RECENT CASES

FEDERAL COURTS — SEVERABILITY — SIXTH CIRCUIT HOLDS THAT SEVERED PROVISIONS CANNOT BE APPLIED TO VIOLATIONS PREDATING SEVERANCE. — *Lindenbaum v. Realgy, LLC*, 13 F.4th 524 (6th Cir. 2021), *cert. denied*, No. 21-866, 2022 BL 94035 (U.S. Mar. 21, 2022).

Courts sometimes do what they claim they cannot. When a court severs a provision from a statute, is it rewriting the statute to remedy a constitutional defect, or interpreting what the statute has always meant in light of the Constitution? In *Barr v. American Association of Political Consultants*[1] (*AAPC*), the Supreme Court held that a 2015 amendment to the Telephone Consumer Protection Act[2] (TCPA) robocall ban violated the First Amendment.[3] The amendment — which consisted of a "government-debt exception" that allowed robocalls made to collect government debt — transformed the otherwise-valid ban on robocalls into an impermissible content-based regulation.[4] The Court severed the government-debt exception from the statute, leaving the original robocall restriction in force.[5] But the Court did not resolve whether the restriction itself was constitutional, and thus enforceable against robocallers outside the government-debt exception ("non-GD callers"), in the time between the amendment's enactment and its severance.[6] Recently, in *Lindenbaum v. Realgy, LLC*,[7] the Sixth Circuit held that the severance had retroactive effect because a severing court merely recognizes what the law has always been, as constrained by the Constitution.[8] Though the *Lindenbaum* court narrowly reached the doctrinally correct result in this case, it did so based on an idealized model of severance doctrine that is conceptually inapplicable to equal-treatment cases such as this one.

After Congress enacted the government-debt exception and before the Supreme Court severed it, Realgy, LLC hired a John Doe corporation to solicit new customers for its energy-utility business via telemarketing.[9] In 2019, the John Doe corporation placed unsolicited robocalls to Roberta Lindenbaum and others.[10] Lindenbaum filed a

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1 140 S. Ct. 2335 (2020).

2 Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015), *invalidated by AAPC*, 140 S. Ct. 2335 (2020).

3 *AAPC*, 140 S. Ct. at 2343.

4 *Id.*

5 *Id.* at 2356.

6 Lindenbaum v. Realgy, LLC, 497 F. Supp. 3d 290, 295 (N.D. Ohio 2020).

7 13 F.4th 524 (6th Cir. 2021).

8 *Id.* at 528.

9 Complaint at 3, *Lindenbaum*, 497 F. Supp. 3d 290 (No. 19-CV-2862).

10 *Id.* at 7, 4–5.

class action suit against Realgy, alleging that those calls violated the TCPA's robocall restriction.[11] The suit was still pending in federal district court when the Supreme Court decided *AAPC*.[12]

After the *AAPC* decision came down, Realgy moved to dismiss for lack of subject matter jurisdiction.[13] It argued that, because the Supreme Court had held the TCPA's robocall restriction unconstitutional while the government-debt exception was in effect, Realgy could not be liable for a violation of that unconstitutional restriction.[14] The district court agreed, holding the TCPA's robocall restriction unconstitutional from 2015, when the government-debt exception was enacted, until 2020, when the Supreme Court severed it in *AAPC*.[15] Chief Judge Gaughan reasoned that the severance in *AAPC* operated only prospectively.[16] On her view, the Supreme Court had recognized that the amended restriction had been unconstitutional for five years, but had restored constitutional validity to the restriction by severing the exception.[17]

Chief Judge Gaughan then considered Justice Kavanaugh's plurality opinion in *AAPC*. Though Justice Kavanaugh asserted in a footnote that the robocall restriction was still effective as to non-GD callers from 2015 to 2020, the Chief Judge recognized that this assertion failed to garner a majority of the Court and was thus nonbinding.[18] She also reasoned that if the Supreme Court's decision severed the government-debt exception retroactively, a due process concern would arise: government-debt callers from 2015 to 2020 would face liability despite having had no fair notice that their calls were illegal.[19] Further, if the robocall restriction were effective from 2015 to 2020 only as applied to non-GD callers, then liability would be determined by the same content-based differential treatment of speech that *AAPC* held unconstitutional, violating the First Amendment.[20] Chief Judge Gaughan concluded that the Supreme Court's severance of the government-debt exception must operate prospectively only.[21] Because the robocall restriction was therefore unconstitutional at the time of Realgy's calls, the court granted the motion to dismiss.[22]

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[11] *Lindenbaum*, 497 F. Supp. 3d at 292.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 293.

[15] *Id.* at 294.

[16] *Id.*

[17] *See id.* at 298–99.

[18] *Id.* at 295 (citing Barr v. Am. Ass'n of Pol. Consultants (*AAPC*), 140 S. Ct. 2335, 2355 n.12 (2020) (opinion of Kavanaugh, J.)).

[19] *Id.* at 298; *see also id.* at 294 (quoting *AAPC*, 140 S. Ct. at 2354–55 (opinion of Kavanaugh, J.)).

[20] *Id.* at 298.

[21] *Id.* at 298–99.

[22] *Id.* at 299.

The Sixth Circuit reversed.[23] Writing for a unanimous panel, Judge Bush[24] held that severance always has retroactive effect.[25] He noted that the aforementioned footnote in *AAPC* explicitly suggested the outcome that the district court found impermissible: that non-GD callers should be legally liable for violations of the TCPA's robocall restriction between 2015 and 2020, but government-debt callers should be exempt.[26] Conceding that the footnote was not binding, Judge Bush noted that it is still relevant "to the extent of its power to persuade."[27] He thus considered in turn the retroactive effects of severance and the First Amendment concern raised by the district court.[28]

Turning first to retroactive severability, Judge Bush addressed Realgy's and Chief Judge Gaughan's view that the TCPA's robocall restriction was actually unconstitutional until the Supreme Court altered it in *AAPC*.[29] To the contrary, Judge Bush argued, "[c]ourts do not rewrite, amend, or strike down statutes"[30] and "do not sit as councils of revision."[31] Instead, the Constitution itself "automatically displaces any conflicting statutory provision from the moment of the provision's enactment."[32] Severance does not fix an otherwise unconstitutional statute, but merely "say[s] what the law is,"[33] disregarding provisions that have no legal effect because they are unconstitutional.[34] Because severance does not alter the statute,[35] and the Constitution renders an

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[23] *Lindenbaum*, 13 F.4th at 526. The court treated the district court's dismissal as a dismissal for failure to state a claim on which relief could be granted, rather than as a dismissal for lack of subject matter jurisdiction, because federal district courts have subject matter jurisdiction when "'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another[,]' . . . [which] is the case here." *Id.* at 527 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998)).

[24] Judge Bush was joined by Judges Gibbons and Stranch.

[25] *Lindenbaum*, 13 F.4th at 528–29.

[26] *Id.* at 527 (quoting Barr v. Am. Ass'n of Pol. Consultants (*AAPC*), 140 S. Ct. 2335, 2355 n.12 (2020) (opinion of Kavanuagh, J.)).

[27] *Id.* at 527 n.1.

[28] *See id.* at 528, 530.

[29] *Id.* at 528 ("Realgy contends that severability is a remedy that fixes an unconstitutional statute, such that it can only apply prospectively.").

[30] *Id.* at 526; *see also id.* at 528 ("Courts do not change statutes.").

[31] *Id.* at 529 (quoting United States v. Rutherford, 442 U.S. 544, 555 (1979)).

[32] *Id.* at 528 (quoting Collins v. Yellen, 141 S. Ct. 1761, 1788–89 (2021)).

[33] *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Judge Bush argued that statements of the law are always retroactive, and that only remedies and legislative acts are prospective. *Id.* at 529. He argued that severance cannot be a remedy because it is not "an injunction, declaration, or damages," *id.* (quoting Barr v. Am. Ass'n of Pol. Consultants (*AAPC*), 140 S. Ct. 2335, 2351 n.8 (2020) (opinion of Kavanuagh, J.)), because the severability inquiry is not circumscribed by the plaintiff's request for relief, *id.*, and because the inquiry's focus on congressional intent shows that it is an interpretive, not remedial, exercise, *id.* at 528–29. Nor can severance be a legislative act, as courts are not legislatures. *Id.* at 529–30.

[34] *Id.* at 528.

[35] *Id.*

unconstitutional enactment "a nullity" from the time it is enacted,[36] it is irrelevant when severance occurs.[37] Thus, when the *AAPC* Court severed the government-debt exception from the robocall restriction, it was merely recognizing that the exception had never been valid law.[38] Given that the exception was never in effect, the robocall restriction itself was never unconstitutional, even between the 2015 amendment and the 2020 decision.[39] And if the restriction was valid during that time, then Realgy could be liable for a violation of the restriction in 2019.[40]

Judge Bush next turned to the First Amendment issue presented by the nonbinding footnote in the *AAPC* plurality. The footnote stated that the robocall restriction should apply retroactively to non-GD callers, but not to government-debt callers, as the latter had no fair notice of their liability.[41] In the district court, Chief Judge Gaughan had held that, for defendants who robocalled between 2015 and 2020, this rule would base liability on the content of callers' speech, a distinction the *AAPC* Court held to be unconstitutional.[42] Judge Bush first noted that the issue of government-debt callers' liability between 2015 and 2020 was not before the court.[43] Nonetheless, he then found that even if government-debt callers between 2015 and 2020 were not liable, this distinction would not violate the First Amendment.[44] The liability inquiry for a past violation of the robocall restriction would turn not on a content-based restriction of speech, but instead on the content-neutral question of who had fair notice.[45] Thus, lack of fair notice was a permissible, content-neutral defense against government-debt callers' liability.[46]

In *Lindenbaum*, the Sixth Circuit grappled with two conceptual models of severance.[47] Call one the "salvage model," according to which a statute with an unconstitutional provision is actually unconstitutional until the offending provision is severed by a court, thereby

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[36] *Id.* at 528 n.2 (quoting Frost v. Corp. Comm'n, 278 U.S. 515, 526–27 (1929)).

[37] *See id.* at 528.

[38] *See id.* at 530.

[39] *See id.* at 527, 530.

[40] *See id.*

[41] Barr v. Am. Ass'n of Pol. Consultants (*AAPC*), 140 S. Ct. 2335, 2355 n.12 (2020) (opinion of Kavanaugh, J.).

[42] *See* Lindenbaum v. Realgy, LLC, 497 F. Supp. 3d. 290, 298 (N.D. Ohio 2020).

[43] *Lindenbaum*, 13 F.4th at 530.

[44] *Id.*

[45] *Id.*

[46] *Id.* (finding the fair-notice argument "does not create a First Amendment problem" because "applying the speech-neutral fair-notice defense in the speech context does not transform it into a speech restriction").

[47] *See generally* Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 236 (2020) (describing the two models).

"salvag[ing]"[48] or "fix[ing]"[49] the statute.[50] Call the other the "recognition model," according to which those statutes were never unconstitutional because severed provisions were never good law to begin with — in severing them, courts merely recognize the fact that they were void "ab initio."[51] Judge Bush's conclusion that severance must be retroactive depended on his argument that, because the salvage model is inconsistent with the constitutional separation of powers,[52] the recognition model must be correct.[53] On his view, the severing court does not alter a statute[54] but instead merely recognizes that the Constitution itself "automatically" acted to void the severed provision upon its enactment.[55] However, whether or not the salvage model is inconsistent with the separation of powers, the recognition model fares no better. Equal-treatment[56] cases like *Lindenbaum*, where no provision is independently unconstitutional, require judicial handiwork in reformulating statutes to restore constitutionality.

It would be impossible for all severed provisions to be automatically voided by the Constitution ab initio as constitutionally repugnant: Not all severed statutory provisions are unconstitutional. In fact, severance doctrine often involves decisions about whether to sever a constitutionally valid statutory provision that is closely intertwined with another, unconstitutional provision.[57] For example, in *United States v. Booker*,[58] the Supreme Court found that a mandatory sentencing-guideline system in which district courts find facts as to aggravating factors on a preponderance of the evidence standard violated the Sixth

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[48] Ruth Bader Ginsburg, Address, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEVELAND ST. L. REV. 301, 308 (1979).

[49] *Lindenbaum*, 13 F.4th at 528.

[50] *See* Lindenbaum v. Realgy, LLC, 497 F. Supp. 3d 290, 297 (N.D. Ohio 2020); *cf. Lindenbaum*, 13 F.4th at 528 (discussing Realgy's theory that severance "is a remedy that fixes an unconstitutional statute").

[51] *Lindenbaum*, 497 F. Supp. 3d at 298; *see also Lindenbaum*, 13 F.4th at 528.

[52] *See Lindenbaum*, 13 F.4th at 526, 528–30.

[53] *Id.* at 528–29.

[54] *Id.* at 526.

[55] *Id.* at 530 (quoting Collins v. Yellen, 141 S. Ct. 1761, 1788 (2021)).

[56] Though outside the scope of this comment, contemporary severance doctrine is arguably unworkable even beyond equal-treatment cases. *See generally* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part and dissenting in part); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1486–87 (2018) (Thomas, J., concurring); Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011); Eric Fish, *Judicial Amendment of Statutes*, 84 GEO. WASH. L. REV. 563, 593–98 (2016); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 749–55 (2010).

[57] John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 71 n.79 (2014) ("In an ordinary severability situation, one application or provision is unconstitutional standing alone, and the question is whether *other applications or provisions* are predicated on it and thus inoperative if it is." (emphasis added)); *see also id.* at 57 n.3.

[58] 543 U.S. 220 (2005).

Amendment.[59] Severing the provision that mandated use of the sentencing guidelines, the Court also severed a provision that stipulated a de novo standard of review on appeal of departures from the guidelines,[60] even though the de novo standard was not itself unconstitutional.[61] Because courts regularly sever constitutionally valid provisions,[62] severance cannot, at least not always, be recognition of ab initio constitutional voiding.

The government-debt exception itself is not clearly unconstitutional. To see why, consider a similar case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[63] In *Free Enterprise Fund*, the Supreme Court examined a regime in which directors of the Public Company Accounting Oversight Board (PCAOB) could be removed only for cause and only by Securities and Exchange Commission (SEC) Commissioners, who are themselves removable only for cause.[64] The Court held that three features of the regime were each independently constitutional but jointly unconstitutional: that PCAOB's directors had for-cause protection; that the SEC Commissioners had for-cause protection;[65] and that PCAOB had regulatory, as opposed to just advisory, power.[66] The Court severed the PCAOB directors' for-cause protection, despite its independent constitutionality.[67] Similarly, in *AAPC*, it was constitutional for the government to permit robocalls to collect government debt, and it was constitutional for the government to restrict robocalls generally.[68] But it was not constitutional to do both at once.[69] Like in *Free Enterprise Fund*, it is only the combination of the provisions that is unconstitutional, not the provisions themselves. The Constitution alone could not have automatically invalidated the government-debt exception: It would have been equally consistent with the First Amendment to revoke the entire prohibition on robocalling

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[59] *Id.* at 232–33.

[60] *Id.* at 259.

[61] *Id.* at 282 (Stevens, J., dissenting in part).

[62] *See, e.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 682–83 (1987) (the foundational case of modern severance analysis, *see, e.g.*, Harrison, *supra* note 57, at 71 n.79, discussing severance of a constitutionally valid provision); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 698–703 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (considering severance of the constitutionally valid guaranteed-issue and community-ratings provisions); *see also* Harrison, *supra* note 57, at 75–80 (discussing the *Sebelius* Court's and litigants' focus on the severance of constitutional provisions from potentially unconstitutional provisions).

[63] 561 U.S. 477 (2010).

[64] *Id.* at 483–87.

[65] *Id.* at 495–96.

[66] *See id.* at 485–86, 506; *see also* Harrison, *supra* note 57, at 71.

[67] *Free Enterprise Fund*, 561 U.S. at 513–14.

[68] Barr v. Am. Ass'n of Pol. Consultants (*AAPC*), 140 S. Ct. 2335, 2355 (2020) (opinion of Kavanaugh, J.).

[69] *Id.* at 2355–56; *see also Lindenbaum*, 13 F.4th at 527 ("The amendment, however, was unconstitutional. . . . [A]dding the exemption for government-debt robocalls would cause impermissible content discrimination.").

rather than the limited permission for government-debt robocalling.[70] Because the exception was not independently unconstitutional, and because the TCPA would have been rendered equally constitutional had the restriction rather than the exception been void, it is difficult to see how the Constitution alone could have selected the exception for voiding, absent the interference of a court.

In fact, this indeterminacy regarding which provisions to sever will arise in almost every equal-treatment case, including equal protection and First Amendment cases such as this one.[71] Whenever the constitutional problem is that two classes are being treated differently, one restricted while another is not, there are always at least two ways to solve the problem. Neither the partial restriction nor the partial permission is independently unconstitutional.[72] The Constitution is agnostic between leveling up and leveling down in equal-treatment cases: it is equally constitutional to impose the restriction on all or on none.[73] Because the Constitution is compatible with either option, it cannot automatically void just one. The Constitution will require that *some* provision be void — after all, severance occurs only after a court finds a statute unconstitutional.[74] But in equal-treatment cases, the Constitution cannot require that a specific provision be void. Thus, in such cases, the recognition model fails. Courts cannot simply recognize what the Constitution has already invalidated; they must make a choice.

Courts should acknowledge that they are salvaging rather than recognizing constitutionality in equal-treatment cases. The recognition model, untenable in equal-treatment cases, claims to be the only model consistent with the separation of powers.[75] But that is not necessarily so: even scholars like Professor Richard Fallon who remain skeptical of the salvage model[76] have argued that the Constitution "creates no categorical bar" to courts' "exercise [of] judgment" in selecting a provision to sever in equal-treatment cases.[77] Neither should the Constitution bar us from acknowledging that this exercise of judgment is what severing courts already do — at least in equal-treatment cases. With its main

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[70] *AAPC*, 140 S. Ct. at 2355 (opinion of Kavanaugh, J.).

[71] *See id.* at 2354–55; Lindenbaum v. Realgy, LLC, 497 F. Supp. 3d 290, 295 (N.D. Ohio 2020).

[72] *AAPC*, 140 S. Ct. at 2355 (opinion of Kavanaugh, J.).

[73] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 787 (2011) ("[T]he equality norm allows the [government] to 'level down' (ensuring equality by depriving all of the entitlement) as well as to 'level up' (ensuring equality by according all the entitlement). If a city wishes to close down all its swimming pools (leveling down) rather than to allow integration (leveling up), this is, at least under existing precedents, consistent with the equal protection guarantee." (citation omitted)).

[74] *See, e.g.*, Walsh, *supra* note 56, at 743.

[75] *See, e.g.*, *Lindenbaum*, 13 F.4th at 528.

[76] *See* Fallon, *supra* note 47, at 257–58.

[77] *Id.* at 278.

counterargument off the table, Chief Judge Gaughan's view regains its force: When a court severs a provision, it salvages a previously unconstitutional statute.[78] That statute cannot retrospectively govern conduct, like Realgy's, that occurred while the statute was unconstitutional.[79]

The indeterminacy of severing provisions from statutes that violate equal treatment suggests the Sixth Circuit's holding in *Lindenbaum* should be confined narrowly to a unique feature of the case: that the government-debt exception was an amendment rather than an original section of the statute.[80] Because the government-debt exception was not independently unconstitutional, the Constitution could not have voided it ab initio. Thus, ordinarily, it could not have been retroactively severed. However, there is an additional ground for severance when Congress enacts an unconstitutional amendment. When a valid law is unconstitutionally amended, "the original law stands without the amendatory exception."[81] Though the government-debt exception itself was not unconstitutional, the 2015 amendment that contained it arguably was: that amendment created the unequal treatment of government-debt and non-GD robocallers.[82] Because an unconstitutional amendment is void, the *Lindenbaum* court was right that the robocall restriction was enforceable in 2019 — it was as if the 1991 TCPA had never been amended. But this case-specific idiosyncrasy does not mean that severance in general is retroactive. Severance questions do not arise only in the face of amendments.[83] Had the government-debt exception been in the original 1991 TCPA, for example, then retroactive severance of that exception would be subject to all the problems discussed above.

In *Lindenbaum*, the Sixth Circuit reached the right result, but for the wrong reason. According to the recognition model, severance is just recognition of action taken by the Constitution, not by the court: repugnant provisions are void before the case is briefed.[84] But severance, at least in equal-treatment cases, cannot work that way: in such cases, severable provisions are not unconstitutional at all.[85] In equal-treatment cases, severance is not the recognition of a mechanical action springing from the gears of the Constitution. It is a series of choices by which courts alter statutes. If the separation of powers bars courts from amending duly enacted statutes, then it bars courts from severing provisions from statutes that violate equal-treatment protections.

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78 *See* Lindenbaum v. Realgy, LLC, 497 F. Supp. 3d 290, 295 (N.D. Ohio 2020).

79 *Id.* at 294.

80 *See* Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015), *invalidated by* Barr v. Am. Ass'n of Pol. Consultants (*AAPC*), 140 S. Ct. 2335 (2020).

81 *AAPC*, 140 S. Ct. at 2353 (opinion of Kavanaugh, J.) (quoting Truax v. Corrigan, 257 U.S. 312, 342 (1921)).

82 § 301(a)(1)(A), 129 Stat. at 588.

83 *See, e.g.*, cases discussed *supra* notes 58–67 and accompanying text.

84 *Lindenbaum*, 13 F.4th at 528.

85 *See* Harrison, *supra* note 57, at 57 n.3.