

Severability, Separation of Powers, and Agency Design

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Kristin E. Hickman, [Symbolism and Separation of Powers in Agency Design](#), 93 **Notre Dame L. Rev.** 1475 (2017).

Kristin Hickman pursues a “modest” goal in [Symbolism and Separation of Powers in Agency Design](#): “to raise a few reservations regarding judicial refashioning of agency design via [a] severance remedy for separation of powers violations.” This understated approach commands attention to Hickman’s analysis. In this contribution to a Notre Dame symposium on “Administrative Lawmaking in the Twenty-First Century,” Hickman clearly identifies and carefully analyzes problems arising out of what might otherwise have passed as unremarkable applications of existing severability doctrine. With an eye toward big-picture legitimacy of courts and agencies, and with attention toward doctrinal and statutory detail, Hickman provides fresh reasons for judges to rethink this doctrine. And the increased attention earned by relatively restrained criticisms like Hickman’s may eventually move the law in the direction of more radical critiques that have started to receive an audience at the Supreme Court.

Hickman describes three cases or sets of cases in which the Supreme Court or the D.C. Circuit held an agency design unconstitutional based on separation of powers principles and then “fixed” the problem by “severing” a structural provision of the statutory agency design. These cases addressed the structure of the Public Company Accounting Oversight Board, the Copyright Royalty Board, and the Consumer Finance Protection Bureau.

The accounting oversight board was protected by two layers of for-cause removal restrictions. Board members were removable by SEC commissioners, but only for cause; SEC commissioners were removable by the President, but also only for cause. The Court fixed this problem by eliminating the for-cause restriction on SEC Commissioners’ ability to remove board members.

The Copyright Royalty Board’s three Copyright Royalty Judges, who were appointed subject to removal by the Librarian of Congress, were judicially determined to be principal rather than inferior officers. This status was owing, in part, to a for-cause limitation on the Librarian’s authority to remove them. Because the Librarian of Congress is not constitutionally permitted to appoint principal officers, the D.C. Circuit transformed the royalty judges into inferior officers. The court accomplished this by eliminating the statutory for-cause limitation on the Librarian’s removal authority.

The Consumer Finance Protection Bureau, according to a split D.C. Circuit panel, was unlawfully headed by a single director removable only for cause, rather than by a multimember commission made up of commissioners removable only for cause. The panel fixed this problem by eliminating the for-cause limitation on the President’s ability to remove the Bureau’s director. The need for severance was ultimately obviated, though, when the D.C. Circuit took the panel decision en banc and reversed on the constitutional merits. That en banc decision removed the need to determine whether the panel’s severance move was correct.

Hickman raises three reservations about the appropriateness of severance in these three cases. First, the remedy was not as restrained as it seems when compared with the alternative of leaving the statute operative as is but without a functioning agency for the time it takes Congress to fix it, and when taking into account the tradeoffs reflected in the now-invalidated agency design. Second, litigants will have less incentive to challenge agency design when the end result makes little practical difference to the outcome of their particular cases. Third, severance of for-cause removal restrictions renders agency actors less politically independent and thereby undercuts their perceived legitimacy.

These criticisms are not of equal weight—the first and third are more powerful than the second. Hickman acknowledges that a reduction in litigation incentives may not be that significant given the presence of other available actors to press structural separation of powers arguments in challenging agency actions. She properly sees a form of “cause lawyering” at work in the accounting oversight board case, for example.

Adding to Hickman’s points about mixed litigation incentives, one might also observe that severance in the three cases reduced the practical costs of the underlying constitutional holding by leaving the agency’s day-to-day operations untouched. And the Supreme Court may have been more responsive to the substantive constitutional arguments presented by separation-of-powers “cause lawyers” precisely because of the availability of a non-disruptive fix. While this observation limits the force of the litigation-incentives argument, it provides greater cause to be concerned about judicial interference with the agency-design choices that Hickman discusses in connection with her other two reservations.

A few weeks after the November 2017 symposium at which Hickman presented her paper, the Supreme Court heard oral arguments in [Murphy v. NCAA](#). The case had nothing to do with agency design, but the resulting opinions had much to do with severability doctrine. After declaring a federal statute partially unconstitutional, the Court used severability doctrine to render it totally unenforceable.

Justice Thomas took the occasion to write a powerful concurrence, one that deserves the serious and sustained attention it will receive over time. Thomas details many ways in which the Court’s “modern severability precedents are in tension with longstanding limits on the judicial power.” The judicial power is the power to render judgments in cases, and what we now call “judicial review” is “a byproduct of that process.” As a consequence, “when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them.” Later deviations from this practice should be curbed.

If Thomas is correct, there is more reason to reject the statutory severance Hickman calls into question. The three cases Hickman discusses exemplify what happens when the metaphor of “severability” gets away from the judges and they mistakenly think that severance is a thing that they can do. But just as Hamilton was right in [Federalist No. 78](#) that the judiciary lacks the power of the sword, Justice Thomas is right that the judiciary lacks the power of the Exacto knife.

And this brings our consideration full circle to Hickman’s explanation of how things might have worked better if the judiciary had simply followed the traditional path of setting aside the challenged agency action in these cases. The most powerful part of Hickman’s analysis is her insistence on the obvious but overlooked fact that “declaring an administrative agency’s structure to be unconstitutional and the agency’s actions to be inoperative” is not the same as “invalidating a statute altogether.” Statutory prohibitions and requirements would remain in force even if there is no enforcement agency at work. And Congress could then revive the agency by making any necessary changes. If severance were not available, the litigants who successfully challenged the agency design would have been better off, and the agencies would not have been judicially reconstituted in ways that risk undermining their perceived legitimacy and that ignore legislative debates and choices.

In his [Murphy](#) concurrence, Thomas emphasized the way in which modern severability doctrine “requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions.” The scenario in which this worry has appeared most acutely is when a holding of inseverability threatens the enforceability of parts of a statute not otherwise properly before the court. But the cases that Hickman discusses reveal a different version of an advisory opinion problem. The courts purported to remove a sentence or two from the agencies’ governing statutes—which they can only do metaphorically—while leaving “the actions of the challenged agency, and the structures and actions of identically or similarly designed agencies, largely or entirely untouched.”

Although Hickman does not question the fundamental legitimacy of modern severability doctrine, her analysis of its application in a few cases shows the power of raising reservations “regarding judicial refashioning of agency design.”

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If the Supreme Court and the D.C. Circuit were to follow Hickman's advice and contemplate their application of modern severability doctrine more thoroughly, they might find their conclusions more unsettling than Hickman's lawyerly disclaimer of any "grand proposals" suggests.

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