

Summer 2014

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### Recommended Citation

Jonathon Whitfield, *Two Tests of Severance: Procedural and Substantive Constitutional Violations and the Legislative Process in Missouri*, 79 Mo. L. REV. (2014)

Available at: <https://scholarship.law.missouri.edu/mlr/vol79/iss3/10>

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## NOTE

# Two Tests of Severance: Procedural and Substantive Constitutional Violations and the Legislative Process in Missouri

*Missouri Roundtable for Life, Inc. v. State of Missouri*, 396 S.W.3d 348 (Mo. 2013) (en banc).

JONATHAN WHITFIELD\*

### I. INTRODUCTION

Legislation is an inexact process. John Godfrey Saxe noted that “[l]aws . . . like sausages, cease to inspire respect in proportion as we know how they are made.”<sup>1</sup> In Missouri, laws are created in the General Assembly.<sup>2</sup> First, a bill is introduced in either the House or the Senate.<sup>3</sup> Second, once a bill passes through the required legislative procedures, it is presented to the Governor, who will sign the bill into law, veto the bill and send it back to the General Assembly for a potential override vote, not sign the bill, or veto line-items in an appropriations bill.<sup>4</sup> In two of the four options, the bill becomes a law and is made a part of the Revised Statutes of Missouri.<sup>5</sup>

But some bills may become laws even when the constitutional rules governing the legislative process were not followed. Such bills are usually challenged on the grounds that they are unconstitutional, but not because of their content; rather, they are challenged because they violate constitutional mandates like the single-subject rule, the clear title rule, or other procedural rules.<sup>6</sup> In Missouri, constitutional challenges are heard by the Supreme Court

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1. *An Impeachment Trial*, MICH. U. CHRON., Mar. 27, 1869, at 4, available at [books.google.com/books?id=cEHiAAAAMAAJ&pg=PA164#v=onepage&q&f=false](http://books.google.com/books?id=cEHiAAAAMAAJ&pg=PA164#v=onepage&q&f=false).

2. See MO. CONST. art. III, § 21.

3. Appropriations bills are traditionally introduced in the House. See *The Legislative Process in Missouri*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/content.aspx?info=/info/howbill.htm> (last visited Aug. 3, 2014).

4. *Id.*

5. Appropriations bills, once enacted and passed, are not placed in the Missouri Revised Statutes. MO. REV. STAT. § 3.040 (2012).

6. See generally Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and*

of Missouri.<sup>7</sup> When faced with a procedural rule violation, a court has the option of severing the unconstitutional portions of the bill, letting the constitutional portions of the bill remain law.<sup>8</sup>

*Missouri Roundtable for Life, Inc. v. State of Missouri* (“*Missouri Roundtable*”) concerned a challenge to the Missouri Science and Innovation Reinvestment Act (“MOSIRA”)<sup>9</sup> based on a procedural constitutional violation of the single-subject rule,<sup>10</sup> which is a type of constitutional limitation placed on the subject matters to be addressed by a bill.<sup>11</sup> On August 22, 2011, pursuant to Article IV, Section 9 of the Missouri Constitution, Governor Jeremiah Nixon called a special session of the Missouri General Assembly to address MOSIRA.<sup>12</sup> According to the Governor’s proclamation, MOSIRA would have authorized the Missouri Technology Corporation to provide funding to science- and innovation-related businesses.<sup>13</sup> The Missouri Technology Corporation “is a public-private partnership created by the Missouri General Assembly to promote entrepreneurship and foster the growth of new and emerging high-tech companies.”<sup>14</sup> The Missouri Senate codified MOSIRA in Senate Bill No. 7 (“S.B. 7”), titled “AN ACT to repeal sections [certain sections of RSMo], and To enact in lieu thereof fourteen new sections relating to science and innovation, with a contingent effective date.”<sup>15</sup> In addition to MOSIRA, the General Assembly enacted legislation dealing with tax credit reform, streamlining state training programs, developing an international air cargo hub, building high-tech data centers, and attracting amateur sporting events.<sup>16</sup> These provisions were enacted in Senate Bill No. 8 (“S.B. 8”).<sup>17</sup>

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*Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103 (2001) (explaining procedural constitutional violations using Missouri case law).

7. See MO. CONST. art. V, § 3 (“The supreme court shall have exclusive appellate jurisdiction in all cases involving . . . a statute or provision of the constitution of this state . . .”).

8. See MO. REV. STAT § 1.140 (2012).

9. S.B. 7, 96th Gen. Assemb., 1st Spec. Sess. (Mo. 2011) [hereinafter S.B. 7], available at <http://www.senate.mo.gov/11info/pdf-bill/S1/tat/SB7.pdf>.

10. *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 350 (Mo. 2013) (en banc).

11. See MO. CONST. art. III, § 23.

12. See S. JOURNAL, 96th Gen. Assemb., 1st Spec. Sess., at 1-3 (Mo. 2011) [hereinafter FIRST DAY JOURNAL], available at [www.senate.mo.gov/11info/Journals/SDay0109061-14.pdf](http://www.senate.mo.gov/11info/Journals/SDay0109061-14.pdf).

13. This funding would have been through “grants, loans and investments” resulting from increases in income taxes generated by employees of new or existing science- and innovation-related businesses. See *id.* at 2.

14. *About Missouri Technology Corporation*, MO. TECH. CORP., <http://www.missouritechnology.com/about-us> (last visited Sept. 12, 2013).

15. See S.B. 7, *supra* note 9, at 1.

16. See FIRST DAY JOURNAL, *supra* note 12, at 2.

17. See SB 8: *Modifies Provisions of Missouri Tax Credit Programs in Accordance With Recommendations Made by the Missouri Tax Credit Review Commission*

S.B. 7 was the only bill passed during the special session,<sup>18</sup> and it contained two sections.<sup>19</sup> Section A addressed the substantive provisions of MOSIRA,<sup>20</sup> and Section B contained a contingency clause that conditioned the effectiveness of S.B. 7 on the Governor signing S.B. 8 into law.<sup>21</sup> On October 21, 2011, Governor Nixon signed S.B. 7 into law.<sup>22</sup> But, unlike S.B. 7, S.B. 8 was not signed into law.<sup>23</sup> The contingency clause in S.B. 7 and the failed passage of S.B. 8 provided the necessary legal grounds for interest groups to challenge the bill.<sup>24</sup>

This Note argues that severance is justified in two situations. First, severance is justified where authorized by the legislature. Alternatively, severance is justified when innocent third parties rely on the passage and implementation of a law in good faith, and invalidation of the law would have collateral effects that outweigh the need to ensure consistent legislative practice. Part II of this Note analyzes the facts and holding of *Missouri Roundtable*. Part III explores the development of severance as a remedy for procedural constitutional violations, particularly in the context of the single-subject rule. Part IV examines the court's rationale in *Missouri Roundtable* and analyzes the concurrence by Judge Zel Fischer. Lastly, Part V argues how single-subject violations invalidate the entirety of a bill, except in situations where other interests outweigh the complete invalidation of a law on an equitable, case-by-case basis.

Because severance is justified in some circumstances, this Note concludes that severance may be carefully applied to procedurally unconstitutional legislation and, in so doing, can restore respect for laws in proportion to our knowledge of "how they are made."<sup>25</sup>

## II. FACTS AND HOLDING

In *Missouri Roundtable for Life, Inc. v. State of Missouri*, the Supreme Court of Missouri addressed whether the legislature may condition the effectiveness of a section of a law on the future passage of another law.<sup>26</sup> Mis-

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*Report*, MO. SENATE (Oct. 25, 2011), [www.senate.mo.gov/11info/BTS\\_Web/Bill.aspx?SessionType=S1&BillID=4696928](http://www.senate.mo.gov/11info/BTS_Web/Bill.aspx?SessionType=S1&BillID=4696928) [hereinafter *S.B. 8*].

18. *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 350 n.1 (Mo. 2013) (en banc).

19. *See S.B. 7, supra* note 9, at 1, 26.

20. *Id.* at 1-25.

21. *Id.* at 26.

22. *See SB 7: Establishes the Missouri Science and Innovation Reinvestment Act*, MO. SENATE (Oct. 25, 2011), [http://www.senate.mo.gov/11info/BTS\\_Web/Bill.aspx?SessionType=S1&BillID=4696927](http://www.senate.mo.gov/11info/BTS_Web/Bill.aspx?SessionType=S1&BillID=4696927).

23. *See S.B. 8, supra* note 17.

24. *See Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 350 (Mo. 2013) (en banc).

25. *An Impeachment Trial, supra* note 1.

26. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 351.

souri Roundtable for Life,<sup>27</sup> Missouri Right to Life,<sup>28</sup> and Lawyers for Life, Inc.<sup>29</sup> (collectively, “Roundtable”) are all pro-life interest organizations that include Missouri taxpayers as their officers and members.<sup>30</sup> In 2012, Roundtable filed suit in the Circuit Court of Cole County, seeking to enjoin S.B. 7 from taking effect and to reverse any actions already taken to execute its provisions.<sup>31</sup> In a press release, Missouri Round Table for Life stated that the organizations sought to enjoin S.B. 7 because of their belief that the General Assembly “refused to attach protective language to MOSIRA that [would prevent] Missouri taxpayer dollars from going to abortion, human cloning, and embryo experimentation.”<sup>32</sup> Roundtable also filed a motion for judgment on the pleadings based on two grounds: first, “Section B of S.B. 7 was a constitutional example of contingent legislation and that, by the plain terms of Section B, Section A was null and unenforceable”;<sup>33</sup> and second, “if the Circuit Court were to find Section B unconstitutional, Section B could not be severed from S.B. 7 because the record demonstrated that the General Assembly would not have passed S.B. 7 without the inclusion of Section B.”<sup>34</sup>

The Circuit Court of Cole County granted Roundtable’s motion based on the second argument, ruling that S.B. 7 violated the single-subject rule as codified in Article III, Section 23 of the Missouri Constitution.<sup>35</sup> The court specifically noted it was “convinced beyond a reasonable doubt” that the

27. Missouri Roundtable for Life is a nonprofit corporation “whose purposes include education and advocacy on behalf of human life, especially where misunderstanding or the lack of adequate legal protection threatens human life.” *About*, MO. ROUNDTABLE FOR LIFE, <http://www.missouriroundtable.org/about/> (last visited July 30, 2014).

28. Missouri Right to Life is a “state-wide organization which upholds and promotes the sanctity of all innocent human life . . . by providing education, by supporting legislation and programs that endorse that ideal, and by organizing citizens for effective results.” *Mission & Vision Statement*, MO. RIGHT TO LIFE, <http://missourilife.org/information/mission.html> (last visited July 30, 2014).

29. Lawyers for Life, Inc., is a “Missouri non-profit corporation . . . formed in 1974 for the purpose of education, research, and dissemination of information, relative to a human being’s right to life, from conception to death, and particularly to those matters relating to lawyers and the legal profession.” *Home*, LAWYERS FOR LIFE, <http://www.lawyersforlifeinc.org/> (last visited July 30, 2014).

30. Brief of Respondents at 4, *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348 (Mo. 2013) (en banc) (No. SC92455), 2012 WL 4425890, at \*4.

31. See *Missouri Roundtable For Life, Missouri Right to Life, and Missouri Citizens File Petition with Court; Seek Declaration That MOSIRA Bill Is Void*, MO. ROUNDTABLE FOR LIFE, <http://www.missouriroundtable.org/missouri-roundtable-for-life-missouri-right-to-life-and-missouri-citizens-file-petition-with-court-seek-declaration-that-mosira-bill-is-void/> (last visited July 30, 2014).

32. *Id.*

33. Brief of Respondents, *supra* note 30.

34. *Id.*

35. *Id.*

General Assembly would not have passed S.B. 7 without Section B.<sup>36</sup> The court further held that Section B could not be severed from S.B. 7.<sup>37</sup> Consequently, the court found S.B. 7 unconstitutional in its entirety.<sup>38</sup> The court enjoined any further implementation of S.B. 7 and ordered that actions already taken be reversed.<sup>39</sup>

The Missouri Attorney General's Office appealed the circuit court's judgment to the Supreme Court of Missouri.<sup>40</sup> The State of Missouri argued that S.B. 7 was unconstitutional insofar as it abridged the governor's constitutional authority to sign a bill into law and added a second subject to the bill.<sup>41</sup> The State also argued that Section B of S.B. 7 could be severed from the bill while Section A could stand.<sup>42</sup> Though Roundtable opposed the State, they also argued that S.B. 7 was unconstitutional.<sup>43</sup> However, Roundtable differed from the State's position by maintaining that Section B could not be severed from S.B. 7 and that the court should strike down the bill in its entirety.<sup>44</sup>

On appeal, the Supreme Court of Missouri agreed with the circuit court, holding that S.B. 7 was an unconstitutional violation of the single-subject rule.<sup>45</sup> The court reasoned that when a contingency clause conditions the passage of one bill upon the passage of another, and is included in the title of the initial bill, the initial bill violates the single-subject rule.<sup>46</sup> Accordingly, the court held that the contingency clause could not be severed from the initial bill due to its inclusion in the title of the bill.<sup>47</sup>

### III. LEGAL BACKGROUND

Three concepts form the doctrinal structure of *Missouri Roundtable*. The first is the concept of, and the different types of, unconstitutionally creat-

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36. *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 354 (Mo. 2013) (en banc).

37. *Id.* at 350.

38. *Id.*

39. *See id.*; *see also* Jo Mannies, *Judge Rules MOSIRA Law Unconstitutional*, ST. LOUIS BEACON (Feb. 22, 2012), [https://www.stlbeacon.org/#!/content/22734/mosira\\_022112](https://www.stlbeacon.org/#!/content/22734/mosira_022112).

40. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 349.

41. Brief of Appellants at 7-16, *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348 (Mo. 2013) (en banc) (No. SC92455), *available at* [http://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/c4763db796a45e3186257a3a006ac9ee/\\$FILE/SC92455\\_State\\_brief.pdf](http://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/c4763db796a45e3186257a3a006ac9ee/$FILE/SC92455_State_brief.pdf).

42. *Id.* at 16-23.

43. *See id.* at 6.

44. Brief of Respondents, *supra* note 30.

45. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 350.

46. *Id.* at 352-53.

47. *See id.* at 350.

ed laws.<sup>48</sup> The second is the single-subject rule.<sup>49</sup> As noted above, the single-subject rule is a type of constitutional limitation placed on the subject matters to be addressed by a bill.<sup>50</sup> The last is severability, which refers to the capability that courts have to strike unconstitutional parts of a law and let the remainder stand.<sup>51</sup>

### A. Types of Unconstitutional Laws

There are two types of unconstitutional legislation – legislation that violates procedural constitutional requirements and legislation that violates substantive constitutional requirements. Controls on the procedure of the legislative process are featured in most state constitutions.<sup>52</sup> These types of restrictions “regulate only the process by which legislation is enacted.”<sup>53</sup> Examples of *procedural* regulations on legislation include limitations on the purpose, subject, or title of the bill.<sup>54</sup> Each of these restrictions is “designed to eradicate perceived abuses in the legislative process, such as hasty, corrupt, or private interest legislation.”<sup>55</sup> Abuses of these restrictions are called procedural constitutional violations.<sup>56</sup> *Substantive* constitutional violations, on the other hand, occur when a bill contains provisions that are found to “be substantively invalid based on the U.S. Constitution or the Missouri Constitution.”<sup>57</sup> These types of violations are more diverse than procedural constitutional violations and can arise from a number of situations, such as laws that violate guarantees from the Bill of Rights to “statutes limiting wrongful death recoveries or mandating a certain type of civil service system[.]”<sup>58</sup>

### B. The Single-Subject Rule

Section 23 of Article III of the Missouri Constitution states that “[n]o bill shall contain more than one subject which shall be clearly expressed in its

48. See generally Dragich, *supra* note 6 (explaining procedural constitutional violations in law creation using Missouri case law).

49. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 351.

50. See MO. CONST. art. III, § 23.

51. See MO. REV. STAT. § 1.140 (2012). Severability has been part of Missouri constitutional law for at least 100 years. See *Simpson v. Witte Iron Works Co.*, 155 S.W. 810, 815 (Mo. 1913) (en banc).

52. Dragich, *supra* note 6, at 103.

53. *Id.*

54. *Id.*

55. *Id.* at 104.

56. See *id.* at 109, 154.

57. *Legends Bank v. State*, 361 S.W.3d 383, 391 n.5 (Mo. 2012) (en banc) (Fischer, J., concurring).

58. Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 799 (1987).

title.”<sup>59</sup> The purpose of this limitation is to “facilitate orderly procedure, avoid surprise, . . . prevent ‘logrolling[,]’ [and] serve to keep individual members of the legislature and the public fairly apprised of the subject matter of pending laws.”<sup>60</sup> It also provides the Governor an analogous power to the appropriations line-item veto power created in Article IV, Section 26 that can be applied to general legislation.<sup>61</sup>

The Supreme Court of Missouri has created a doctrinal framework to guide the application of Section 23 to contested legislation. Importantly, the single-subject rule is mandatory and not merely directory.<sup>62</sup> Missouri precedent explains that the mandatory application of the single-subject rule requires that “where a law is clearly and palpably in opposition to it, there is no other alternative but to pronounce it invalid.”<sup>63</sup> The test for whether a bill violates the single-subject rule is “whether the bill’s provisions fairly relate to, have a natural connection with, or are a means to accomplish the subject of the bill as expressed in the title.”<sup>64</sup> The subject of the bill “includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation” and must be clearly stated in the title of the bill.<sup>65</sup> The relationships between the individual provisions of the bill are not the focus of the test; rather, the test is applied to the title of the bill to determine its subject.<sup>66</sup>

The seminal case interpreting Section 23 is *Hammerschmidt v. Boone County*.<sup>67</sup> In *Hammerschmidt*, the Supreme Court of Missouri considered a bill that featured the word ‘elections’ in its title and dealt with elections in its first section, yet also contained provisions in its second section that allowed certain counties to “adopt an alternative form of government and frame a county constitution.”<sup>68</sup> It ultimately found that the second section of the bill

59. MO. CONST. art. III, § 23.

60. *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-26 (Mo. 1997) (en banc). “Logrolling” describes the situation in which a number of bills that would otherwise not receive a majority vote are grouped into a single bill to ensure passage. *Id.* at 325.

61. *See* MO. CONST. art. IV, § 26; *see also* *Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98, 102 (Mo. 1994) (en banc) (discussing the “line-item” collateral effect of Section 23).

62. *Hammerschmidt*, 877 S.W.2d at 102; *see also* *State v. Miller*, 45 Mo. 495, 498 (1870) (explaining that other states had held analogous provisions as “merely directory,” meaning that “if it was disregarded by the Legislature, its violation would not render the law void”).

63. *Miller*, 45 Mo. at 498.

64. *Mo. Health Care Ass’n v. Att’y Gen. of Mo.*, 953 S.W.2d 617, 622 (Mo. 1997) (en banc).

65. *Hammerschmidt*, 877 S.W.2d at 102.

66. *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 351 (Mo. 2013) (en banc) (citing *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 328 (Mo. 2000) (en banc)).

67. *Hammerschmidt*, 877 S.W.2d at 102-03.

68. Alexander R. Knoll, *Tipping Point: Missouri Single Subject Provision*, 72 MO. L. REV. 1387, 1405 (2007) (quoting *Hammerschmidt*, 877 S.W.2d at 99-100).



did not relate to elections, did not have a “natural connection” to that subject, was not a necessary subordinate part to the bill, and did not further the purposes of a bill as they related to elections.<sup>69</sup> As a result of the lack of connection between the title and the second section of the bill, the court found that House Bills 551 and 552 both violated the single-subject rule.<sup>70</sup> The court in *Hammerschmidt* then turned to the question of whether or not it could sever the unconstitutional portions of the bill.<sup>71</sup>

### C. Statutory and Doctrinal Severance

Severance refers to the ability of courts to strike out a portion of a statute if that portion is held to be unconstitutional.<sup>72</sup> In Missouri, the courts are granted this power by statute<sup>73</sup> and by judicially-created doctrine.<sup>74</sup>

The Missouri General Assembly has delegated authority to the courts to sever unconstitutional parts of laws.<sup>75</sup> Statutory severance is codified under Section 1.140 of the Missouri Revised Statutes.<sup>76</sup> Under the terms of Section 1.140, severance is appropriate unless one of two exceptions is met.<sup>77</sup> First, severance is inappropriate when the unconstitutional and constitutional provisions are “so essentially and inseparably connected” that a court cannot presume that the legislature would have enacted the valid provisions without the unconstitutional one.<sup>78</sup> Second, severance is inappropriate when the valid provisions cannot be executed in accordance with legislative intent as a result of incompleteness after severance.<sup>79</sup> However, Missouri courts have inter-

69. *Hammerschmidt*, 877 S.W.2d at 102-03.

70. *Id.* at 103.

71. *Id.*

72. *See id.* at 103.

73. MO. REV. STAT. § 1.140 (Supp. 2011).

74. *See Hammerschmidt*, 877 S.W.2d at 103. For the remainder of this note, severance by the statute will be referred to as “statutory severance” and severance by judicial doctrine will be referred to as “doctrinal severance”; when referring to the remedy in general, it will be called “severance.”

75. *See id.*

76. That section states:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

MO. REV. STAT. § 1.140 (Supp. 2011).

77. *Id.*

78. *Id.*

79. *Id.*

preted this statute to be inapplicable to laws with provisions found unconstitutional due to procedural violations.<sup>80</sup>

In addition to the statutory delegation of authority to sever portions of substantively unconstitutional laws, the courts have also created a separate doctrine of severability.<sup>81</sup> This doctrine applies to procedurally unconstitutional laws and supplements the statutory delegation of authority in Section 1.140,<sup>82</sup> as the ability to sever portions of laws based on the substance of its provisions does “not adequately address the problems inherent in *procedurally* unconstitutional statutes.”<sup>83</sup> For procedural constitutional violations, “the entire bill is unconstitutional unless [the court] is convinced beyond reasonable doubt that one of the bill’s multiple subjects is its original, controlling purpose and that the other subject is not.”<sup>84</sup> To determine whether or not the provisions that are part of the added subject pass this test, the court considers “whether the additional subject is essential to the efficacy of the bill, whether it is a provision without which the bill would be incomplete and unworkable, and whether the provision is one without which the legislators would not have adopted the bill.”<sup>85</sup>

#### *D. Severance as Applied to Violations of the Single-Subject Rule*

Historically, the Supreme Court of Missouri has applied severance as a remedy in several cases involving the single-subject rule, starting with *Hammerschmidt*.<sup>86</sup> In that case, severance was discussed as a potential remedy for the constitutional infirmities of House Bills 551 and 552.<sup>87</sup> Specifically, the court indicated that severance is a “more difficult issue” when procedural mandates of the constitution are violated.<sup>88</sup> Despite the stated difficulty of such an analysis, the court in *Hammerschmidt* had “no difficulty in divining the primary subject” of the bills in question and found that the “title indicates

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80. “[Section] 1.140 is intended to address . . . the circumstance when a statute has been enacted in a procedurally constitutional manner, but later some of the provisions of the statute are found by a court of competent jurisdiction to be *substantively invalid* based on the U.S. Constitution or the Missouri Constitution.” *Legends Bank v. State*, 361 S.W.3d 383, 391 n.5 (Mo. 2012) (en banc) (Fischer, J., concurring) (emphasis added).

81. *See generally* *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 353-54 (Mo. 2013) (en banc).

82. *See* § 1.140.

83. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 354 n.4.

84. *Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98, 103 (Mo. 1994) (en banc).

85. *Id.* (citations omitted) (internal quotation marks omitted).

86. Dragich, *supra* note 6, at 106 n.27 (noting that the Supreme Court of Missouri did not invalidate any statute due to Section 23 for the ten years prior to *Hammerschmidt* (1984-1994)).

87. *Hammerschmidt*, 877 S.W.2d at 103.

88. *Id.*

the bill relates to elections.”<sup>89</sup> The court stated that a comparison of the “bill’s passage through the House prior to the addition of amendments [with the] contents as finally passed and presented to the governor shows that the bill is about election procedures.”<sup>90</sup>

The severance standard applied by the court was originally used in a case on procedural requirements in initiative petitions.<sup>91</sup> The court applied that standard to bills, and, after analyzing the subsections of the second section, held that severance was possible for House Bills 551 and 552 because it was “convinced beyond reasonable doubt” that the second section was not essential to the efficacy of the bill, that the remainder of the bills were complete and workable without the second section, and that “the legislature would have adopted the bills without [the second section].”<sup>92</sup> In *Hammerschmidt*, the second section violated Section 23 and was severed from the remainder of the bill.<sup>93</sup>

In cases since *Hammerschmidt*, the Supreme Court of Missouri has applied doctrinal severance in Section 23 cases and has severed the unconstitutional portions in every case.<sup>94</sup> The court has recently applied doctrinal severance in *Legends Bank v. State*.<sup>95</sup> In *Legends*, the court considered Senate Bill 844 (“S.B. 844”).<sup>96</sup> S.B. 844 was enacted as “An Act . . . relating to ethics, with penalty provisions.”<sup>97</sup> However, the bill was amended – and the title changed – several times prior to its passage.<sup>98</sup> The final bill included provisions stating “that the office of administration could not prohibit the purchase of supplies from an authorized General Services Administration vendor” and “that each member of the senate and house of representatives be provided with keys to the capitol dome.”<sup>99</sup> *Legends Bank* and Joseph Klebba filed a declaratory judgment action, asserting *inter alia* that S.B. 844 violated the

89. *Id.* at 104.

90. *Id.*

91. *Id.* at 103 (citing *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 832 (Mo. 1990) (en banc)) (discussing and applying the standard applicable to severability of provisions of a constitutional amendment).

92. *Id.* at 104.

93. *Id.* The court also determined that none of the second section could be severed and combined with the remainder of the bill. *Id.*

94. See *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 716-17 (Mo. 2011) (en banc) (severed); *Rizzo v. State*, 189 S.W.3d 576, 581 (Mo. 2006) (en banc) (severed); *SSM Cardinal Glennon Children’s Hosp. v. State*, 68 S.W.3d 412, 418 (Mo. 2002) (en banc) (severed); *Carmack v. Dir., Mo. Dep’t of Agric.*, 945 S.W.2d 956, 961 (Mo. 1997) (en banc) (severed unconstitutional portions).

95. *Legends Bank v. State*, 361 S.W.3d 383, 387 (Mo. 2012) (en banc) (affirming the trial court’s severance, which was based on Section 23, on different procedural grounds with the same severance analysis).

96. *Id.* at 385.

97. *Id.* (internal quotations omitted).

98. *Id.*

99. *Id.*

single-subject rule and the original purpose clause contained in Article III, Section 21, of the Missouri Constitution.<sup>100</sup> The circuit court determined that the bill violated the single-subject rule and declared it unconstitutional.<sup>101</sup>

On appeal, the majority of the Supreme Court of Missouri affirmed the circuit court's decision based upon a violation of the original purpose clause, rather than the single-subject rule.<sup>102</sup> After declaring it unconstitutional, the court then decided whether the constitutional portions of the bill could be severed, holding that severance in this case was appropriate.<sup>103</sup> The court was convinced beyond a reasonable doubt that the portions of the bill relating to "campaign finance, ethics and keys to the capitol dome" were not essential to the bill and the portions relating to procurement were "complete and are capable of being executed in accordance with the legislative intent."<sup>104</sup>

Judge Fischer, however, filed a concurrence in the case, stating that he believed that the judicially created doctrine of severance should be abolished.<sup>105</sup> Specifically, he argued two grounds that supported his contention: first, that doctrinal severance provides "no incentive [for legislators] to follow the clear and express procedural mandates of the Missouri Constitution[.]"<sup>106</sup> and second, that it potentially violates state separation of powers.<sup>107</sup> Elaborating on the effect of judicial severance on the separation of powers, Judge Fischer stated that it may subvert the legislative process by allowing legislation that might not have received enough votes to become law to survive.<sup>108</sup> Procedural constitutional violations, severance, and the discussion prompted by them came into sharp focus in *Missouri Roundtable*.<sup>109</sup>

#### IV. INSTANT DECISION

In *Missouri Roundtable*, the Supreme Court of Missouri held that S.B. 7 was unconstitutional in its entirety<sup>110</sup> because (1) the inclusion of a contingency clause referencing another bill violated the single-subject rule and (2) this violation was not severable from its remaining substantive provisions.<sup>111</sup>

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100. *Id.* The respondents also argued that S.B. 844 violated their First Amendment right to free speech as a result of the decision in *Citizens United v. Federal Election Commission*. *Id.* at 388-89 (Fischer, J., concurring) (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

101. *Id.* at 386.

102. *Id.*

103. *Id.* at 386-87.

104. *Id.* at 387.

105. *Id.* (Fischer, J., concurring).

106. *Id.* at 392.

107. *Id.*

108. *Id.* at 392-93.

109. See generally *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348 (Mo. 2013) (en banc).

110. Judge Paul C. Wilson did not participate in the decision. *Id.* at 355.

111. *Id.* at 354-55.

Though he concurred in the result, Judge Zel Fischer wrote separately to express his position that the “judicially created doctrine of severance should be abolished.”<sup>112</sup> On appeal, the court reviewed the circuit court’s ruling *de novo*.<sup>113</sup>

### A. The Court’s Opinion

First,<sup>114</sup> the court determined whether S.B. 7 violated the single-subject rule.<sup>115</sup> The court began by explaining that the effective date of a law can be conditioned on the occurrence of an event without offending the Missouri Constitution in certain circumstances.<sup>116</sup> However, it was a matter of first impression as to whether a law could be conditioned on the passage of future legislation that concerned a different subject matter.<sup>117</sup>

The court then stated the beneficial aspects of the single-subject rule, noting that it facilitated orderly procedure, avoided surprise, prevented log-rolling, raised awareness of legislation for the public and members of the legislature, and helped preserve the separation of powers.<sup>118</sup> Elaborating on the single-subject rule’s role in the separation of powers, the court provided that the rule prevented the governor from being forced by the legislature into a “take-it-or-leave-it” decision where a bill “addresses one subject in an odious manner and another subject in a way the governor finds meritorious.”<sup>119</sup>

Proceeding in its analysis, the court then set out the premises necessary for determining if Section 23 was violated by S.B. 7 and S.B. 8.<sup>120</sup> First, the court stated the title of S.B. 7, specifically regarding the portion stating that the bill was “relat[ed] to science and innovation, with a contingent effective date.”<sup>121</sup> Section A of S.B. 7 contained the operational provisions of MOSIRA, while Section B conditioned the effectiveness of S.B. 7 on the passage of S.B. 8.<sup>122</sup> S.B. 8 contained eighty-two sections, all of which pertained to tax credits.<sup>123</sup> By its title, S.B. 8 “relat[ed] to taxation, with penalty

112. *Id.* at 355 (Fischer, J., concurring).

113. *Id.* at 351 (majority opinion).

114. Before the court proceeded with its analysis, it noted that Governor Nixon could have vetoed the bill but chose not to due to his “uncertainty as to whether the bill could become effective.” *Id.*

115. *Id.*

116. *Id.* at 351 (citing *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 299 (Mo. 1996) (en banc) (discussing a bill that conditioned its effectiveness on a popular vote)).

117. *Id.*

118. *Id.* at 351-52 (citing *Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98, 102 (Mo. 1994) (en banc)).

119. *Id.* at 352 (quoting *Hammerschmidt*, 877 S.W.2d at 102).

120. *Id.*

121. *Id.* (internal quotations omitted); see also S.B. 7, *supra* note 9.

122. *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 352 (Mo. 2013) (en banc).

123. *Id.* at 350.

provisions and an emergency clause.”<sup>124</sup> Based on the title of S.B. 7, the court determined that “the single subject core of this bill was to amend laws relating to science and innovation.”<sup>125</sup> Because S.B. 7 was conditioned through Section B on the passage of S.B. 8,<sup>126</sup> the court concluded that S.B. 7 “clearly contained at least two subjects [because] the two bills cannot reasonably be read separately” as a result of the “tax reform measures . . . not fairly relat[ing] to science and innovation [and not having] any natural connection to that subject.”<sup>127</sup>

However, the court distinguished the case from *Akin v. Director of Revenue*,<sup>128</sup> which constitutionally conditioned a bill on a popular vote.<sup>129</sup> Rather than the specific tax increase contemplated in *Akin*, the tax provisions in *Missouri Roundtable* were general provisions.<sup>130</sup> Additionally, the public and legislature were not notified of the comprehensive tax credit reform upon which S.B. 7 was conditioned.<sup>131</sup> Finally, the court stressed that if the effectiveness of a bill could be conditioned on the passage of another piece of legislation that has a different subject, then the procedural limitations of the constitution would be circumvented.<sup>132</sup>

Once the court determined that S.B. 7 was procedurally unconstitutional, it considered whether severance was possible.<sup>133</sup> As an initial matter, the court strictly delineated the difference between the analyses employed for procedurally and substantively unconstitutional statutes.<sup>134</sup> For substantively unconstitutional statutes, Section 1.140 controls.<sup>135</sup> For procedurally unconstitutional statutes, however, severance will only be employed when the court is “‘convinced beyond a reasonable doubt’ that the legislature would have passed the bill without the additional provisions and that the provisions in question are not essential to the efficacy of the bill.”<sup>136</sup> The court held that when a contingency clause conditions the passage of one bill upon the passage of another and is included in the title of the initial bill, the initial bill violates the single-subject rule and the contingency clause cannot be severed

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124. *Id.* (internal quotations omitted).

125. *Id.* at 352.

126. *Id.*

127. *Id.*

128. *See generally* *Akin v. Dir. of Revenue*, 934 S.W.2d 295 (Mo. 1996) (en banc).

129. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 352 (citing *Akin*, 934 S.W.2d at 302).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 353.

134. *Id.* at 353-54.

135. *Id.*

136. *Id.*

from the initial bill due to the inclusion of the contingency clause in its title.<sup>137</sup>

### B. *The Concurrence*

Judge Fischer stated that although he concurred in the result of the case, he was writing separately to express his view, consistent with his positions in prior cases, that the doctrine of severance as applied to procedurally unconstitutional bills should be abolished.<sup>138</sup> He noted that his reasoning was identical to his concurrence in *Legends*: first, that judicial severance encourages the Missouri General Assembly to disregard its oath to protect the Missouri Constitution and the procedural mandates expressed within it, and second, that judicial severance violates the separation of powers.<sup>139</sup> He observed that *Missouri Roundtable* demonstrated the problems caused by the separation of powers when judicial severance is used.<sup>140</sup> Specifically, Governor Nixon “signed a bill into law that he knew the General Assembly had made contingent on the passage of another bill related to a different subject that the Governor knew did not pass.”<sup>141</sup> Ultimately, the case strengthened Judge Fischer’s view that doctrinal severance should be discontinued and that he would affirm the circuit court “without even considering whether any part of a bill enacted in violation of the Missouri Constitution should become law.”<sup>142</sup>

## V. COMMENT

The main result of the ruling in *Missouri Roundtable* is the clarification of the different analyses employed by the court for procedural and substantive constitutional violations. The court noted that the differences between the two types of violations had not been fully explained prior to its decision.<sup>143</sup> Proceeding from the court’s clarification, this Part considers an alternative doctrine of severance that considers the concerns with procedurally unconstitutional provisions and the separation of powers.

*Missouri Roundtable* demonstrates the tension between the two approaches to severance: first, that under certain circumstances severance is allowable by statute or by doctrine, and second, that severance is allowable by statute but not allowable under doctrine.<sup>144</sup> The first stance is that taken

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137. *Id.* (citing *Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98, 103-04 (Mo. 1994) (en banc)).

138. *Id.* at 355 (Fischer, J., concurring).

139. *Id.*

140. *Id.* at 355-56.

141. *Id.* at 356.

142. *Id.*; see also *id.* at 351 (majority opinion) (noting that the Governor “express[ed] uncertainty as to whether the bill could become effective”).

143. *Id.* at 356 (Fischer, J., concurring).

144. *Id.* at 353 (majority opinion).

by the *Hammerschmidt* and the *Missouri Roundtable* majority, while the second is that taken by Judge Fischer. However, these competing policy stances are irreconcilable considering the efforts of the *Missouri Roundtable* majority to remain true to prior precedent and to give effect to the intent of the legislature, as is required for substantive constitutional violations,<sup>145</sup> and Judge Fischer's efforts to remain true to the text of the U.S. and Missouri Constitutions. Law Professor Martha Dragich summarizes these two different stances as "deference to the legislature's policy choices [and] enforcement of . . . constitutional restrictions."<sup>146</sup>

An answer to this tension is to find a compromise position that respects the branches of state government and their different functions while remaining true to the requirements of the U.S. and Missouri Constitutions. The compromise position forwarded in this Part is to enforce and apply statutory severance strictly to substantive constitutional violations and never as a remedy for procedural violations, unless other parties rely on the passage and implementation of a law in good faith and invalidation of the law would have collateral effects that outweigh the need to correct inconsistent legislative practice.

#### A. Constitutional and Statutory Considerations

As previously stated, Missouri law grants courts the power to sever unconstitutional portions of laws from constitutional portions of laws.<sup>147</sup> Yet the nature and extent of these powers in single-subject challenges are not immediately clear in the Supreme Court of Missouri's precedent, from *Hammerschmidt* to *Missouri Roundtable*.<sup>148</sup> The basis and validity of a court's power to sever can be ascertained by returning to the powers granted to both the legislature and the judiciary under the Missouri Constitution.<sup>149</sup>

##### 1. Statute Permits Severance for Substantive Violations

Section 1.140 provides that the "provisions of every statute are severable."<sup>150</sup> This statute represents a delegation of authority to "court[s] of competent jurisdiction" to sever provisions of statutes.<sup>151</sup> This section does not facially restrict its application to substantive constitutional violations.<sup>152</sup> However, the statute does provide that if any provision of a statute is found to

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145. *Id.* at 353 n.4.

146. Dragich, *supra* note 6, at 110.

147. MO. REV. STAT. § 1.140 (2012).

148. *Missouri Roundtable*, 396 S.W.3d 348; *Hammerschmidt*, 877 S.W.2d 98.

149. *See* MO. CONST. art. III, V.

150. Dragich, *supra* note 6, at 110.

151. MO. REV. STAT. § 1.140 (2012).

152. *See id.*



be unconstitutional, then the remaining provisions are valid.<sup>153</sup> This grant of power is only available for substantive constitutional violations, as single-subject violations, like logrolling, taint the entire act.<sup>154</sup> If the entire act is tainted, a court cannot intelligibly sever a portion of it to stand on its own.

Another implication of the statute that supports its application to substantive constitutional violations is found by determining legislative intent. One of the grounds for not applying severance under the statute is when the valid portions of the statute “are incapable of being executed in accordance with the legislative intent.”<sup>155</sup> Legislative intent is impossible to ascertain for single-subject violations, as legislative intent involves determining the will of a majority.<sup>156</sup> This is particularly troublesome in the context of single-subject violations because the use of a majority to pass unrelated and otherwise infeasible legislation is what is being addressed.<sup>157</sup> Thus, attempting to determine legislative intent in these cases ignores the fact that the “necessary assumption that this will carry out the legislative purpose . . . cannot be made.”<sup>158</sup>

Since one of the grounds for the inapplicability of Section 1.140 is nonsensical when applied to procedural constitutional violations, and procedural violations taint the entire affected act, it makes more sense to restrict it to substantive constitutional violations.<sup>159</sup> Legislative intent is regularly used in ascertaining the substantive constitutionality of a statute, and it is possible for such violations to be restricted to only a portion of a bill.<sup>160</sup> As such, statutory severance under Section 1.140 is not applicable to procedural violations – in particular the single-subject rule – and is applicable only to substantive constitutional violations.<sup>161</sup> This reasoning supports the conclusion in *Missouri Roundtable* that substantive and procedural constitutional violations have separate analyses in the context of severance.<sup>162</sup>

## 2. The Constitution Prohibits Severance for Single-Subject Violations

According to Article 3, Section 1 of the Missouri Constitution, the legislative power is vested in a “senate and house of representatives to be styled

153. *Id.*

154. Dragich, *supra* note 6, at 155.

155. § 1.140.

156. *See, e.g.,* Mount Wilderness Ass’n v. U.S. Forest Serv., 314 F.3d 1146 (9th Cir. 2003) (discussing the use of legislative intent in statutory interpretation).

157. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 355.

158. Dragich, *supra* note 6, at 161. Missouri’s “beyond a reasonable doubt” standard for procedural violations is particularly burdensome, as it is the highest standard available under the law, normally reserved for juries in criminal cases. *See, e.g.,* *In re Winship*, 397 U.S. 358, 363-64 (1970).

159. § 1.140; Dragich, *supra* note 6, at 103.

160. *See* Dragich, *supra* note 6, at 157.

161. *Id.* at 155.

162. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 353-54.

‘The General Assembly of the State of Missouri.’”<sup>163</sup> In other words, only the legislature has the power to pass laws.<sup>164</sup> Further, Section 23 states that “[n]o bill shall contain more than one subject.”<sup>165</sup> The text of Section 23 considers appropriations bills and a matter related to state debts and bond issues to be exempt from this requirement.<sup>166</sup> Applying the canon of *expressio unius est exclusio alterius* – the expression of one thing is the exclusion of the other – it becomes clear that *only* appropriations bills and those matters related to state debts and bond issues are exempt from this rule.<sup>167</sup>

Having established the applicability of Section 23 and the power of the legislature, the only conclusion is that these constitutional restrictions – the power to pass laws and the inability to pass laws that violate the single-subject provision of Section 23 – when taken together, mean that the legislature is entirely without the substantive power to pass laws with more than one subject.<sup>168</sup> As Professor Dragich correctly states, this renders the inquiry into legislative intent irrelevant<sup>169</sup> – without the power to enact the laws in the first place, it does not matter what the law was meant to do or achieve. Thus, severance is inapplicable to *all* procedural constitutional violations: if the law violates the procedural mandates of the constitution, then the law is without effect regardless of its separate parts.

In sum, since Section 1.140 of the Revised Statutes of Missouri applies only to substantive constitutional violations,<sup>170</sup> and the state constitution prohibits severance for procedural constitutional violations, *Missouri Roundtable* gives effect to legislative intent through severance when the command of the Missouri Constitution is to strike the entire law.<sup>171</sup>

### B. Reliance Interests

Though the Missouri Constitution contemplates no exception to the single-subject rule,<sup>172</sup> there are other concerns at work that may justify severance apart from legislative intent, as was considered in *Missouri Roundtable*.<sup>173</sup> Specifically, a court may, when the law is insufficient to provide relief for parties before them, use its equitable powers to grant declaratory or injunctive relief; in fact, this is what a court does when it severs bills using doctrinal

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163. MO. CONST. art. III, § 1.

164. *See id.*

165. *Id.* at § 23.

166. *Id.*; *see also id.* at § 37(3).

167. BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

168. MO. CONST. art. III, § 23.

169. Dragich, *supra* note 6, at 158.

170. MO. REV. STAT. § 1.140 (2012).

171. *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 351, 353 (Mo. 2013) (en banc).

172. *See supra* Part II, Section B.

173. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 354-55.

severance.<sup>174</sup> There is one potential way for a court to use its equitable power to sever bills without potentially contradicting the constitution: by applying severance to give fair and reasonable relief to those harmed by the potential collateral effects of procedurally unconstitutional statutes.

As an example, MOSIRA was not severed in *Missouri Roundtable*.<sup>175</sup> MOSIRA was created to address economic development in science and technology in Missouri.<sup>176</sup> Within the bill, key areas of Missouri's economic development were targeted, including science and technology entrepreneurship, using a percentage of state revenue from science and technology growth.<sup>177</sup> Though MOSIRA was struck down very early in its implementation,<sup>178</sup> a suit against a law arguing that it is procedurally unconstitutional can be brought so long as the relevant statute of limitations is met.<sup>179</sup> Greater implementation of the law absent such a challenge would have produced reliance interests on otherwise blameless third parties.<sup>180</sup> Once these interests accrued, striking down such a law in its entirety could harm individuals to such an extent that the court, in its equitable powers, may sever portions of the law to preserve the rights that were, according to every indication and belief of the aggrieved, legally valid.<sup>181</sup>

Applying this argument to a hypothetical shows the reliance interests created in this situation. Assume *arguendo* that the challenge to MOSIRA was brought after the first of the year, after which a contract or grant may have been awarded to a third party contractor. The contract or grant starts to pay the contractor, who then starts purchasing materials acting in reliance on the facial validity of the then-unchallenged act. If a court were to strike the whole law, as in *Missouri Roundtable*,<sup>182</sup> the contractor in this case would be stuck with the costs incurred to fulfill the obligations under the now-unconstitutional law. Thus, severance would be an adequate remedy to allow the provisions that would permit such reliance interests to remain intact.

A maxim of equity, *equity follows the law*, holds that, “[c]ourts of equity can no more disregard statutory and constitutional requirements and provi-

174. *Hammons v. Ehney*, 924 S.W.2d 843, 846 (Mo. 1996) (en banc) (emphasis added) (“Normally when distinguishing between legal and equitable actions one looks to the remedy requested. A money judgment is a legal remedy whereas *some other type of court order is equitable*.”).

175. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 353, 55.

176. *Id.* at 352.

177. S.B. 7, *supra* note 9.

178. *See generally Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 351.

179. MO. REV. STAT. § 516.500 (2012).

180. The extent of the interest and the level of reliance on the law depend on the case. For this hypothetical, it is assumed that the interest would be significant enough to merit a court's attention, as a *de minimis* reliance interest would not justify severance regardless of the test used.

181. *See, e.g., Flood v. Kuhn*, 407 U.S. 258 (1972) (using the reliance interest to justify the refusal to apply antitrust laws to baseball teams).

182. *Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 350.

sions than can courts of law.”<sup>183</sup> A more recent formulation is that a court in equity “may not disregard a statutory provision, for where the Legislature has enacted a statute which governs and determines rights of the parties under stated circumstances, equity courts . . . are bound thereby.”<sup>184</sup> In the exceptional circumstance under consideration, it is the good faith reliance of third-parties on what *was* the law that would act to preserve their rights, even though the law that was passed was determined to be procedurally constitutionally deficient. A court, as stated, cannot disregard the statutory provisions that created rights that the court itself would then take away. Rather, where severance would deprive otherwise blameless individuals of rights created under procedurally unconstitutional litigation, a court should strive to strike a balance between the mandates of the constitution and the rights of the people – the same people for whom the constitution was adopted.<sup>185</sup>

## VI. CONCLUSION

Procedural and substantive constitutional violations will continue to occur, despite the best efforts of the General Assembly. The Supreme Court of Missouri must be prepared to deal with these violations in a way that remains true to the mandates of the Missouri and U.S. Constitutions, yet allows for the realities of government and the consequences of statutes of general application. Presently, severance analysis in Missouri uses the dichotomy of substantive and procedural violations to frame the inquiry.<sup>186</sup> Going forward, this distinction will be tested in unique factual situations that will challenge the utility of these concepts. As stated by Judge Fischer, procedural constitutional mandates exist to promote “necessary and valuable legislative accountability and transparency.”<sup>187</sup>

Instead of using its current analysis, the court should return to the constitutional and statutory mandates and equitable principles of the law to produce an outcome that spans the gap that separates rigid reliance on the text of positive law and the process of justice. Only by honoring these traditions can the judiciary and law inspire respect in proportion to our knowledge of how law is made.

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183. *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Mo. 1950) (citations omitted) (internal quotation marks omitted).

184. *Kuenzle v. Mo. State Highway Patrol*, 865 S.W.2d 667, 669 (Mo. 1993) (en banc).

185. “That all political power is vested in and derived from *the people*; that all government of right originates from *the people*, is founded upon *their will only*, and is instituted solely for the good of the whole.” MO. CONST. art. I, § 1 (emphasis added).

186. *See, e.g., Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 353-54.

187. *Legends Bank v. State*, 361 S.W.3d 383, 389 (Mo. 2012) (en banc).