

## CONDITIONALITY AS OPPOSED TO INSEVERABILITY

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Eric Fish has given us a most engaging defense of a proposal to allow severability of statutes in almost all cases. In comparison with the current Supreme Court standard, Fish argues that he does not have courts engage in the difficult task of interpreting congressional intent. Instead, he would allow severability as the default, with only very limited exceptions where the legislative branch has indicated inseverability. Fish gives us four such indicators: 1) an inseverability clause, 2) where the text becomes nonsensical as a result of the severing, 3) where what's left of the statute cannot be enforced, and 4) where what's left "serves no plausible purpose."<sup>1</sup> Other authors who favor severability, Fish claims, have not limited the instances of inseverability as much as he has.<sup>2</sup> "The main benefit of the conditionality theory," Fish maintains, "is that it limits the incidence of judges reasoning like legislatures."<sup>3</sup>

Of course, the best way to prevent judges from acting as legislators is to prevent them from treating something that was not passed by the legislature as law. The only way to do that, with one hundred percent certainty, is to follow a rule of inseverability, which I advocated in my article, *Severability of Statutes*,<sup>4</sup> to which Mr. Fish offers some critical attention. So, if the "main benefit" truly is to constrain judges, inseverability wins over severability every time. With inseverability, the court voids a statute, and Congress gets to legislate anew.

As to Fish's claim of being novel, other authors who favor severability<sup>5</sup> can undertake to dissect how different his approach is to theirs. Fish claims he is unique because "none of these [other authors] have explored the possibility of implicit inseverability."<sup>6</sup> However, when these other commentators, and the Supreme Court itself, ask whether the Congress would have wished to see the remnant of a statute continue in force after the unconstitutional part was

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<sup>1</sup> Eric S. Fish, *Severability as Conditionality*, 64 EMORY L.J. 1293, 1343 (2015).

<sup>2</sup> *Id.* at 1323.

<sup>3</sup> *Id.* at 1298.

<sup>4</sup> Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011).

<sup>5</sup> See Fish, *supra* note 1, at 1296–97 & nn.10–11.

<sup>6</sup> *Id.* at 1333 n.139.

severed, they are engaged in searching for implicit inseverability. Fish denigrates this undertaking as a court “putting itself in Congress’s place and imagining whether Congress would have wanted to keep the remainder of the statute.”<sup>7</sup> However, Fish does allow a court to ask if a statute, after being severed, is nonsensical, unenforceable, or serving no plausible purpose—three of the four bases Fish prescribes for implicit inseverability. That is not much different from asking if Congress *intended* a result that is nonsensical, unenforceable, or serving no plausible purpose. Indeed, when he presses himself to find cases where his outcome would be different from the current jurisprudence that does ask about hypothetical congressional intent, Fish finds no statutory cases, and only one Executive Order instance that might.<sup>8</sup> Fish finds it a virtue of his approach that it is so closely congruent to decided cases. One might suggest it is for that very reason not so novel.

Can one imagine a case where the severed remnant of a statute is sensible, enforceable, and serves a plausible purpose but should nevertheless not be allowed to stand without the part that was severed? That is what one would have to posit to criticize Fish’s approach on a policy ground, and I have a very good example: *Buckley v. Valeo*.<sup>9</sup> Congress passed limits on campaign expenditures and campaign contributions. The Court struck down the limits on campaign expenditures. The result has created a plutocracy in our country: wealthy candidates can fund their own campaigns; less wealthy candidates are limited to raising money from others, under per donor caps. No one in Congress voted for such a system.

That Fish’s approach would uphold the outcome of creating a campaign system that Congress never intended and did not pass is not a high recommendation.<sup>10</sup>

Leaving the question of whether it is a virtue to ignore congressional intent when the remnant of a statute results in an outcome Congress did not wish, is Fish internally consistent in claiming he does, in fact, ignore congressional intent under his test? He claims superiority for his approach over the hypothetical intent test because “[t]he hypothetical intent theory thus devolves into imaginative reconstruction. . . . The hypothetical intent approach

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<sup>7</sup> *Id.* at 1323.

<sup>8</sup> *See id.* at 1347–58.

<sup>9</sup> 424 U.S. 1, 7, 108–09 (1976) (per curiam).

<sup>10</sup> However, to be fair, the Court didn’t get it right either. It was a classic case for inseverability, based on congressional intent analysis but the majority didn’t so rule. Chief Justice Burger’s opinion argued for inseverability. *See id.* at 254–55 (Burger, C.J., concurring in part and dissenting in part).

effectively makes a court a kind of replacement Congress, telling judges to get into the heads of legislators and decide what they would have wanted to repeal.”<sup>11</sup>

Actually, his approach is not so pure. Here are four of many examples of his inconsistency.

1. In criticizing the holding in *Mille Lacs*, Fish tells us “the Court at least framed the inquiry properly—the question was whether President Taylor *intended* the two parts of the order to stand or fall together.”<sup>12</sup> How can Fish maintain he does not get courts into the business of ascertaining intent when the “proper inquiry,” in his view, is whether the author of the law (here, an executive order), “intended” it?

2. Fish would send a federal court on a search through the entire U.S. Code to determine if other provisions of law, perhaps years apart in when they passed, were nevertheless so linked in effect to an unconstitutional provision of the law before the court, that they, too, should be struck down. Why is that the correct approach? “[B]ecause Congress often *intends* provisions to work in concert even where it does not enact them as part of the same bill or act.”<sup>13</sup>

3. In his hypothetical of a sculpture of Moses erected with public money, on top of a pedestal, Fish argues for striking down the inoffensive pedestal because “the pedestal is so clearly *intended* only to support the statue.”<sup>14</sup>

4. In applying his test to *Williams v. Standard Oil*, Fish invites an inquiry into legislative intent parallel to analyzing an employer’s motives in an employment discrimination case: “In deciding whether the [remaining] . . . provision is conditional on the rest of the statute [that was struck down], judges would have to determine whether legislators actually had that independent *purpose* in mind when they enacted the statute.”<sup>15</sup>

Judicial inquiry into legislative “purpose” and legislative “intent” is positively rife in Fish’s examples! By his own admission, Fish’s theory of “implied conditionality seems perilously close to an inquiry into hypothetical congressional intent.”<sup>16</sup>

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<sup>11</sup> Fish, *supra* note 1, at 1323–24.

<sup>12</sup> *Id.* at 1357 (emphasis added).

<sup>13</sup> *Id.* at 1347 (emphasis added).

<sup>14</sup> *Id.* at 1340 (emphasis added).

<sup>15</sup> *Id.* at 1341 n.159 (emphasis added).

<sup>16</sup> *Id.* at 1341.

So, if implied conditionality is what sets Fish's analysis apart from other authors who defend severability, by his own admission, and implied conditionality encompasses analysis of intent, by his own examples, Fish must lose his claim to having a theory that is both different in kind and superior to other advocates of severability. Perhaps he looks into legislative intent, but just a little less frequently than they.

Further, if avoiding the exercise of divining hypothetical legislative intent is a virtue, how can Fish's approach hold a candle to inseverability? Inseverability absolutely abstracts from congressional intent. If a clause in a bill passed by Congress is unconstitutional, the bill is void. That is what I advocate. Inseverability is so simple. What passed Congress was one set of words. If a part of those words is eliminated, what is left did not pass Congress. So it is not valid law. Under inseverability, there is no need to investigate or hypothesize about intent. Judges are never asked to legislate. It is a superior approach to Fish's, on exactly the criteria he sets as important. Nevertheless, Fish has two criticisms of my approach.

First, Fish argues that the burden would be excessive on Congress to have to reconsider an entire bill that passed Congress because part was unconstitutional. "It would overburden Congress to force it to periodically reenact such massive laws, and given the realities of partisanship and legislative inertia, such reenactments could take a long time or not happen at all."<sup>17</sup>

However, elsewhere in his article, Fish has no problem with giving such a burden to Congress. Fish admits that severability will often result in mangled laws, "statutory distortion,"<sup>18</sup> which is "[t]he main cost of the conditionality theory."<sup>19</sup> His cure is that, following a court holding part of a law

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<sup>17</sup> *Id.* at 1315. To the point that Congress might never get around to reenacting a law if it were struck down, I observe Fish has a bias toward one Congress over another. Congress A passed a law that was unconstitutional. Under inseverability, the law dies. Congress B decides it is not important to attempt to pass a new version of that law. The world reverts to where it was before Congress A acted. *A priori*, I cannot say that is a worse world than a world in which only part of what Congress A passed continues to be the law. Fish makes frequent reference to the Affordable Care Act, concerned that if inseverability had been applied, there would be no new law left at all. That betrays a perfectly understandable, but overtly policy-based prejudgment, that America is better off with some part of the Affordable Care Act than it was before 2010 when the act was passed. Suppose we were speaking of the Patriot Act, and the Court had struck down the portion allowing warrantless searches. Would Fish be happy or sad that the rest of the Patriot Act would be allowed to continue in force?

<sup>18</sup> *Id.* at 1309–13, 1348.

<sup>19</sup> *Id.* at 1348.

unconstitutional, and severing it while the rest continues, Congress can come back and fix any awkward consequences that have resulted.<sup>20</sup> Fish realizes that, unless Congress comes back and fixes the court's work, there could be "negative consequences" that would "undermine the law's purpose."<sup>21</sup>

Citing Professor Eskridge's research, Fish notes that "[f]rom 1967 to 2011, 275 Supreme Court opinions have been overridden by Congress."<sup>22</sup> This works out to 6.25 congressional rewrites per year. Fish is comfortable with this workload upon Congress. However, an embarrassing artifact of Fish's appeal to Congress to fix the imperfection of severability is that it undermines his first criticism of inseverability. To one willing to have Congress consider 6.25 laws a year because Congress disagreed with the Court's statutory construction, how burdensome is it to ask Congress to reconsider as well those laws that have been struck down as unconstitutional by the Court? We can actually calculate the answer.

From the adoption of the U.S. Constitution to 2005, the Supreme Court has held 165 federal statutes unconstitutional, an average of less than once a year.<sup>23</sup> Most of these have been after the beginning of the twentieth century. Measuring from 1900 to 2005, the Court has held 137 statutes unconstitutional, or an average of four every three years. And measuring from *West Coast Hotel Co. v. Parrish*,<sup>24</sup> the modern era when the U.S. Supreme Court no longer applied *Lochner v. New York*,<sup>25</sup> ninety statutes were overturned in seventy-five years, six laws every five years, barely more than one statute per year.

Asking Congress to reconsider just over one more statute a year is not demonstrably burdensome when Congress is already reconsidering six.

The best illustration Fish has for his position about the burden inseverability would impose on Congress comes from *INS v. Chadha*,<sup>26</sup> the case which struck down the legislative veto that at the time existed in 196 different statutes. However, if instead of holding the legislative veto

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<sup>20</sup> *Id.* ("Congress can amend or repeal a statute that has been partially invalidated.")

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (citing Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1328–29 (2014)).

<sup>23</sup> *See Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*, JUSTIA, <http://law.justia.com/constitution/us/046-acts-of-congress-held-unconstitutional.html> (last visited Apr. 27, 2015).

<sup>24</sup> 300 U.S. 379 (1937).

<sup>25</sup> 198 U.S. 45 (1905).

<sup>26</sup> 462 U.S. 919, 944, 959 (1983); *see also* Fish, *supra* note 1, at 1314.

unconstitutional, the Court had simply interpreted it in way that Congress thought caused “statutory distortion,” Fish would be happy having Congress review all 196 statutes to undo the distortion. Suppose, for instance, that the Court held, as a matter of statutory construction, that Congress really meant a two-house veto rather than a one-house veto in all those instances. The burden on Congress of going back through all those laws and making clear its intent for a one-house veto would be identical, yet Fish would approve it.

So the congressional burden disadvantage has to be borne by Fish as much as by me.<sup>27</sup>

Fish might still maintain that fixing some parts of a statute is easier work for Congress than passing an entire statute again. That depends, of course, on the size and complexity of the statute in question. Even with large statutes, however, whole sections of a law would likely pass again without much controversy—as has quite frequently happened in recent years when Congress has voted on sequential continuing budget resolutions to fund thousands of government agencies for a month, or a week, at a time.

The second criticism Fish offers of my approach is that my view requires “constructing a constitutional metaphysics of statutes in which a bill is an atom of law that cannot be divided. One could do so by interpreting bicameralism and presentment to make bills into unbreakable units, but the features of the legislative process do not compel that interpretation.”<sup>28</sup> He continues in the footnote:

In defending his formalism, Campbell draws an analogy to the line-item veto: the President cannot choose which parts of a bill he vetoes, and so the courts cannot choose which parts of a bill they strike down. But this analogy does not hold. The line item veto is invalid because the Presentment Clause requires that the President accept or reject a bill *in toto* during its passage, not because bills are inherently indivisible once Congress approves them. Judges can strike down part of an enacted bill without affecting the rest of it, just

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<sup>27</sup> In truth, *Chadha* is unique. Fish cites no other instance of a clause so ubiquitous in statutes that was either held unconstitutional (his case against my approach) or was misinterpreted by the Court (my case against his approach). However, whatever the burden, his approach cannot escape it as long as he advocates congressional action to remedy the statutory distortion caused by severability.

<sup>28</sup> Fish, *supra* note 1, at 1315–16.

as Congress can repeal part of an enacted bill while leaving the rest in place.<sup>29</sup>

Actually, Congress cannot “repeal part of an enacted bill while leaving the rest in place.” The President would have to sign such a repeal; and that, of course, would be a new law following all the procedures of bicameralism and presentment. A law is needed to change a law.

Further, *Clinton v. City of New York*, to which Fish refers in the above passage, overwhelmingly supports the logic of inseverability. Here is the quote from *Clinton* on which I relied in my article,

The Balanced Budget Act of 1997 . . . became “Public Law 105-33” after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may “become a law.” If one paragraph of that text had been omitted at any one of those three stages, Public Law 105-33 would not have been validly enacted. . . . Something that might be known as “Public Law 105-33 as modified by the President” may or may not be desirable, but it is surely not a document that may “become a law” pursuant to the procedures designed by the Framers of Article I, §7, of the Constitution.<sup>30</sup>

The Supreme Court in *Clinton* said that a bill “containing its exact text” had to be approved by each of the two houses of Congress, and by the President, for it to become law.<sup>31</sup> What resulted from the use of the line-item veto had not been the “exact text” that passed each house. So also, a bill that has part of its excised by the Court under the severability doctrine is not the “exact text” that passed each house.

Fish attempts to distinguish this syllogism by saying the formalism of an exact text passing both houses and receiving the President’s signature only deals with creating a law. Thereafter, assumedly, the law can be mangled by some other process less than the creation of another law. He gives no instance, however, of when that is so, except the case he is attempting to bolster: by a Court imposing severability. A President cannot mangle a law once it is

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<sup>29</sup> *Id.* at 1316 n.86 (citing, in turn, Campbell, *supra* note 4, at 1498–99, and *Clinton v. City of New York*, 524 U.S. 417, 439–41 (1998)).

<sup>30</sup> *Clinton*, 524 U.S. at 448–49 (citation omitted); *see also* Campbell, *supra* note 4, at 1498 n.7.

<sup>31</sup> *Clinton*, 524 U.S. at 448–49.

passed; a single house of Congress cannot. The fact that Congress can repeal the law, Fish's attempted rebuttal, proves only that one duly enacted law can supersede another. It says nothing about what a court can do.

Inseparability is superior to Fish's approach for one additional reason, which he does not address, though it was prominent in my article.<sup>32</sup> When an unconstitutional conclusion results from the interplay of different sections of a law, the cure through severability requires judicial legislation of the clearest kind. My example was *Free Enterprise Fund v. Public Company Accounting Oversight Board*.<sup>33</sup> The PCAOB members were appointed by the Securities and Exchange Commission, not the President, and they could not be removed except for cause.<sup>34</sup> Yet they exercised executive authority.<sup>35</sup> The Court mused that it could solve the problem of "officers of the United States" not being answerable to the President in one of two ways. The Court said it could limit the Board's functions to exclude the executive parts so that PCAOB members were no longer "officers of the United States," since that term means officials exercising executive powers (they would still have plenty to do in the quasi-legislative world of rulemaking). Alternatively, the Court said it could strike the part of the law making the PCAOB members removable only for cause.<sup>36</sup> The Court chose the latter approach but explicitly stated they could have chosen the former solution.<sup>37</sup>

Inherently, severability analysis cannot deal with the *Free Enterprise Fund* problem. Between two very different solutions, which should a court choose? Inseparability, however, handles the problem very easily. The entire statute is defeated, and Congress gets to try again.

Fish suggests it is more respectful to keep some of the legislature's work than to toss it all, when a subsequent legislature might not revisit the subject matter.<sup>38</sup> Why this favoritism for one Congress over another? One Congress addressed a problem that seemed pressing at the time. Its effort failed, however, because its legislative product violated the Constitution. A subsequent Congress might not consider the same problem to be as pressing.

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<sup>32</sup> Campbell, *supra* note 4, at 1500–02.

<sup>33</sup> 561 U.S. 477 (2010).

<sup>34</sup> *Id.* at 484.

<sup>35</sup> *Id.* at 485–86.

<sup>36</sup> *Id.* at 508–10.

<sup>37</sup> *Id.*

<sup>38</sup> Fish, *supra* note 1, at 1350–51.



“At least a partial invalidation leaves the law’s supporters with something to build on.”<sup>39</sup> Why is that a virtue, if the new Congress does not want the law?

Fish even gets into the specifics of the Affordable Care Act, extolling its passage because of a unique political situation of sixty Democratic Senators, a Democratic majority in the House of Representatives, and a Democratic President; conditions, he fears, might not recur.<sup>40</sup> After the Supreme Court invalidated part of the Affordable Care Act,

there was no way Congress was going to enact the ACA again—Republicans had taken control of the House of Representatives, and America was in the midst of a presidential election. Thus if the Supreme Court had struck down the entire ACA because part of it was unconstitutional, it would not just have been deciding that a partial law was worse than no law at all. It would have been undoing all the deliberative and political events that formed the law’s history. This is not respectful of the democratic process.<sup>41</sup>

What is not respectful of the democratic process is for Congress to pass a law violating the U.S. Constitution. If Congress could not count on having a court salvage some of its work, it might be incentivized to be more careful to abide by the Constitution in its drafting of laws in the first place.

Further, it is not respectful of the congressional process to pretend that a bill with several parts represents the will of Congress when only parts of it remain. Neither Fish, nor a reviewing court, can tell whether the Affordable Care Act, minus its unconstitutional parts, represents the will of the Congress that passed the entire bill. To assume so undoes “all the deliberative and political events that formed” the law into the multipart document that it was. A real respect for Congress would give to Congress the right to rebuild the legislative product as it sees fit. That it might be a new Congress does not make it any less the legislative branch.

To conclude:

- 1) Fish does not escape analysis of legislative intent. His proposal, therefore, is not as novel as he supposes.
- 2) If avoiding judicial inquiry into legislative intent is a virtue, inseverability is clearly preferable.

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<sup>39</sup> *Id.* at 1351.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

- 3) Inseverability imposes no greater a burden on Congress to reconsider legislation than Fish's approach, once he falls back on the necessity for Congress to re-legislate following the application of his doctrine, to prevent statutory distortion.
- 4) When judges allow part of a law to continue when the rest does not, they legislate. Every version of severability has that flaw; inseverability prevents it absolutely. This is clearest when a statute's unconstitutionality can be cured in one of several ways, and the Court simply chooses one.
- 5) Respect for the legislative branch should not allow a law to result in words that Congress did not approve, as opposed to giving a new Congress a blank slate on which to legislate when a prior Congress had failed.