY CLAUSE .....	201
A. The Plain Meaning Approach .....	201
B. The "Mirror Image" Approach.....	203
C. The Germaneness Approach.....	204
D. The Good Faith Approach.....	206
CONCLUSION .....	207

#### INTRODUCTION

On June 24, 2011, Governor Andrew Cuomo signed the Marriage Equality Act, extending the right to marry to same-sex couples in the state of New York.<sup>1</sup> As a concession to secure a floor vote and the necessary Republican votes, the final bill contained several religious exemptions and an inseverability clause.<sup>2</sup> If a court were to strike

---

<sup>†</sup> B.A., Cornell University, 2008; Candidate for J.D., Cornell Law School, 2013; Articles Editor, *Cornell Law Review*, Volume 98. I would like to thank Professor Michael Dorf for his invaluable advice on this Note. I am also very grateful to my family for their endless patience, to my friends and classmates Antonio Haynes and Ross Thomas for their gentle criticism and calming dispositions, and to my partner Alex for his superb insights and encouragement. I would also like to thank the editors, associates, and support staff of *Cornell Law Review*.

<sup>1</sup> Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws 749 (McKinney); Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

<sup>2</sup> See Michael Barbaro, *How the Same-Sex Marriage Deal Nearly Collapsed*, N.Y. TIMES CITY ROOM BLOG (June 27, 2011 9:32 AM), <http://cityroom.blogs.nytimes.com/2011/06/27/how-the-same-sex-marriage-deal-nearly-collapsed/> ("Without those exemptions, I'm having

down the exemptions, or any other part of the bill, the inseverability clause would be triggered and the entire law invalidated, same-sex marriage and all.

A leading activist opposing same-sex marriage and at least one commentator have suggested that these exemptions are unlikely ever to face serious challenge in court.<sup>3</sup> But although the protections do not reach very far beyond the Free Exercise Clause, they do reach beyond it, and there is at least one plausible scenario that could lead to their invalidation.<sup>4</sup> Furthermore, until now, inseverability clauses have been relatively rare, and scholars and courts have seldom squarely addressed them.<sup>5</sup> This high-profile, contentious legislation is as likely a vehicle as any for a judicial decision frankly addressing the byzantine difficulties presented by inseverability clauses. In a world of infinite factual permutations and a law which “must be stable and yet . . . cannot stand still,”<sup>6</sup> one ought to hesitate to say that what should not occur shall not occur. This Note examines the New York Marriage Equality Act’s inseverability clause and the mechanics of its operation in the event it is triggered by the invalidation of the religious exemptions.

The Marriage Equality Act, which faced an uncertain fate in a Republican-controlled New York State Senate, passed narrowly in the wake of prominent and protracted debates within the state legislature

a hard time supporting this measure . . .” (quoting Senate Republican Mark Grisanti) (internal quotation marks omitted)). Inseverability clauses serve to invalidate an entire statute should a court hold any provision of that statute invalid. By contrast, severability clauses instruct a court that has held portions of a statute invalid to sever the invalid provisions and allow the valid provisions to remain operative. See Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 903 (1997).

<sup>3</sup> See Jon Campbell, *What’s Next for Gay Couples? Marriage Ceremonies Start July 24*, WGRZ.COM (June 26, 2011, 2:59 PM), <http://www.wgrz.com/rss/article/125791/37/Whats-Next-For-Gay-Couples-Marriage-Ceremonies-Start-July-24> (“[National Organization for Marriage President Brian] Brown said he doesn’t foresee any lawsuits on the bill itself, in part because he doesn’t believe the religious exemptions have much strength. ‘Because the language itself is not particularly strong—it’s not strong at all—I don’t see how a court overturns it . . . .’”); Michael Dorf, *The Puzzling Insistence on a Non-Severability Clause*, DORF ON LAW (June 27, 2011, 12:37 AM), <http://www.dorfonlaw.org/2011/06/puzzling-insistence-on-non-severability.html> (“Let’s think about the reasons why the religious exemptions might be ‘adjudged . . . invalid’ by a court. I can come up with two possibilities, one of which seems extremely unlikely, and the other of which seems remotely possible but self-defeating.” (omission in original)). But see Dan Wiessner & Jessica Dye, *Fear of Lawsuits from New York Gay Marriage May Be Overblown*, REUTERS, June 22, 2011, available at <http://www.reuters.com/article/2011/06/22/us-gaymarriage-newyork-exemptions-idUSTRE75L5EQ20110622> (quoting an attorney for the New York Catholic Archdiocese who predicted “years of litigation on individual cases at all levels of government”).

<sup>4</sup> See *infra* Part II.

<sup>5</sup> Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 ALB. L. REV. 997, 1002 & n.29 (2005) (remarking that inseverability clauses are infrequently used or studied and noting that the only previous scholarship devoted exclusively to the subject was a single student note).

<sup>6</sup> ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

and national media.<sup>7</sup> Religious groups opposed to same-sex marriage relied heavily upon rhetoric of religious freedom, invoking fears that their organizations and congregants would be forced by law to solemnize or provide services for same-sex marriages in contravention of their beliefs.<sup>8</sup> Governor Cuomo, who served as an indispensable unifying force in the effort to achieve passage,<sup>9</sup> was by many accounts solicitous of religious groups' concerns.<sup>10</sup>

The final bill contained several provisions intended to mollify those who perceived a threat to religious freedom. First, the bill broadly exempts religious organizations and affiliated nonprofits from civil liability or punishment by local and state agencies for refusing to provide services or facilities for the solemnization of a marriage.<sup>11</sup> Second, notwithstanding state and local nondiscrimination laws, a religious organization or affiliated nonprofit retains the right to discriminate in favor of its own adherents in employment and housing decisions and to "tak[e] such action as is calculated . . . to promote the religious principles for which it is established . . . ."<sup>12</sup> Third, the bill includes an inseparability clause directing that the entire bill shall be invalid if a court strikes down any part of it.<sup>13</sup>

For weeks, New York State Senate Republicans wrestled uneasily with the decision of whether to allow a floor vote on the Marriage Equality Act.<sup>14</sup> Observers can only speculate as to precisely why they

---

<sup>7</sup> See Confessore & Barbaro, *supra* note 1; Dan Wiessner, *New York Lawmakers Debate Allowing Gay Marriage*, REUTERS, June 16, 2011, available at <http://www.reuters.com/article/2011/06/16/us-newyork-gaymarriage-idUSTRE75F61320110616> (stating that lobbyists from both sides and celebrities such as Cynthia Nixon headed to Albany to lobby lawmakers).

<sup>8</sup> See Paul Vitello, *Faith Groups Campaign to Block Gay Marriage*, N.Y. TIMES, May 6, 2011, at A23 (discussing religious liberty concerns of several denominations, including the concern that the legalization of same-sex marriage could endanger the ability of religious groups to provide "social services, like foster care and adoption").

<sup>9</sup> See Michael Barbaro, *Behind Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 26, 2011, at A1 (revealing in detail the behind-the-scenes lobbying efforts of Governor Andrew Cuomo).

<sup>10</sup> N.Y. State S., Reg. Sess., OPEN LEGIS. (June 24, 2011), <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011> (session transcript) ("And let me first say I would be remiss if I didn't acknowledge the very active role of Governor Cuomo. He was not merely active but certainly sensitive, both to the dual issues of religious freedoms and the importance of equality in terms of the purposes of this bill." (statement of Sen. Stephen M. Saland)).

<sup>11</sup> Act of June 24, 2011, ch. 96, 2011 N.Y. Sess. Laws 751, 751 (McKinney) (regarding ability to marry).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 752.

<sup>14</sup> See Barbaro, *supra* note 9 (reporting that Republican polling in their critical counties suggested "little political rationale for legalizing [same-sex marriage]" but that several Republican senators yielded to familial pressure to support the bill amid a fractured caucus with timid leadership); see also Glenn Blain & Kenneth Lovett, *Altering History! State Lawmakers OK Gay Marriage by Vote of 33-29*, N.Y. DAILY NEWS, June 25, 2011, at 6 (reporting that Republican senators "agonized" for weeks, culminating in a six-hour closed-door meet-

chose to allow the vote to proceed.<sup>15</sup> However, if we are to take the senators at their word, it is clear that the religious exemptions and the inseverability clause were crucial to securing both a floor vote and the necessary Republican votes on the final bill.<sup>16</sup> We may safely conclude that the senators who demanded the inclusion of an inseverability clause feared the possibility of a court striking down the religious exemptions and leaving same-sex marriage intact.<sup>17</sup>

Nevertheless, it is clear that the religious exemptions and the inseverability clause did little to mollify most of the senators and religious groups leading the opposition.<sup>18</sup> Those groups had pressed for

ing where some members opposed a vote on grounds of moral opposition or favored deciding the issue by popular referendum, while many others favored allowing the vote so as to dispose of the issue well before the 2012 elections).

<sup>15</sup> See Blain & Lovett, *supra* note 14, for several possibilities.

<sup>16</sup> The Republican Senate Majority Leader said as much. Press Release, Sen. Dean Skelos, N.Y. State Senate (June 24, 2011), <http://www.nysenate.gov/press-release/statement-senate-majority-leader-dean-skelos-7> (“The entire Senate Republican Conference was insistent that amendments be made to the Governor’s original bill in order to protect the rights of religious institutions and not-for-profits . . .”). A key Republican vote in favor of the bill also emphasized the importance of the exemptions and nonseverability to the deliberations. N.Y. State S., Reg. Sess., OPEN LEGIS. (June 24, 2011), <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011> (session transcript) (“This language [of the exemptions and inseverability clause] was the product of lengthy and at times challenging negotiations.” (statement of Sen. Stephen M. Saland)); see also Barbaro, *supra* note 2 (noting the significance of the exemptions to Republican Senator Mark Grisanti).

<sup>17</sup> Senator Stephen Saland, a crucial Republican defector who ultimately voted in favor of the bill, explained the inseverability clause as if it were part and parcel of the religious protections. After explaining the religious exemptions, he moved to inseverability: “[L]astly and every bit as importantly, and perhaps even most importantly, there is . . . an inseverability clause.” N.Y. State S., Reg. Sess., OPEN LEGIS. (June 24, 2011), <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011> (session transcript). During the floor vote, no senator explicitly linked the inseverability clause to the exemptions, but in an earlier statement to reporters, Senate Majority Leader Skelos squarely addressed the issue: “We have concerns that if you’re truly going to protect religious institutions, the issue of severability. You could have a federal judge come in, knock out all the religious protections, and you could still have the gay marriage. So we’re working to protect religious protections to make sure that they are solid and that they will stand, and I think that’s critically important as part of these negotiations.” Nick Reisman, *Skelos: Religious Protections Being Worked on, Capital Tonight*, YNN (June 20, 2011, 4:40 PM), <http://www.capitaltonight.com/2011/06/skelos-religious-protections-being-worked-on/> [hereinafter *Skelos*] (including video interview of Sen. Skelos).

<sup>18</sup> See N.Y. State S., Reg. Sess., OPEN LEGIS. (June 24, 2011), <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011> (session transcript) (“I just have a release from the Catholic Conference that says that the matter of a religious exemption has been and continues to be a secondary issue that in no way negates the fact that this bill is bad for society.” (statement of Sen. Ruben Diaz)); Jose Bayona & Christina Boyle, *Religious Leaders Bash Gay Marriage Law, Vow to Ban Pols Who Supported Measure*, NYDAILYNEWS.COM (June 26, 2011), [http://articles.nydailynews.com/2011-06-26/local/29724126\\_1\\_gay-marriage-law-religious-leaders-catholic-schools](http://articles.nydailynews.com/2011-06-26/local/29724126_1_gay-marriage-law-religious-leaders-catholic-schools) (“I believe the passage of same-sex marriage is another ‘nail in the coffin’ of marriage.” (quoting Bishop Nicholas DiMarzio, diocese of Brooklyn) (internal quotation marks omitted)); Timothy M. Dolan et al., *Statement of the Bishops of New York State on Same-Sex “Marriage” Vote*, N.Y. STATE CATH. CONF., <http://www.nyscatholic.org/2011/06/statement-of-the-bishops-of-new-york-state-on-same-sex-marriage->

even broader religious protections that would have allowed, for example, individuals and for-profit businesses to discriminate for religious reasons.<sup>19</sup> Moreover, several Republican senators voted for the religious exemptions but not the final bill legalizing same-sex marriage.<sup>20</sup> Indeed, several influential opposition groups and activists have stated that no amount of religious protection would convince them that enacting same-sex marriage is good for society.<sup>21</sup>

To date, the legal controversy surrounding the bill has not concerned the religious exemptions or inseparability language. First, and entirely irrelevant here, activist groups opposing same-sex marriage have challenged the closed-door meetings and expedited voting procedure leading to the bill's passage.<sup>22</sup> Second, several town clerks

vote/ (last visited Sept. 22, 2012) (“[W]e . . . affirm that marriage is the joining of one man and one woman . . . . This definition cannot change, though we realize that our beliefs about the nature of marriage will continue to be ridiculed, and that some will even now attempt to enact government sanctions against churches and religious organizations that preach these timeless truths.”).

<sup>19</sup> Thomas Kaplan, *Settled in Albany, Gay Marriage Is Still Drawing Opposition*, N.Y. TIMES, July 13, 2011, at A20 (“[O]pponents of same-sex marriage predicted complications for wedding industry professionals like caterers, photographers or florists, who might not want to provide their services to gay couples but fear legal repercussions for refusing. The opponents had sought to include protections in the same-sex marriage legislation for private bridal-related businesses, but did not succeed.”).

<sup>20</sup> N.Y. State S., Reg. Sess., OPEN LEGIS. (June 24, 2011), <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011> (session transcript) (“While I will not be voting for the bill in chief, I will be voting for this because of the importance of the exemptions that were placed into the main body of law by this amendment.” (statement of Sen. Kemp Hannon)). Compare N.Y. State S. Floor Vote on An Act to Amend the Domestic Relations Law, Reg. Sess., OPEN LEGIS. (June 24, 2011), <http://open.nysenate.gov/legislation/bill/A8520-2011> (indicating that Republican Senators Hannon, Marcellino, and Skelos voted for the religious exemptions), with N.Y. State S. Floor Vote on the Marriage Equality Act, Reg. Sess., OPEN LEGIS. (June 24, 2011) <http://open.nysenate.gov/legislation/bill/A8354-2011> (indicating that Republican Senators Hannon, Marcellino, and Skelos voted against the final bill).

<sup>21</sup> E.g., *Frequently Asked Questions About the Defense of Marriage*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/frequently-asked-questions-on-defense-of-marriage.cfm#r17> (last visited Sept. 22, 2012) (“[N]o religious exemption—no matter how broadly worded—can justify a supportive or neutral position on the redefinition of marriage. Such ‘redefinition’ is always fundamentally unjust, and indeed, religious exemptions may even facilitate the passage of such unjust laws. *Protecting marriage protects religious liberty; the two are inseparable.*” (citation omitted)); see also Cheryl Wetzstein, *Religious Groups Fear Legal Fallout from N.Y. Gay Law*, WASH. TIMES, July 6, 2011, at A7, available at <http://www.washingtontimes.com/news/2011/jul/5/religious-groups-fear-legal-fallout-from-ny-gay-la/?page=all> (“The . . . religious exemptions are ‘a complete and total fraud,’ said Paul Atanasio, an officer of the Conservative Party of New York State (CPNYS). A fundamental precept of the Catholic faith is that ‘marriage was given to us . . . as a sacrament by our Lord Jesus Christ,’ he said.” (second omission in original)).

<sup>22</sup> Thomas Kaplan, *Judge Says Suit to Void Marriage Act May Proceed*, N.Y. TIMES, Nov. 30, 2011, at A28 (“Acting Justice Robert B. Wiggins . . . wrote that it was possible that the Republican majority in the State Senate had violated the state’s open meetings law as it discussed whether to bring the marriage bill to a vote.”).

have refused to issue marriage licenses on moral or religious grounds, raising the question of whether they may be compelled to issue licenses by their supervisors or by state law.<sup>23</sup> While on first blush these clerks' religious objections seem relevant, it is clear that a municipal clerk's office is not a "religious organization" within the meaning of the statutory exemptions.<sup>24</sup> These clerks would have to look elsewhere for legal support.

This Note proceeds in five parts, exploring the operation of the New York marriage law's inseverability clause in light of the legal and scholarly debate regarding this type of clause and religious exemptions. Part I explores the general legal landscape governing religious exemptions to otherwise applicable laws. Part II proposes a scenario that might plausibly lead a court to strike down the religious exemptions of the Marriage Equality Act, thus triggering its inseverability clause. Part III investigates the conceptual difficulties posed by the triggering of various types of inseverability clauses. Part IV explores several possible judicial solutions in the event that circumstances trigger the inseverability clause of the Marriage Equality Act. Part V concludes by evaluating the normative and political desirability of these judicial solutions.

## I

### THE RELIGIOUS EXEMPTIONS

The Free Exercise Clause of the First Amendment provides the most foundational baseline of religious exemptions from otherwise valid laws. For example, a state may not interfere with ecclesiastical matters such as the selection of clergy and lay employees who perform religious functions.<sup>25</sup> Courts may examine discrimination claims of

---

<sup>23</sup> The most high-profile case involves Rose Belforti of the town of Ledyard, who hoped to continue in her job by delegating the responsibility of issuing licenses to same-sex couples to another clerk. Two other clerks in the state resigned rather than comply with the Marriage Equality Act. When asked for comment on the resignations, Governor Cuomo responded, "When you enforce the laws of the state, you don't get to pick and choose." Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. TIMES, Sept. 28, 2011, at A1.

<sup>24</sup> See Act of June 24, 2011, ch. 96, 2011 N.Y. Sess. Laws 751, 751 (McKinney). The Act applies the religious exception to:

[any] religious entity as defined under the education law or section two of the religious corporations law, or a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof, being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation as described in this subdivision.

*Id.*

<sup>25</sup> See *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevic*, 426 U.S. 696, 713 (1976) ("[A] civil court must accept the ecclesiastical decisions of church tribunals as

lay employees to determine whether they perform a religious function in the organization. If they do not, a state law prohibiting discrimination against them would not present a First Amendment problem.<sup>26</sup>

Federal and state nondiscrimination statutes frequently go beyond the baseline protections of the First Amendment and provide additional exemptions. For example, under Title VII of the Civil Rights Act of 1964, religious schools may discriminate in employment based on religion but not race, sex, or national origin.<sup>27</sup> Currently, of course, Title VII does not prohibit employers from discriminating based on sexual orientation or gender identity.<sup>28</sup>

New York's nondiscrimination statute does prohibit discrimination based on sexual orientation,<sup>29</sup> but the statute includes a religious

it finds them.”); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 107–08 (1952) (“Legislation that regulates church administration, the operation of the churches, the appointment of clergy . . . prohibits the free exercise of religion.”); *Watson v. Jones*, 80 U.S. (1 Wall.) 679, 710 (1871) (“[C]ivil courts being confined to ‘civil actions,’ they may not take cognizance of purely spiritual or ecclesiastical questions.”).

<sup>26</sup> See, e.g., *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 284 (5th Cir. Unit A July 1981) (holding that a labor dispute did not implicate First Amendment concerns because the workers were “not engaged in activities traditionally considered ecclesiastical or religious,” although they were nominally ordained ministers), *cert. denied*, 456 U.S. 905 (1982); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975) (“[W]e are dealing with the discharge of a typist-receptionist, not a minister. Nothing in the record indicates that . . . the relationship between the church and its clerical help touches so close to the heart of church administration as to be protected by the First Amendment . . .”). Note that in a recent case, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the Supreme Court significantly strengthened this First Amendment protection by recognizing a “ministerial exception” exempting religious employers from employment discrimination suits relating to the selection of ministers. The Court held that an employee was a minister within the exception despite the fact that the majority of her duties were secular, where she was ordained as a minister and, “[a]s a source of religious instruction,” “reflected a role in conveying the Church’s message and carrying out its mission.” *Id.* at 708.

<sup>27</sup> 42 U.S.C. § 2000e–2(e)(2) (2006); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); see also § 2000e–1(a) (providing an exception for religious organizations “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [religious organization] of its activities”).

<sup>28</sup> Members of Congress have perennially proposed to amend Title VII to include sexual orientation and, more recently, gender identity in a bill colloquially known as the Employment Non-Discrimination Act (ENDA). See William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 69–72 (2001); Chris Geidner, *ENDA Introduced—with 92 Fewer Co-Sponsors than at the End of the 111th Congress*, METRO WEEKLY (Apr. 6, 2011, 9:05 PM), <http://www.metroweekly.com/poliglot/2011/04/enda-introduced---with-92-few.html>. Support for ENDA has increased over time, but ENDA has yet to garner sufficient support for passage. See § 2000e–2(a) (referring only to “race, color, religion, sex, or national origin”); Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149, 178–87 (John D’Emilio et al. eds., 2000).

<sup>29</sup> N.Y. EXEC. LAW § 296 (McKinney 2010).

exemption.<sup>30</sup> Under this exemption, a religious organization or affiliated nonprofit retains the right to discriminate in favor of its own adherents in employment and housing decisions and to “tak[e] such action as is calculated . . . to promote the religious principles for which it is established . . . .”<sup>31</sup> This language exactly tracks the language of the broader religious exemption attached to New York’s Marriage Equality Act.<sup>32</sup> Therefore, we can look to state court precedent interpreting New York’s employment nondiscrimination law to inform our understanding of the similar exemption attached to the Marriage Equality Act.

New York courts have never fully explicated the exact scope of this seemingly broad religious exemption found within the state’s nondiscrimination statute, and case law is scant. However, in *Scheiber v. St. John’s University*,<sup>33</sup> the New York Court of Appeals offered some guidance. In that case, a university denied that it had discriminated against the plaintiff based on his religion but asserted that, even if it had, it would have been entitled to do so under the religious exemption.<sup>34</sup> The court rejected that argument:

[T]he exemption operates to exclude from the definition of “discrimination” exercise of a preference in hiring for persons of the same faith *where that action is calculated by the institution to effectuate its religious mission*. A religious employer may not discriminate against an individual for reasons having nothing to do with the free exercise of religion and then invoke the exemption as a shield against its unlawful conduct.<sup>35</sup>

Thus, despite a disjunctive “or” in the statute,<sup>36</sup> the court interpreted this “calculation clause” as restrictive of the general exemption rather than as an exemption in its own right.

The religious exemption language in the Marriage Equality Act that diverges from the extant nondiscrimination law provides that re-

<sup>30</sup> *Id.* § 296(11).

<sup>31</sup> *Id.*

<sup>32</sup> Compare *id.* (“Nothing contained in this section shall be construed to bar any [religious organization] from limiting *employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.*” (emphasis added)), with Act of June 24, 2011, ch. 96, 2011 N.Y. Sess. Laws 751, 751 (McKinney) (“[N]othing in this article shall . . . limit *employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.*” (emphasis added)).

<sup>33</sup> 638 N.E.2d 977 (N.Y. 1994).

<sup>34</sup> *Id.* at 980.

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> N.Y. EXEC. LAW § 296(11) (McKinney 2010) (“*or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained*” (emphasis added)).

ligious groups, affiliated nonprofits, and employees thereof “shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. Any such refusal . . . shall not create any civil claim or cause of action or result in any state or local government action to penalize” such a religious group or affiliated nonprofit.<sup>37</sup> This language is new to New York law, so there is no case law to turn to;<sup>38</sup> yet, a close reading of the text suggests at least three troublesome implications.

First, the language exempts eligible entities from being required to “solemniz[e] or celebrat[e]” a marriage.<sup>39</sup> It is entirely unclear how broadly courts may interpret this language. For example, during the push for the religious exemptions and following the bill’s passage, religious interest groups and pundits cited fears that state agencies would pull funding from religious charities that refuse to place children with adoptive gay and lesbian parents.<sup>40</sup> Could such a decision be viewed as an impermissible penalty by state agencies in response to a refusal to provide services that solemnize or celebrate a marriage?

Second, the language exempts “any employee” of a religious organization or affiliated nonprofit from being required to solemnize or celebrate a marriage.<sup>41</sup> Imagine that the religious organization employer freely solemnizes and celebrates same-sex marriages, but an individual employee refuses to participate. Is that employee protected from civil liability by the exemption?<sup>42</sup>

---

<sup>37</sup> N.Y. DOM. REL. LAW § 10-b (McKinney 2012).

<sup>38</sup> Similar exemptions on the books in Connecticut, New Hampshire, and Vermont were the likely inspiration for the New York language. See CONN. GEN. STAT. § 46b-35a (2011); N.H. REV. STAT. ANN. § 457:37 (2004); VT. STAT. ANN. tit. 9, § 4502(1) (Supp. 2011). However, as of this writing, there are no reported cases in any of those states interpreting the language of their respective exemptions.

<sup>39</sup> DOM. REL. § 10-b.

<sup>40</sup> See, e.g., John Hayward, *The Future of Marriage*, HUMAN EVENTS (June 27, 2011, 2:50 PM), <http://www.humanevents.com/article.php?id=44494> (“For that matter, how can religious exemptions, such as those included in the New York bill, be allowed to stand? No religious belief can be allowed to trump a basic human right for very long. Already Catholic Charities, among the oldest adoption agencies in the country, has been forced out of the adoption business due to its refusal to place children with same-sex couples in Massachusetts.”); Michael Hill, *NY Gay-Marriage Talks Hinge on Religious Rights*, SEATTLE TIMES (June 22, 2011, 2:45 PM), [http://seattletimes.com/html/nationworld/2015397743\\_apusgaymarriagereligion.html?syndication=rss](http://seattletimes.com/html/nationworld/2015397743_apusgaymarriagereligion.html?syndication=rss) (noting that “the Catholic establishment in New York, which opposes the bill, was worried that its adoption agencies might close down” and citing instances of Catholic adoption agencies in Illinois and Massachusetts shutting down rather than comply with state nondiscrimination laws).

<sup>41</sup> DOM. REL. § 10-b.

<sup>42</sup> For example, suppose that a church employs a person to manage a church-owned banquet facility. Despite the church’s doctrinal approval of same-sex marriage, the banquet hall manager refuses to accommodate same-sex couples. If there were no religious exemption, the manager would be liable under N.Y. EXEC. LAW § 296(2)(a), which makes it unlawful for a “manager” of a place of public accommodation, *inter alia*, to refuse accommodations to a person because of sexual orientation. Does the manager’s mere status as

Third, the exemption allows eligible entities to refuse to provide privileges to solemnize or celebrate a “marriage”<sup>43</sup>—any marriage, not just a same-sex marriage. Does this language then serve to exempt eligible entities from penalties by state and local agencies if they, for instance, refused to provide health benefits to an employee’s spouse in an interracial marriage? This scenario is explored in Part II.

## II

### HYPOTHETICAL SOURCES OF INVALIDATION

A potential source of invalidation<sup>44</sup> flows from the marriage exemption allowing organizations and their employees to refuse privileges to celebrate a “marriage.”<sup>45</sup> Imagine that a religion called the Church of Yesteryear Racists (CYR) operates a banquet hall frequently used for wedding receptions but openly refuses to allow its use for interracial marriages because interracial marriages go against CYR’s religion. An interracial couple sues CYR under New York’s Human Rights Law for withholding the use of a public accommodation because of race.<sup>46</sup> Before the Marriage Equality Act, the interracial couple would have prevailed. While the religious exemptions in the Human Rights Law allow organizations to discriminate in favor of their own religious adherents in limited circumstances, those exemptions do not permit discrimination based on race.<sup>47</sup>

However, the religious exemptions in the Marriage Equality Act now allow religious organizations, “notwithstanding any state . . . law,” to refuse to provide accommodations to celebrate a marriage, period.<sup>48</sup> A court facing the question would have two choices: (1) hold that religious organizations, affiliated nonprofits, and their employees are now permitted to discriminate based on race in matters related to the celebration of a marriage; or (2) construe the marriage exemptions as inapplicable to refusals to provide accommodations based on race. Option 1 has many obviously undesirable consequences and is

---

an employee of a religious organization shield against liability despite the fact that the manager’s discriminatory acts are in accordance with personal beliefs—or perhaps even whimsy and caprice—and not those of the religious employer?

<sup>43</sup> DOM. REL. § 10–b.

<sup>44</sup> This scenario relies heavily upon a hypothetical originally posed by Michael Dorf. See Dorf, *supra* note 3.

<sup>45</sup> See DOM. REL. § 10–b.

<sup>46</sup> See N.Y. EXEC. LAW § 296(2)(a) (McKinney 2010).

<sup>47</sup> See *id.* § 296(11); N.Y. Att’y Gen., Formal Op. No. 86-F8, 1986 N.Y. Op. Att’y Gen. 29, 31 (N.Y.A.G.) (“Religious organizations are not exempt from the prohibitions in the Federal and State anti-discrimination laws against discrimination based on race, color or national origin.”).

<sup>48</sup> DOM. REL. § 10–b.

completely contrary to every indication of legislative intent.<sup>49</sup> Option 2 comports with what senators who voted “yes” on the exemptions probably supposed they were voting for—exemptions to protect religious organizations from being forced to celebrate same-sex marriages.

Option 2, however, invites further litigation. Presumably, similar results would follow if the Church of He-Man Woman-Haters refused to allow the wife in an opposite-sex couple to sign the banquet hall rental agreement, or if the Church of the Real America forbade naturalized citizens to adopt children at their affiliated agency. Now we have an exemption scheme that allows organizations to discriminate based on sexual orientation in providing accommodations to celebrate marriage but does not allow discrimination on the basis of race, sex, or national origin. This is closer to what the legislators probably thought they were voting for,<sup>50</sup> but it poses two potential constitutional problems.

First, same-sex couples could sue to strike down the exemptions, as interpreted, as a deprivation of equal protection of the laws under the Fourteenth Amendment.<sup>51</sup> Like the statute the U.S. Supreme Court struck down in *Romer v. Evans*,<sup>52</sup> the exemption as construed effectively “withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.”<sup>53</sup> Of course,

---

<sup>49</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389–90 (2003) (“[L]egislative intent is widely assumed to be the touchstone of statutory interpretation. While the enacted text is generally considered the best evidence of such intent, Congress does not always accurately reduce its intentions to words because legislators necessarily draft statutes within the constraints of bounded foresight, limited resources, and imperfect language. The absurdity doctrine builds on that idea: If a given statutory application sharply contradicts commonly held social values, then the Supreme Court presumes that this absurd result reflects imprecise drafting that Congress could and would have corrected had the issue come up during the enactment process.” (footnote omitted)). In available media reports of the negotiations and in the senators’ own statements explaining their votes, it is nowhere suggested that the religious exemptions would permit the refusal of accommodations for marriages other than same-sex marriages. Compare this, however, with the views of Senator Stephen Saland:

[W]e start off with ‘Notwithstanding any state, local or municipal law rule, regulation, ordinance or other provision of law to the contrary’ . . . And what is the purpose of that? The purpose is to ensure that there shall be no local law or no other law of this state that might be in conflict with this law that would supersede the [religious exemptions] that are provided in this chapter. Concerns had been expressed that there might be municipal action, . . . there might be the possibility of conflicts with other provisions of law. Clearly the purpose here is to ensure that whatever conflicts there might be, those conflicts are resolved in favor of the [religious exemption].

N.Y. State S., Reg. Sess., OPEN LEGIS. (June 24, 2011), <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011> (session transcript) (statement of Sen. Stephen Saland)).

<sup>50</sup> See *id.*

<sup>51</sup> U.S. CONST. amend. XIV, § 1.

<sup>52</sup> 517 U.S. 620 (1996).

<sup>53</sup> *Id.* at 627.

there are many ways to distinguish this hypothetical from *Romer*, but fifteen years have passed since the Court last dealt with the Equal Protection Clause and sexual orientation as a class.<sup>54</sup> It is at least plausible that a court would find the same-sex couple's argument credible.<sup>55</sup>

Second, CYR and its misogynist and xenophobic likenesses might argue that the law effectively enacts a shield for one type of religion—those that disapprove of homosexuality—and that it withholds this shield from religions featuring other doctrines in conflict with New York's Human Rights Law. CYR could argue that this favoritism violates the Establishment Clause of the First Amendment.<sup>56</sup>

### III

#### THE INSEVERABILITY QUAGMIRE

##### A. The Legal Landscape

An inseverability clause is a subset of a class of statutory clauses that have been termed “fallback law.”<sup>57</sup> Whenever a court finds a statute partially unconstitutional, it must choose whether to sever the in-

---

<sup>54</sup> The only significant discussion by the Court of the applicability of the Equal Protection Clause to sexual orientation is contained in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the majority declined to analyze the issue under an equal protection analysis, opting to strike down the law under due process analysis instead. *Id.* at 574–75, 578–79. Notably, Justice Sandra Day O'Connor stated in her concurrence that she would have invalidated the anti-sodomy statute at issue under the Equal Protection Clause. *Id.* at 579 (O'Connor, J., concurring).

<sup>55</sup> In 1996, when *Romer* was decided, a nationwide opinion poll put support of legal recognition of same-sex marriages at 27% in favor and 68% opposed. See Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP (May 8, 2012), <http://www.gallup.com/poll/154529/Half-Americans-Support-Legal-Gay-Marriage.aspx>. The same poll in 2012 reported support at 50% and opposition at 48%. *Id.* While the Court typically avoids admitting it, such dramatic changes in public opinion can and do influence the Court. Justice Kennedy hinted as much in the majority opinion in *Lawrence*, noting the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,” as evidenced in part by gay rights advances in many U.S. states and Western nations. 539 U.S. at 572–73. Justice O'Connor's stare decisis analysis in *Planned Parenthood of Southeastern Pennsylvania v. Casey* is also revealing, noting that a decision to overturn precedent is “comprehensible as the Court's response to facts that *the country* could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive.” 505 U.S. 833, 863 (1992) (emphasis added). Notably, the *Lawrence* majority was centrally concerned that criminalizing same-sex sexual conduct was “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” 539 U.S. at 575. Between the language in *Lawrence*, the opinion in *Romer*, and the ongoing change of public opinion toward gays and lesbians, it seems plausible that the Court would look skeptically on a legal regime which specifically withdraws antidiscrimination protection from homosexuals while leaving the protection of other classifications intact.

<sup>56</sup> U.S. CONST. amend. I; see *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 875–76 (2005) (“[T]he principle of neutrality has provided a good sense of direction: the government may not favor one religion over another . . .”).

<sup>57</sup> See Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 303, 339–40 (2007).

valid part or to strike down the whole.<sup>58</sup> In an effort to wrest some control over the severability decision from courts, legislators have from time to time codified their preference into law. The most common fallback provision is a severability clause, providing that if a court strikes down part of the statute, the rest shall remain intact.<sup>59</sup>

However, when faced with statutes containing severability clauses, courts do not treat them as sacrosanct.<sup>60</sup> The leading Supreme Court case is *Champlin Refining Co. v. Corp. Commission of Oklahoma*,<sup>61</sup> in which the Court held that a drilling statute was partially unconstitutional. The Court explicated the general test that a statute is only inseverable if “it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not.”<sup>62</sup> The statute at issue contained a severability clause, but the court treated it as a mere rebuttable presumption, and was only satisfied that severability was proper after determining that the remainder of the statute would be functional to achieve its purpose standing alone.<sup>63</sup> More than three decades later, the Court noted in *United States v. Jackson* that “the ultimate determination of severability will rarely turn on the presence or absence of such a clause.”<sup>64</sup>

The Court confronted the issue of severability again in *INS v. Chadha*, which considered whether an unconstitutional legislative veto provision was severable from the rest of the Immigration and Nationality Act.<sup>65</sup> Again, the Court refused to accept a severability clause uncritically, choosing instead to examine the legislative history of the statute to decide whether the record supported severability and whether the surviving remainder would be “fully operative” as a “workable administrative mechanism.”<sup>66</sup>

When a federal court partially invalidates a state statute, the question of severability is one of state law.<sup>67</sup> Unsurprisingly, the courts of several states,<sup>68</sup> including New York,<sup>69</sup> have adopted an approach to

<sup>58</sup> See *infra* pp. 196–200.

<sup>59</sup> Dorf, *supra* note 57, at 303.

<sup>60</sup> See, e.g., *id.* at 306 (“If a fallback provision itself has constitutional defects, then those defects render the fallback invalid.”).

<sup>61</sup> 286 U.S. 210 (1932).

<sup>62</sup> *Id.* at 234.

<sup>63</sup> *Id.* at 235–36.

<sup>64</sup> 390 U.S. 570, 585 n.27 (1968).

<sup>65</sup> 462 U.S. 919, 931–35 (1983).

<sup>66</sup> *Id.* at 934–35.

<sup>67</sup> Nat'l Adver. Co. v. Town of Niagara, 942 F.2d 145, 148 (2d Cir. 1991).

<sup>68</sup> See Friedman, *supra* note 2, at 906 n.16 (citing cases from Illinois, New Jersey, and Washington, which treat severability clauses as mere presumptions rebuttable by evidence of contrary legislative intent).

<sup>69</sup> See *People v. Mancuso*, 175 N.E. 177, 180 (N.Y. 1931) (“The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excinded, or rejected altogether.” (internal

severability clauses similar to the Supreme Court's approach in federal cases. However, in New York, cases interpreting even these relatively common provisions have been rare, and federal courts have decided most of the cases by applying state law.<sup>70</sup> The New York Court of Appeals has laid down this general standard on severability:

The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch, instead of at the roots.<sup>71</sup>

Thus, apart from legislative intent, of primary importance is whether the remaining legislation will be able to function independently; if not, then a court should not sever even in the presence of a severability clause.<sup>72</sup> One court remarked that severability clauses represent "a narrow exception to the general rule that, when a clause is unambiguous, construction is unnecessary."<sup>73</sup>

In a sense, any judicial invalidation of a statute results in the implementation of a substitutive provision, since whether the law is partially or wholly struck down, the void it leaves is filled by the background law that remains. A few scholars have argued that all laws should effectively be construed to have an inseverability clause because this would minimize the extent to which judges can "rewrite the laws" by striking only portions of them. According to this view, adopting a blanket doctrine of inseverability would preserve legislative in-

---

quotation marks omitted)); *St. Joseph Hosp. of Cheektowaga v. Novello*, 840 N.Y.S.2d 263, 269 (App. Div. 2007) (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)) (holding that the severability clause created a "presumption" of legislative intent for severability).

<sup>70</sup> See *Nat'l Adver. Co.*, 942 F.2d at 148; *Clear Channel Outdoor, Inc. v. Town Bd. of Windham*, 352 F. Supp. 2d 297, 311 (N.D.N.Y. 2005); *801 Conklin St. Ltd. v. Town of Babylon*, 38 F. Supp. 2d 228, 245-46 (E.D.N.Y. 1999); *N. Shore Concrete & Assocs. v. City of New York*, No. 94 CV. 4017, 1998 WL 273027, at \*13 (E.D.N.Y. April 12, 1998).

<sup>71</sup> *People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 N.E. 202, 207 (N.Y. 1920).

<sup>72</sup> *Nat'l Adver. Co.*, 942 F.2d at 148 (citing *N.Y. State Superfund Coal., Inc. v. N.Y. State Dep't of Envtl. Conservation*, 550 N.E.2d 155, 157 (N.Y. 1989) (holding that despite severability clause in regulation, severing was inappropriate because disputed standard was at "the core" of and "interwoven inextricably" through the entire scheme)).

<sup>73</sup> *Stiens v. Fire & Police Pension Ass'n*, 684 P.2d 180, 184 n.12 (Colo. 1984).

tent and incentivize lawmakers to comply with constitutional norms.<sup>74</sup> However, courts have not adopted such a blanket doctrine.<sup>75</sup>

The inseverability clause is a much rarer species of fallback law than the severability clause.<sup>76</sup> Most states have enacted, by statute or by canons of interpretation, the presumption of statutory severability.<sup>77</sup> One might think, then, that legislatures would only need to express their preference when that preference is inseverability rather than severability. Moreover, as we shall see, inseverability clauses are potentially much more powerful tools than severability clauses, raising the question of whether the two should be treated the same.

One approach is to treat an inseverability clause as the logical inverse of a severability clause.<sup>78</sup> This approach treats an inseverability clause as merely a different preference the legislature can express regarding the severability question. While case law is scarce, several courts have adopted this “mirror image” approach. In *Biszko v. RIHT Financial Corp.*,<sup>79</sup> the First Circuit adopted the *Chadha* analysis but applied it to an inseverability clause, concluding that the clause created no more than a presumption of inseverability that could be overcome with evidence of legislative intent.<sup>80</sup> The Colorado Supreme Court, likewise, applied its severability analysis to an inseverability clause in *Stiens v. Fire & Police Pension Ass’n*.<sup>81</sup>

<sup>74</sup> See Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1525 (2011); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 675 (2008); cf. Transcript of Oral Argument at 36, *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-393), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-393.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-393.pdf) (“When you say judicial restraint, you are echoing the . . . premise that it increases the judicial power if the judiciary strikes down other provisions of the Act. I suggest to you it might be quite the opposite. . . . [W]e would have a new regime that Congress did not provide for, did not consider. That . . . can be argued at least to be a more extreme exercise of judicial power . . . than striking the whole.”).

<sup>75</sup> See e.g., *Nat’l Adver. Co.*, 942 F.2d at 148 (citing *Alpha Portland Cement Co.*, 129 N.E. at 207) (“As a general rule, a court should refrain from invalidating an entire statute when only portions of it are objectionable.”).

<sup>76</sup> Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 243 (2004) (“[I]nseverability clauses have not featured as prominently in the development of the current doctrine. This can probably be attributed to the . . . fact [ ] that Congress only occasionally enacts such clauses . . .” (footnote omitted)); see also John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 251 n.235 (1993) (noting that there have been vastly more federal cases discussing severability clauses compared with the very few discussing inseverability clauses).

<sup>77</sup> See, e.g., *Alpha Portland Cement Co.*, 129 N.E. at 208 (“Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert.”); see also Nagle, *supra* note 76, at 251–52 (discussing congressional expectations of severability).

<sup>78</sup> For a general overview and criticism of this approach, see Friedman, *supra* note 2, at 907–13.

<sup>79</sup> 758 F.2d 769 (1st Cir. 1985).

<sup>80</sup> *Id.* at 773 (“[A] non-severability clause cannot ultimately bind a court, it establishes a presumption of non-severability.” (citing *INS v. Chadha*, 462 U.S. 919 (1983))).

<sup>81</sup> 684 P.2d 180, 184 (Colo. 1984) (“The special unseverability clause . . . is not conclusive as to legislative intent. It gives rise only to a presumption that, if the unconstitutional

The U.S. Supreme Court, by contrast, has largely managed to avoid in-depth discussion of the deference that should be afforded inseverability clauses. In *Zobel v. Williams*, the Court discussed an inseverability clause in dicta:

Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion. Here, we need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid . . . .<sup>82</sup>

In *Zobel*, the court invalidated a scheme that paid dividends from a state mineral fund to state residents in an amount proportionate to each resident's duration of residency.<sup>83</sup> The Court held that feature—the differential based on the duration of residency—to be unconstitutional.<sup>84</sup> Despite the language quoted above, the Court remanded the severability question to the Alaska courts.<sup>85</sup>

## B. Theoretical Challenges

Israel Friedman convincingly argues that inseverability clauses are fundamentally different from severability clauses and that, as such, courts should not treat them similarly, let alone as “mirror images” of each other.<sup>86</sup> Severability clauses are common, so much so that scholars and legislators alike refer to them as “boilerplate.”<sup>87</sup> They are hardly negotiated, but rather are inserted into complex bills as a perfunctory matter to preserve the tree when a bough here or there breaks. Inseverability clauses, by contrast, are exceptional and are the product of heavy negotiation.<sup>88</sup> They often reflect a jockeying of position among competing interest groups and political factions, the natural product of legislative logrolling. As such, Friedman argues, they represent a more forceful expression of legislative intent and thus should not be treated as a mere rebuttable presumption but as strictly binding.<sup>89</sup>

Along the same lines, Friedman argues that amidst this self-interested chaos, inseverability clauses serve as a valuable tool to reach leg-

---

parts of an Act were eliminated, the legislature would not have been satisfied with what remained.” (citations omitted)).

<sup>82</sup> *Zobel v. Williams*, 457 U.S. 55, 64–65 (1982) (citations omitted).

<sup>83</sup> *Id.* at 56.

<sup>84</sup> *Id.* at 65.

<sup>85</sup> *Id.*

<sup>86</sup> See Friedman, *supra* note 2, at 907–13.

<sup>87</sup> *Id.* at 910.

<sup>88</sup> *Id.* at 910–13.

<sup>89</sup> See *id.* at 913–18.

islative compromise.<sup>90</sup> In contract negotiations, parties frequently manifest an intent that some term or other is so essential, so material, that it is inseverable from the rest. Similarly, inseverability clauses function as insurance for legislators negotiating a legislative deal, ensuring the survival of the compromise such that one party does not enjoy their benefit of the bargain while the other is deprived by judicial invalidation.<sup>91</sup>

However, there must be some limits on the use of inseverability clauses, and on the broader class of fallback law in general, because it is not hard to imagine how the clauses might be used as coercive tools.<sup>92</sup> For example, suppose that the Patient Protection and Affordable Care Act (PPACA) had included a provision stating that if any part of the act shall be found invalid, all provisions in the Code relating to health—including those establishing the Department of Health and Human Services, Medicare, and Medicaid—are thereby repealed.<sup>93</sup> It would be hard not to infer that Congress had intended to coerce courts into upholding the PPACA and did not really want all health legislation repealed.

Intuitively, there is something problematic about legislatures coercing courts in this way. However, a thoughtful analysis reveals something of a paradox. In our example, if Congress had instead announced its intention to repeal all health laws in the event the courts invalidated the PPACA, it is difficult to imagine a constitutional problem. Congress could, acting within the powers vested in it by the Constitution, repeal all federal health laws for any number of reasons, or no reason at all. However, such a repeal would have to survive political blowback directed at Congress as well as a potential presidential veto. So the threat itself is not the problem; rather, it is the aspect of making the threat self-executing that gives us pause, and for good reason. Making the consequence self-executing forces the judiciary to suffer the political backlash for exercising its sound constitutional judgment. It also obviates the necessity for Congress to muster the political will to follow through on its threat and for the President to sign the bill into law.

---

<sup>90</sup> *Id.* at 914–17.

<sup>91</sup> *See id.*

<sup>92</sup> *See generally* Dorf, *supra* note 57, at 327–42 (exploring the use of fallbacks “as a means of coercing courts into resolving close constitutional questions in favor of the challenged legislation” and proposing several germaneness tests to detect coercive fallbacks); Kameny, *supra* note 5, at 997–1000, 1016–28 (identifying subtypes of coercive inseverability clauses and proposing a good faith test rooted in nondelegation principles to detect coercive inseverability clauses).

<sup>93</sup> *See* Dorf, *supra* note 57, at 333–36 (providing an in-depth analysis of a similar hypothetical coercive fallback).

Fred Kameny proposes two illegitimate types of inseverability clauses.<sup>94</sup> First, “in terrorem clauses” are used when a legislature wishes to coerce a reviewing court into upholding a suspect provision by making the consequences of total invalidation too severe to countenance.<sup>95</sup> Our example above with the PPACA is an example of this type of coercive inseverability clause. Kameny’s second type of illegitimate inseverability clauses, “poison-pill clauses,” refers to an inseverability clause inserted by legislators who actually oppose a statute, expect that it is at least partially unconstitutional, and hope that a court will exercise its duty, triggering the inseverability clause and invalidating the entire act.<sup>96</sup>

Inseverability clauses can arguably serve proper purposes.<sup>97</sup> For instance, a legislature might use an inseverability clause if it fears that partial judicial invalidation would leave a law unworkable. Alternately, the legislature might fear that partial invalidation would leave a law that it would not have adopted absent the invalid portion.

Nevertheless, inseverability clauses present problems independent of improper legislative motive or purpose. For example, regardless of their underlying motive, they limit judicial power and discretion in a way that severability clauses do not. Severability clauses merely express the legislature’s intent to save whatever part of the statute can be saved in the event of judicial invalidation. They do not purport to deprive courts of their discretion to invalidate the entire statute—a power inherent in the power of judicial review. Inseverability clauses, by contrast, instruct the court to invalidate the entire statute when a part of it is problematic, without regard to the relationship between the invalid portion and the lawful remainder. This feature may render some inseverability clauses unconstitutional under principles of nondelegation and separation of powers.<sup>98</sup>

### C. Practical Challenges

There are a number of practical problems often left unresolved by the drafters of inseverability clauses.<sup>99</sup> Suppose a legislature enacts a statute with a clause that reads: “If any part of *X* shall be adjudged by a court to be invalid, then the law shall thereafter be *Y*.” First, individuals affected by this statute would face difficulty in structuring their affairs without assurance of whether *X* or *Y* will be the law going for-

---

<sup>94</sup> Kameny, *supra* note 5, at 1000–01 (introducing these subtypes of coercive inseverability clauses).

<sup>95</sup> *Id.* at 1001.

<sup>96</sup> *Id.* at 1001–02.

<sup>97</sup> *Id.* at 1000.

<sup>98</sup> *Id.* at 1003.

<sup>99</sup> For a discussion of similar issues regarding fallback law in general, see Dorf, *supra* note 57, at 352–69.

ward. An individual who acted on the assumption that *X* was valid prior to a ruling triggering a reversion to *Y* might face legal consequences that a court would then have to unravel.<sup>100</sup>

Second, inseverability clauses frequently fail to specify *which* court's decision to invalidate will be sufficient to trigger the clause.<sup>101</sup> In the case of a state statute *X*, if a federal court strikes down part of *X* on state law grounds, does this revert the law to *Y* even though a state court might hold otherwise in the future? If a trial court strikes down *X*, does this revert the law to *Y* immediately even though appeals might be forthcoming? If it does not revert the law to *Y* immediately, are the constitutional portions of *X* binding upon individuals and officials pending the exhaustion of appeals? Can a trial court's decision to invalidate *X*, triggering reversion to *Y*, affect persons not parties to the case, even though trial decisions are not binding precedent and even though due process prohibits trial decisions from having preclusive effect on nonparties?<sup>102</sup>

Third, if a court holds that part of *X* is unconstitutional only as applied, should that holding trigger reversion to *Y*? If so, would this not overshoot legislative intent by reverting to the second-best law, *Y*, even in cases in which *X* is constitutional?

Fourth, suppose that a plaintiff challenges an unconstitutional provision of *X* and alleges an injury, but reversion to *Y* would harm any plaintiff so injured even more. To have Article III standing, a plaintiff's injury must be redressable by a favorable ruling.<sup>103</sup> In this scenario, it is not clear how such a plaintiff could meet the requirement.

#### D. Challenges Posed by the Inseverability Clause in New York's Marriage Equality Act

Each of the theoretical and practical challenges outlined above finds some expression in the Marriage Equality Act's inseverability clause. A full exploration of these difficulties is beyond the scope of

---

<sup>100</sup> See *id.* at 355–56.

<sup>101</sup> See *id.* at 356–58. The inseverability clause in New York's Marriage Equality Act is one such clause. See Act of June 24, 2011, ch. 96, 2011 N.Y. Sess. Laws 751, 752 (McKinney).

<sup>102</sup> See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) (internal quotation marks omitted)).

<sup>103</sup> E.g., *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (“[A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.” (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992))).

this Note, but a sketch of their application to the New York statute seems warranted; many are explored further in Part IV.

On the one hand, the Marriage Equality Act's inseverability clause appears to be the result of a thorough negotiating process rather than a mere boilerplate insertion.<sup>104</sup> The record discloses little to indicate that any senator *intended* the clause to function as an "in terrorem clause" or a "poison-pill clause."<sup>105</sup> And it is true that the New York legislature might not have passed the Act without the inclusion of religious exemptions and the inseverability clause.<sup>106</sup>

Nevertheless, the inseverability clause strips courts of the ability to exercise a constitutional judgment on the religious exemptions and at the same time leave same-sex marriage intact. A court must choose between upholding the religious exemptions or voiding same-sex marriage. A judge choosing the latter course would bear the political backlash for effectively repealing same-sex marriage—blame that would rightfully belong with the legislature.<sup>107</sup> Arguably, this is "analogous to the power of robbery victims to choose between giving up their money and giving up their lives."<sup>108</sup> There is a very real danger that a judge faced with this choice would eschew exercising constitutional judgment regarding the religious exemptions. Therefore, any judicial response should account for the fact that an inseverability clause may ordain a problematic coercive effect even in the absence of coercive intent.

<sup>104</sup> See *supra* notes 11–17 and accompanying text.

<sup>105</sup> But see *Skelos, supra* note 17 ("You could have a federal judge come in, knock out all the religious protections and . . . still have the gay marriage. So we're working to protect religious protections to make sure that they are solid and that they will stand.").

<sup>106</sup> See Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 26, 2011, at A20.

<sup>107</sup> One might ask what form this political backlash could take against an unelected judiciary. We might begin by remembering the admonition of Alexander Hamilton that the judiciary is "the least dangerous" of the three branches, because it holds "no influence over either the sword or the purse." THE FEDERALIST No. 78 (Alexander Hamilton) (McLean ed. 1788). Justice O'Connor expanded on this point in *Planned Parenthood of South-eastern Pennsylvania v. Casey*: "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." 505 U.S. 833, 865 (1992). This function, as Alexander Bickel notes, includes not only the power to check unconstitutional legislative acts but also to legitimate constitutional ones. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 29 (2d ed. 1986). By forcing a court to take the statute as a whole or reject it entirely, an inseverability clause deprives it of the ability to tailor the "substance and perception" evoked by its opinions in a way that safeguards its legitimacy in the eyes of the public. It is forced to choose between legitimating the unconstitutional and striking down the constitutional. While lawyers may understand a theoretical basis for forcing this choice, many lay observers will doubtlessly perceive only the end result. This perception can only serve to chip away at the judiciary's continued legitimacy as the public witnesses the Court striking down the clearly legitimate or letting stand the clearly unconstitutional.

<sup>108</sup> Kameny, *supra* note 5, at 1021.

IV  
POTENTIAL JUDICIAL RESPONSES TO A TRIGGERED  
INSEVERABILITY CLAUSE

A. The Plain Meaning Approach

The most obvious response to a triggered inseverability clause is to simply apply its plain meaning.<sup>109</sup> In the case of New York's Marriage Equality Act, a judge might easily conclude that inseverability clauses express the unambiguous intent of the legislature and that a court should always honor that intent.

There is significant theoretical weight to this position. Courts have traditionally treated severability clauses as mere rebuttable presumptions.<sup>110</sup> However, legislatures often insert severability clauses as "boilerplate" in an effort to preserve the tree even if a few branches are pruned.<sup>111</sup> In contrast, inseverability clauses are rare, and legislators typically negotiate them heavily,<sup>112</sup> a fact exemplified by the negotiations leading to the passage of the Marriage Equality Act.<sup>113</sup> Thus, the inseverability clause in the Marriage Equality Act arguably presents a more forceful expression of legislative intent that a judge should hesitate to scrutinize.

Moreover, inseverability clauses arguably serve a useful and legitimate function in facilitating the legislative bargaining process.<sup>114</sup> In the case of the Marriage Equality Act, passage of the final bill required several Republican votes.<sup>115</sup> Available evidence raises the inference that one or more of those necessary Republican senators extracted the inseverability clause as a necessary condition of their vote in an effort to protect their benefit of the bargain—namely, the religious exemptions.<sup>116</sup> This narrative comports with the approach of public choice theorists who view statutes as the result of multiple interested groups asserting their self-interests through lobbying and legislative harangu-

---

<sup>109</sup> See generally Friedman, *supra* note 2, at 917–23 (advocating that inseverability clauses be scrupulously honored by distinguishing them from severability clauses); Shumsky, *supra* note 76 at 245–71 (arguing that both severability and inseverability clauses be enforced according to their plain meaning).

<sup>110</sup> See *supra* notes 61–73 and accompanying text.

<sup>111</sup> Friedman, *supra* note 2, at 910; Shumsky, *supra* note 76, at 246.

<sup>112</sup> Friedman, *supra* note 2, at 911–12 ("Inseverability clauses, on the other hand, are anything but boilerplate. . . . [T]hey are strategically designed to ensure that the legislation does not exist without its most fundamental provisions." (footnote omitted)); Shumsky, *supra* note 76, at 267 ("[N]one of the arguments for disregarding severability clauses applies in the inseverability context. Such clauses are far from boilerplate, suggesting that Congress really does know what it is doing when it includes such a directive.").

<sup>113</sup> See *supra* notes 11–17 and accompanying text.

<sup>114</sup> See Friedman, *supra* note 2, 914–17.

<sup>115</sup> See Barbaro, *supra* note 9 (describing Governor Cuomo's efforts to "win over the deciding Senate Republicans").

<sup>116</sup> See *supra* notes 16–17 and accompanying text.

ing.<sup>117</sup> Thus, the Marriage Equality Act can be viewed as a contract between Governor Cuomo and Democratic supporters of marriage equality on the one hand and a few Republicans who were willing to switch sides only if religious interests could be sufficiently protected on the other.<sup>118</sup> In this view, the inseverability clause may have served a vital enforcement function, without which an optimal compromise might not have been possible.<sup>119</sup> In other words, the clause served to ease the minds of those Republican senators whose late-hour defection secured final passage of the bill.<sup>120</sup> Thus, any criticism of inseverability must contend with the argument that without the availability of the inseverability clause as a drafting tool, same-sex marriage might have remained a pipe dream in New York.

Furthermore, this plain meaning approach would avoid the necessity of looking beyond the statute's text to divine legislative history or intent, which is a problematic enterprise in light of a frequently sparse record. The Marriage Equality Act exemplifies this problem. Other than the legislative intent section of the session law<sup>121</sup> and statements made by some senators as they were casting their votes,<sup>122</sup> there is little publicly available information on the details of the negotiating process.<sup>123</sup>

The legislative intent section of the final session law includes the following language:

Marriage is a fundamental human right. Same-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a stronger society. For the welfare of the community and in fairness to all New Yorkers, this act formally recognizes otherwise-valid marriages without regard to whether the parties are of the same or different sex.<sup>124</sup>

How could a court begin to reconcile this language with the clear meaning of the inseverability clause? If marriage—including same-sex marriage—is a “fundamental human right,”<sup>125</sup> then how can it be the intent of the legislature to repeal it upon invalidation of even a minor provision of the bill?

<sup>117</sup> See Friedman, *supra* note 2, 918.

<sup>118</sup> See *id.*; Barbaro, *supra* note 9.

<sup>119</sup> See Hakim, *supra* note 106.

<sup>120</sup> See *supra* notes 16–17 and accompanying text.

<sup>121</sup> Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws 749, 749 (McKinney).

<sup>122</sup> See, e.g., *supra* notes 10, 18, 20; *infra* note 143.

<sup>123</sup> Indeed, the negotiating process took place largely behind closed doors. Opponents of same-sex marriage have even challenged the propriety of these closed-door meetings under New York's open meetings law. See N.Y. PUB. OFF. LAW §§ 100–11 (McKinney 2010); Kaplan, *supra* note 22.

<sup>124</sup> Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws 749, 749 (McKinney).

<sup>125</sup> *Id.*

On the other hand, the Senate Majority Leader who allowed a floor vote on the bill and at least one key senator voting for passage explicitly cited the inseverability clause as a crucial component to the final bill.<sup>126</sup> So, which intent matters in this inquiry? That of the legislature as stated in the statute or that of the few Republican senators whose actions were the marginal lynchpin to securing final passage? Those two intents appear to conflict, and inviting courts to scrutinize the “legislative intent” behind inseverability ignores the possibility of conflicting interests engaging in bargaining as outlined above. It may also undermine the bargaining process in future legislation by reducing the likelihood of useful compromise. Perhaps even more troubling, it might encourage judges to credit the intent they prefer best on normative, rather than principled, grounds.

### B. The “Mirror Image” Approach

The Supreme Court has treated severability clauses merely as rebuttable presumptions in favor of severing. Even when a severability clause is present, the Court asks whether “the Legislature would not have enacted those provisions [of the statute] which are within its power, independently of that which is not”<sup>127</sup> and whether the valid remainder would function as a workable law.<sup>128</sup> A few lower courts have applied the logical inverse of this test to inseverability clauses, treating them merely as rebuttable presumptions that “if the unconstitutional parts of an Act were eliminated, the legislature would not have been satisfied with what remained.”<sup>129</sup> Extrinsic evidence of legislative intent, along with inquiries into whether the effects of entire invalidation would comport with that intent, can thus overcome the presumption of inseverability.<sup>130</sup>

This “mirror image” approach has the advantage of avoiding a significant practical problem with the plain meaning approach, which can lead to an absurd result: a relatively minor triggering condition might require a court to invalidate an entire statute of great social worth. For example, a court might find the Marriage Equality Act’s religious exemptions unconstitutional as disparately applied to a racist

---

<sup>126</sup> See *supra* note 17 and accompanying text.

<sup>127</sup> *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam)).

<sup>128</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919, 934–35 (1983) (finding that § 244 of the Immigration and Nationality Act is “‘fully operative’ and workable administrative machinery” without the unconstitutional portion of the statute).

<sup>129</sup> *Stiens v. Fire & Police Pension Ass’n*, 684 P.2d 180, 184 (Colo. 1984) (citing *City of Lakewood v. Colfax Unlimited Ass’n*, 634 P.2d 52, 70 (Colo. 1981)); see also *Biszko v. RIHT Fin. Corp.*, 758 F.2d 769, 773 (1st Cir. 1985) (“Although, as the district court correctly noted, a non-severability clause cannot ultimately bind a court, it establishes a presumption of non-severability.” (citations omitted)).

<sup>130</sup> See *Stiens*, 684 P.2d at 184.

church compared to an anti-same-sex marriage church as hypothesized in Part II, thus invalidating the whole bill for a reason likely not contemplated by the drafters of the inseverability clause. If the court facing such a challenge were to apply the mirror image approach, it would ask whether the legislature would have intended for a finding of unconstitutionality under these circumstances to effect repeal of same-sex marriage in New York.

One proponent of the plain meaning approach argues that the prospect of an “absurd result” actually serves a valuable function by forcing legislatures to draft statutes containing inseverability clauses with greater care and specificity.<sup>131</sup> However, this judicial admonishment function would afford little solace to the tens of thousands of couples whose marriages might be dissolved in the process. Furthermore, a more searching inquiry into inseverability clauses might encourage legislators to draft statutes more faithfully observant of the limits imposed by the constitutions they have sworn to uphold rather than using potentially unconstitutional provisions as bargaining chips.

### C. The Germaneness Approach

Both the plain meaning and “mirror image” approaches fail to account for the prospect that a legislature might adopt an inseverability clause for improper—even unconstitutional—reasons. Recognizing this possibility, scholars have advanced alternative approaches aimed at distinguishing legitimate uses of inseverability clauses from illegitimate uses.

Michael Dorf has suggested that courts might use a germaneness test to weed out impermissible inseverability clauses.<sup>132</sup> He posits this test by analogy to the requirement that conditions Congress imposes on state funding must be germane to the purpose of the funded programs.<sup>133</sup> By scrutinizing the logical relationship between the legislative goal and the means used to achieve it, we “can ‘smoke out’ illegitimate motives”<sup>134</sup> in a manner similar to the function of heightened scrutiny in other areas of constitutional doctrine. Proceeding from this view, a court should sever the unconstitutional portion if a lack of germaneness seems to indicate that the legislature inserted the inseverability clause for coercive or otherwise illegitimate reasons.

Professor Dorf, in fact, proposed two different formulations of this germaneness test. The first he modeled on the conditional federal-spending case *South Dakota v. Dole*,<sup>135</sup> in which the Supreme Court

---

<sup>131</sup> See Friedman, *supra* note 2, at 922–23.

<sup>132</sup> See Dorf, *supra* note 57, at 333–39.

<sup>133</sup> *Id.* at 334–35.

<sup>134</sup> *Id.* at 335.

<sup>135</sup> 483 U.S. 203 (1987).

held that conditioning federal highway funds on the adoption by states of a drinking age of twenty-one “is directly related to one of the main purposes for which highway funds are expended—safe interstate travel,”<sup>136</sup> and thus was germane to that purpose.<sup>137</sup> Applied to an inseverability clause, we would ask whether a condition imposed via an inseverability clause is related to the purposes for which the conditioned provision was enacted.

His second proposed test is inspired by the scholarship of Lynn Baker<sup>138</sup> on the same federal grants issue examined in *Dole*. Professor Baker argued for an approach that would permit Congress to impose requirements on how states spend grant money but would prohibit Congress from conditioning grants entirely upon the fulfillment of some external criterion, even if that criterion would advance a purpose similar to the purpose the spending was enacted to advance.<sup>139</sup> Adapted to the context of fallback provisions, Professor Dorf formulated this test as follows:

Could Congress plausibly be understood to have intended the fallback provision either to substitute for the original provision, or otherwise to take account of a contingency created by the original provision’s invalidation? If the answer is yes, then the fallback should be deemed germane. If the answer is no, a court should deem the fallback nongermane, and thus invalid.<sup>140</sup>

Professor Dorf ultimately advocated for this second test, concluding that the first test would be too permissive—in other words, too easy for legislatures to circumvent through creative drafting.<sup>141</sup>

However, as applied to the inseverability clause and the religious exemptions in the Marriage Equality Act, the first test would appear to counsel invalidating the clause as nongermane, while the second test would advise upholding the clause. The first test would ask whether conditioning same-sex marriage on the existence of religious exemptions is germane to the purposes for which the legislature enacted same-sex marriage. By its terms, the marriage statute’s avowed purpose was to extend marriage to same-sex couples because “[m]arriage is a fundamental human right,” and thus “[s]ame-sex couples should have the same access as others to the . . . benefits of civil marriage” because “[s]table family relationships help build a stronger society.”<sup>142</sup>

---

<sup>136</sup> *Id.* at 208 (citation omitted).

<sup>137</sup> See Dorf, *supra* note 57, at 334–35.

<sup>138</sup> See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1962–63 (1995); Dorf, *supra* note 57, at 337–38.

<sup>139</sup> See Baker, *supra* note 138, 1916–18.

<sup>140</sup> See Dorf, *supra* note 57, at 338.

<sup>141</sup> See *id.* at 336–39.

<sup>142</sup> Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws 749, 749 (McKinney).

These legislative goals are in no way aligned with the purposes behind conditioning same-sex marriage on religious exemptions. One of the Republicans voting “yes” characterized that purpose as ensuring that “religious aspects and beliefs are protected, as well as for not-for-profits.”<sup>143</sup> Indeed, to the extent that the “benefits of civil marriage”<sup>144</sup> may devolve from exempted religious organizations, these purposes seem directly opposed. Thus, the inseverability clause at issue would fail the first formulation of the germaneness test.

The second germaneness test would first ask whether the legislature could plausibly have intended the effective repeal of same-sex marriage in the event a court finds the religious exemptions invalid. The test would alternatively ask whether the legislature intended the effective repeal of same-sex marriage to take account of a contingency created by the invalidation of the religious exemptions. The answer to both questions is “yes.” Regardless of whether the senators who pushed for the inseverability clause imagined it would ever be triggered, their statements at the time of the vote suggest they intended it to be fully operable in that event.<sup>145</sup> Moreover, the contingency they sought to avoid was precisely the scenario of a court invalidating the religious exemptions while leaving same-sex marriage intact.<sup>146</sup>

The two tests supply contrary results because they ask different questions. The first test essentially aims to detect whether an inseverability clause has a coercive effect while the second aims to detect whether the legislature drafting the inseverability clause harbored a coercive purpose. Professor Dorf’s concern was that it would be “all too easy for a legislature to fashion a fallback that is intended to be coercive but nonetheless satisfies” the first test.<sup>147</sup> However, his account seems to overlook the problem of a fallback provision that ordains a coercive effect despite the drafters’ innocent purpose.

#### D. The Good Faith Approach

Fred Kameny has proposed that courts should refuse to honor an inseverability clause that a legislature adopts in bad faith.<sup>148</sup> Kameny formulated his test as follows:

To apply the standard, one must determine whether a legislature that enacted an inseverable statute was (permissibly) making a policy judgment that no statute at all is better than an emasculated

---

<sup>143</sup> N.Y. State S., Reg. Sess., OPEN LEGIS. (June 24, 2011), <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011> (session transcript) (statement of Sen. Mark Grisanti).

<sup>144</sup> Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws 749, 749 (McKinney).

<sup>145</sup> See *supra* note 17 and accompanying text.

<sup>146</sup> *Id.*

<sup>147</sup> Dorf, *supra* note 57, at 337.

<sup>148</sup> See Kameny, *supra* note 5, at 1026–27.

statute, or rather (impermissibly) strong-arming the judiciary . . . or engaging in legislative sabotage.<sup>149</sup>

To circumvent the problem of whose bad faith controls, Kameny proposed a “but for” test: “without the presence of an improper motive (*i.e.*, to enact a bill without having made a policy judgment), the bill would not have passed.”<sup>150</sup> This approach is similar to Professor Dorf’s second germaneness test discussed above. It relies essentially on an improper purpose or motive and does not address the dangers of an innocently drafted inseverability clause that nevertheless operates to coerce the courts.

The inseverability clause in the Marriage Equality Act satisfies this test for the same reason it satisfies Professor Dorf’s second germaneness test. The New York legislature engaged in a protracted bargaining process to achieve the enactment of same-sex marriage, and that enactment required both that the recalcitrant Republican majority allow the vote to go forward and that a few Republicans vote “yes.”<sup>151</sup> Those Republicans who did defect emphasized the importance of the exemptions and the inseverability clause,<sup>152</sup> reflecting a policy judgment that if same-sex marriage is to be enacted, it should only be enacted with expanded religious exemptions. There is little indication that those senators harbored an improper motive—in other words, to coerce the courts into upholding the religious exemptions if they are challenged.

### CONCLUSION

Applying the plain meaning of an inseverability clause fails in several respects. The plain meaning approach neglects to account for the insuperable practical difficulties discussed in Part III.C—that the text of even an artfully drafted inseverability clause will inevitably leave unresolved. It also fails to afford proper solicitude to the constitutional prerogatives of the judiciary by affording no remedy for coercive inseverability clauses. Insofar as public choice theorists would like to view the legislative process as a contractual arrangement between competing interest groups, they fail to grasp the full implications of the analogy.

In the case of the Marriage Equality Act, the competing interests at work in the New York legislature did reach a bargain *they* found agreeable, but by inserting the inseverability clause, they externalized the political costs of their potentially unconstitutional compact, con-

---

<sup>149</sup> *Id.* at 1022.

<sup>150</sup> *Id.* at 1026.

<sup>151</sup> See *supra* notes 11–17 and accompanying text.

<sup>152</sup> See *supra* note 17 and accompanying text.

scripting the judiciary as an unwilling partner. In doing so, the legislature impermissibly encroached upon a coequal branch.

A method of detecting impermissible inseverability clauses by requiring good faith or a germane legislative purpose is insufficient for similar reasons. The invasion of the judicial prerogative to exercise independent constitutional judgment is no less dangerous when the trespass is unintentional.

An optimal inquiry would test for coercive effect, not coercive purpose. Professor Dorf's first germaneness test is a promising approach. This test would refuse to allow legislatures to impose a condition on an enactment that bears no relation to the purpose of that enactment. In so doing, the test prevents the legislature from requiring the judiciary to bear the political costs of punishing interest group *A* for interest group *B*'s unconstitutional demands. Such a requirement is damaging to the judiciary whether or not interest group *B* made those demands in good faith.

If the unavailability of the bargain reached in New York would have resulted in a delay in the enactment of same-sex marriage, then so be it. In the long run, it is normatively, politically, and constitutionally preferable for the legislature to bear the political costs of its own shady dealing. In the absence of coercive inseverability, legislative blocs would still trade votes for amendments; they would simply have to find another way to induce mutual trust besides foisting dilemmas of their own making upon the judiciary.