

Severability as Judicial Lawmaking

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Introduction

Severability doctrine has been with us since the beginnings of judicial review,¹ yet it remains shrouded in mystery. The doctrine is simple enough to state: it allows a court to excise any unconstitutional clauses or applications from a statute, leaving the remainder in force if the legislature would prefer that result to the statute's total invalidation. This makes possible as-applied adjudication and allows a court to save as much of a statute as it possibly can.

Questions about the doctrine abound. What is a court doing when it severs the invalid portions of a statute? Is it merely issuing a

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¹ The doctrine is implicit in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which invalidated one particular section of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, leaving the remainder in place. *Id.* at 173–80. The Court soon thereafter made the doctrine explicit. *See Bank of Hamilton v. Lessee of Dudley*, 27 U.S. (2 Pet.) 492, 526 (1829) (“If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States . . .”). For a history of the development of severability doctrine, see John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 210–25 (1993).

savings construction or is it rewriting the statute? If the latter, is severability compatible with separation-of-powers principles? How should a court decide whether or not to sever? Should legislative intent be the touchstone? The academic literature, for the most part, does not adequately answer these questions. The literature on the topic is surprisingly limited, with only a handful of articles addressing the doctrine.²

But severability doctrine is getting harder and harder to ignore. Three years ago, in *United States v. Booker*,³ a sharply divided Supreme Court invoked severability doctrine in revising the Federal Sentencing Guidelines, converting the mandatory scheme Congress enacted into a discretionary one and writing into the statute a new standard of review for sentencing appeals.⁴ The Court asked which of two admittedly radical remedies better fit congressional intent,⁵ never once asking whether Congress should have the first crack at writing a new statute. *Booker* read the severability doctrine expansively, investing courts with considerable power to rewrite a statute so long as the newly-minted statute better comports with legislative intent than total invalidation. The following year, in *Ayotte v. Planned Parenthood of Northern New England*,⁶ the Supreme Court reversed a federal court's facial invalidation of a restrictive abortion law, remanding for the court to consider whether the legislature would have preferred severing the invalid applications to invalidation of the statute, even though severance would add an exception the legislature had declined to include.⁷ *Ayotte* required the lower court to add the exception to save the statute, unless the legislature would prefer the statute's total invalidation.⁸

² For important commentary on the doctrine, see generally Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005); Mark Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995); Nagle, *supra* note 1; Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299 (2000); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

³ *United States v. Booker*, 543 U.S. 220 (2005).

⁴ *Id.* at 246.

⁵ *Id.* (noting that both the majority's and the dissent's approaches "would significantly alter the system that Congress designed"); *id.* at 247 (asking which of two remedies "would deviate less radically from Congress's intended system").

⁶ *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006).

⁷ *See id.* at 331.

⁸ *Id.*

Last Term, the trend continued. In *Gonzales v. Carhart*,⁹ the Supreme Court upheld the federal ban on so-called partial-birth abortions, taking it as given that future courts could sever any invalid applications that might later arise.¹⁰ In *FEC v. Wisconsin Right to Life, Inc.*,¹¹ the Supreme Court invalidated a federal campaign finance statute prohibiting corporate electioneering as applied to issue advertisements, silently severing the invalid applications and rewriting the statute in the process.¹² Indeed, the Court's implicit severance achieved virtually the same result as a facial invalidation; the severed statute virtually mimics the fallback provision Congress passed as insurance against facial invalidation.¹³

This spate of recent cases sheds light on the nature and function of severability. Although *Ayotte*, many of the Court's older cases, and much of the scholarly writing make the point that courts should not save statutes by rewriting them,¹⁴ the decisions in the more recent cases seem to do just that. As *Booker* powerfully illustrates, severing an invalid provision or application from a complex statute does more than simply remove it; it simultaneously changes the underlying statutory scheme. *Booker* and *Ayotte*, however, do not constrain judicial rewriting in any meaningful way. They do not call for any considera-

⁹ *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

¹⁰ *Id.* at 1638–39.

¹¹ *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

¹² *See id.* at 2673.

¹³ *Id.* at 2703–04 (Souter, J., dissenting).

¹⁴ *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (“[M]indful that our constitutional mandate and our institutional competence are limited, we restrain ourselves from ‘rewrit[ing] state law to conform it to constitutional requirements’ even as we strive to salvage it.” (quotation omitted)); *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (“This Court ‘will not rewrite a . . . law to conform it to constitutional requirements.’” (alteration in original) (quotation omitted)); *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 479 (1995) (noting “obligation to avoid judicial legislation”); *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (holding that severability clause “did not intend the court to dissect an unconstitutional measure and reframe a valid one . . . by inserting limitations it does not contain”); *United States v. Reese*, 92 U.S. 214, 221 (1875) (“The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.”).

For scholarly commentary echoing this no-rewriting rule, see Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1157 (2003) (arguing that power to sever unconstitutional applications “is rather limited in practice” because “courts will not re-write statutes to narrow and save them”); Fallon, *supra* note 2, at 1333–34 (arguing that severance is not permitted when it “cross[es] the vague line that divides judicial interpretation from judicial legislation”); Metzger, *supra* note 2, at 928 (“Severability is inappropriate unless it represents a fair and reasonable interpretation of a statute rather than a rewriting of statutory text.”).

tion of whether the job of rewriting the statute would be better left to the legislature in the first instance. As long as severance conforms to legislative intent, the judicial inquiry is at its end. That gives a court the first opportunity to cure a statute's defects, subject to overruling by a dissatisfied legislature. These developments call for a fresh look at severability doctrine. If the doctrine gives courts the power to rewrite statutes, should legislative intent be the controlling consideration? Should we consider constraining more tightly the judicial power to sever?

To evaluate severability doctrine's legislative-intent test, we must first consider the doctrine's proper characterization. Is severance an interpretive act or a remedial one? Both the scholarship and much of the black-letter law treat the severability inquiry as a form of statutory interpretation.¹⁵ So conceived, severability should, and does, turn on legislative intent.¹⁶ As *Ayotte* explained, "[a]fter finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"¹⁷ If severability is properly treated as a form of statutory interpretation, it is hard to quibble with the resort to legislative intent.

¹⁵ See Dorf, *supra* note 2, at 289 (arguing that "[s]everability presents a question of statutory interpretation"); Fallon, *supra* note 2, at 1333–34 (arguing that severance is not permitted when it "cross[es] the vague line that divides judicial interpretation from judicial legislation"); Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1752 (2007) ("[S]everability is ultimately a matter of statutory interpretation."); Metzger, *supra* note 2, at 928 (arguing that severability is only permissible when "it represents a fair and reasonable interpretation of a statute rather than a rewriting of statutory text"); Nagle, *supra* note 1, at 232 ("The severability of a statute should be determined according to general principles of statutory construction."); Stern, *supra* note 2, at 115 ("[W]hether or not a particular statute may be severed is a question of statutory construction."); see also Sherwin, *supra* note 2, at 307 (assuming that "severability is a question of interpretation").

Likewise, several cases treat severability as an interpretive act. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (noting, in support of severance, the "cardinal principle of statutory construction . . . to save and not to destroy" (quotation omitted)); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (analogizing severability inquiry to statutory interpretation); see also *Regan v. Time, Inc.*, 468 U.S. 641, 677 (1984) (Brennan, J., concurring in part, dissenting in part) ("A court's obligation to leave separable parts of a statute in force is consistent with its general duty to give statutes constructions that avoid constitutional difficulties."); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 372 (1971) (relying on severability clause to justify construing statute to avoid constitutional difficulties). But see *Ayotte*, 546 U.S. at 328 (treating the choice between partial and facial invalidation as a "question of remedy"); *United States v. Booker*, 543 U.S. 220, 245 (2005) (referring to severability analysis as a "question that concerns the remedy").

¹⁶ For discussion of the development of the legislative-intent test, see Nagle, *supra* note 1, at 212–16.

¹⁷ See *Ayotte*, 546 U.S. at 330 (collecting cases).

This account of severability is wrong. The doctrine does not call for an act of statutory interpretation. Severance occurs in the remedial moment at the tail end of constitutional adjudication after a court has construed the statute, determined a constitutional question was unavoidable, and found the statute partially invalid. It asks a remedial question about the scope of the relief a court should order, not an interpretative question about the statute's meaning. It requires a court to decide whether to revise the statute by eliminating the offending clause or application (subject, of course, to possible legislative revision), or invalidate the statute as a whole and force the legislature to redraft the statute. The doctrine authorizes rewriting in the service of saving, not interpreting, statutes. As such, severability should be seen as part of the federal common law of constitutional remedies and informed by structural constitutional values.¹⁸

Legislative intent should not govern what courts do in the remedial moment. Because legislatures generally prefer that the statutes they enact be saved, the legislative-intent test cannot sufficiently constrain whether (or how) a court should sever the invalid portions or applications of a partially invalid statute. Severing whenever the legislature prefers that course to invalidation is inappropriate for two reasons.

First, such a generous severability doctrine risks enmeshing the judiciary in policy choices that are better left to the legislative branch. Severability licenses one particular judicial fix when there are many ways to correct a statute's constitutional defects. It requires a court to create a new law by preserving as much as it can of the invalidated statute and severing what it cannot save. In giving courts this editorial role, the doctrine requires courts to redraft legislation without any effective limits on the power of the pen or any of the tools that make for sound legislation. Courts have little access to information about how new legal regimes might work and cannot consider the range of corrective options and strategies a legislature might. The end result is lawmaking with a democratic deficit. Of course, the legislature is always free to draft a new law on its own after the court's edit. But, in practice, once a court has rewritten the invalid statute via severance, it

¹⁸ It follows from this point that severability should not be a question left to state law when the partially invalid statute is a state or local law. *Cf.* Stern, *supra* note 2, at 91 ("Whether or not state law should be interpreted so as to exclude unconstitutional applications is a matter of statutory construction, and the duty of construing state statutes rests on the state courts and not the federal.").

is much less likely that the legislature will act. Once a court has put in place a revised statute, legislative inertia takes over.¹⁹

Second, severing invalid portions of a statute—simply because the legislature prefers that course of action—creates the wrong set of incentives for legislatures. It overprotects the legislature's freedom to innovate at the cost of reducing its incentives to attend to constitutional norms *ex ante* (i.e., in drafting the legislation). If courts are willing to save a statute by severing on the legislature's say-so, even when that entails substantial rewriting, the legislature has much less of a reason or incentive to respect constitutional norms at the outset.²⁰ Courts, not legislators, are tailoring statutes to conform to constitutional norms. Over time, the legislature may come to depend on the courts to fix statutes rather than doing the hard work necessary to enact a properly tailored statute in the first instance. Politically, legislators may prefer this arrangement, for it frees them to pass the statute they want, knowing that courts will save as much of their handiwork as they can. But this arrangement breeds an unhealthy dependency on courts and results in a loss of accountability. When courts substantially rewrite statutes to save them, the resulting work is as much that of the judiciary as of the legislature. That makes it hard to hold the legislature accountable for the statute that the judiciary puts in place.

This does not mean that severability should be wholly abandoned. Rather, severability should not simply be a matter of divining the intent of the legislature. Courts must play a more active role in answering the remedial question whether or not to sever. There is still an important role for a more constrained severability doctrine. Severance serves the valuable goal of saving partially invalid statutes by permitting their continued enforcement without a remand to the legislature. It preserves legislative prerogatives, foreclosing the possibility that a statute will be invalidated *in toto* because of a minor defect. But the judicial power to sever has to be constrained by structural constitutional principles. Courts cannot simply focus on legislative in-

¹⁹ Avoiding a judicial rewrite or the possibility of invalidation is one reason legislatures sometimes craft fallback laws that specify exactly the law that will apply in the event of invalidation. For a comprehensive discussion of such laws, see generally Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303 (2007).

²⁰ See *Tennessee v. Lane*, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting) (criticizing the majority's as-applied approach because it "eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations. Congress can now simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute . . . may be enforced against the States").

tent. They must also consider whether severance in any particular case amounts to impermissible judicial lawmaking.

My argument proceeds as follows: Part I discusses the basics of the severability doctrine, examining its purpose and function and the reasons that courts should and do have the power to sever a statute's invalid parts and applications. Part II analyzes the doctrine's proper characterization, arguing that the doctrine is a remedial one, not an exercise in statutory interpretation. For that reason, the legislative-intent test has to be defended on the merits and cannot be treated as the correct test simply because severability is an act of statutory construction. Part III considers the merits of the legislative-intent test and argues that it should be scrapped because it regularly enmeshes courts in policy work for which they are unequipped, and reduces legislatures' incentives to comply with constitutional mandates *ex ante*. Part IV moves from critique to reconstruction, explaining how to craft a better severability doctrine. It urges that severability doctrine shift its focus from intent to the degree and kind of rewriting required and offers a set of questions for courts to consider in deciding whether severance amounts to impermissible rewriting or not.

I. Severability Basics

A. The Legislative-Intent Test

Severability doctrine is well-settled. Once a court has concluded that a statute contains unconstitutional provisions or applications, the doctrine provides that the court should sever the unconstitutional parts unless the legislature would not have intended the valid ones to stand alone.²¹

[A] court should refrain from invalidating more of the statute than is necessary. . . . [W]henver an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.²²

²¹ See *Ayotte*, 546 U.S. at 330; Vermeule, *supra* note 2, at 1950.

²² *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 (1986) (quotation omitted); see also *Ayotte*, 546 U.S. at 329 (“[W]e try not to nullify more of a legislature’s work than is necessary, for we know that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” (quotation omitted)).

The legislative-intent test governs questions of severability.²³ A reviewing court considers if it can sever the unconstitutional portions,²⁴ and, if so, whether the legislature would have “preferred what is left of its statute to no statute at all.”²⁵ Unless the legislature would prefer the statute’s total invalidation, the court severs the unconstitutional provisions or applications, eliminating the offending parts and establishing a new governing regime. This enables the court to rewrite legislation to save it. By deleting the invalid portion of the statute, the court simultaneously changes the underlying statutory scheme.²⁶

The same analysis applies whether or not the legislature has inserted a severability clause in the partially invalid statute. Despite dominant textualist interpretive methods,²⁷ the doctrine does not treat a legislature’s severability clause as dispositive.²⁸ Severability clauses merely establish a presumption in favor of severance²⁹—a presumption that already exists as a general matter.³⁰

²³ Severability is a question left to the law of the enacting jurisdiction, that is, state law when a plaintiff challenges a state or local law and federal law when a federal statute is at issue. *E.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (applying Utah severability law to Utah statute); *Dorchy v. Kansas*, 264 U.S. 286, 290–91 (1924) (per curiam) (remanding to permit state court to decide question of severability under state law). Despite the fact that each state has its own severability doctrine, there is little variance in the doctrine between the states. Virtually all the states use the same legislative intent analysis. *See Dorf, supra* note 2, at 285.

²⁴ *See Alaska Airlines*, 480 U.S. at 684 (observing that severance is not proper “if the balance of the legislation is incapable of functioning independently”).

²⁵ *Ayotte*, 546 U.S. at 330.

²⁶ *See Dorf, supra* note 19, at 305 (“The truncated law is not simply smaller; it is also different from the original law.”); *Sherwin, supra* note 2, at 302 (“[W]hat remains after severance is a new, narrower law.”); *id.* at 303 (“In the interest of preserving legislation, the court is legislating.”); *cf. Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (“The cancellation of one section of a statute may be the functional equivalent of a partial repeal . . .”).

To be sure, not every act of severance can be called rewriting. It is hard to say that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), rewrote the Judiciary Act of 1789 by severing a single jurisdictional provision. If it changed the underlying legislative scheme, the change was so slight as to be nonexistent. But *Marbury* is an unusual example. Most of the time, as demonstrated by the examples discussed in this Article, severance amounts to rewriting: when a court removes one piece of a complex, multipart statute, it usually alters the underlying statutory regime.

²⁷ *See generally* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM L. REV. 1 (2006) (detailing history of textualist interpretive approach and its lasting impact on statutory construction).

²⁸ For arguments bemoaning this state of affairs, see *Movsesian, supra* note 2, at 73–82 (urging a textual approach to severability in which a severability clause would be dispositive); *Nagle, supra* note 1, at 233–46 (arguing for automatic severance of statute that includes a severability clause). Though not dispositive, courts regularly accord severability clauses significant weight. *See, e.g., Jane L.*, 518 U.S. at 139–44 (relying on severability clause in holding severance proper).

²⁹ *See Alaska Airlines*, 480 U.S. at 686.

³⁰ *See Regan v. Time, Inc.*, 468 U.S. 641, 653 (1983) (general presumption in favor of sev-

One reason that severability clauses tend not to matter is that the legislative-intent test is so permissive. In practice, the test gives courts a free hand to sever the invalid parts or applications of a statute. Consider *Brockett v. Spokane Arcades, Inc.*,³¹ in which the Supreme Court held that a Washington moral nuisance statute should not be invalidated on its face because it proscribed sexually explicit materials that appealed to normal, as well as abnormal, sexual appetites.³² The Court explained that the proper solution was not to throw out the entire statute, but to eliminate that part of the statute—the word “lust” in the definition of prurience—that reached constitutionally protected materials.³³ It thought it obvious that the legislature would have preferred the reconstructed statute to none at all: “It would be frivolous to suggest . . . that the Washington Legislature, if it could not proscribe materials that appealed to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute.”³⁴

Booker employed a similar approach in converting the Sentencing Guidelines from mandatory rules into nonbinding considerations to be used in sentencing. The Court thought it obvious that Congress would not have wanted the Sentencing Guidelines invalidated as a whole because of the Constitution’s jury-trial mandate. What divided the Court was how to reconstruct the Guidelines to comport with the applicable jury-trial rights. The majority read Congress to prefer a discretionary system to a mandatory one in which judges sentence defendants based on the jury’s factual findings;³⁵ the dissent, on the other hand, urged the latter remedy.³⁶ Strikingly, it did not matter to the Court that its chosen remedy revolutionized how the Guidelines function. Under *Booker*, courts may invoke severability doctrine to rewrite partially invalid statutes so long as the revision comports with legislative intent.³⁷ The doctrine imposes no additional constraints on how to sever.³⁸

erability); Vermeule, *supra* note 2, at 1950 & n.28; see also *Ayotte*, 546 U.S. at 330 (treating partial invalidation as the normal rule); *United States v. Booker*, 543 U.S. 220, 321 (2005) (Thomas, J., dissenting in part) (referring to the “usual presumption of severability”).

³¹ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

³² *Id.* at 504.

³³ *Id.*

³⁴ *Id.* at 506–07.

³⁵ *Booker*, 543 U.S. at 249–65.

³⁶ *Id.* at 284–91 (Stevens, J., dissenting in part); *id.* at 320–26 (Thomas, J., dissenting).

³⁷ *Id.* at 246 (majority opinion) (admitting that both the majority and dissent’s chosen remedy “would significantly alter the system that Congress designed”).

³⁸ *Booker* notwithstanding, there is a counter-tradition in severability law that limits the

A set of cases in which the Supreme Court decided the severability question implicitly—*FEC v. Wisconsin Right to Life, Inc.*,³⁹ *FEC v. Massachusetts Citizens for Life, Inc.*,⁴⁰ *United States v. Grace*,⁴¹ and *Tennessee v. Garner*⁴²—further underscores the doctrine’s permissive nature. In each, the Court found the statute at issue unconstitutional as applied, implicitly choosing to sever the offending application(s) rather than invalidate the statute as a whole. *Wisconsin Right to Life* held that a ban on corporate electioneering could not be applied to issue advertisements;⁴³ *Massachusetts Citizens for Life* held that a ban on corporate election-related expenditures was unconstitutional as applied to a nonprofit advocacy group;⁴⁴ *Grace* held that a statute banning expressive activities in the Supreme Court’s building and grounds was invalid as applied to sidewalk speech;⁴⁵ and *Garner* held that a state use-of-force statute could not, consistent with the Fourth Amendment, give the police the right to use deadly force to stop a fleeing felon.⁴⁶ The net result was to create statutory exceptions for corporate election spending on issue ads in *Wisconsin Right to Life*, by certain nonprofit advocacy groups in *Massachusetts Citizens for Life*, and for speech on the streets outside the Court in *Grace*, and to cut back the circumstances in which Tennessee’s police officers could use deadly force in *Garner*. We do not know why the Court did not address severability explicitly. But it is fair to say that the legislative-intent question in each case was easy. Indeed, in each case, it is hard to formulate a plausible argument that the legislature would have pre-

power of the judicial pen. In two fairly recent free speech cases, *Reno v. ACLU*, 521 U.S. 844 (1997), and *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Court declined to sever, reasoning that the legislature was the proper body to fix the respective statute’s defects given the lack of a clear line in the statute to use for severance and the complexity of policy issues raised. *ACLU*, 521 U.S. at 884–85; *Treasury Employees*, 513 U.S. at 479. This same logic underlies the Court’s more recent refusal to sever in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), although the Court phrased the point there in terms of legislative intent. *Id.* at 2500 (refusing to sever because to do so “would require us to write words into the statute . . . or to leave gaping loopholes . . . or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found”). Neither *Treasury Employees* nor *ACLU* mentions the long-established legislative-intent test, choosing to focus on whether or not the court *should* sever, not the question of whether the legislature *would have wanted* severance.

³⁹ *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

⁴⁰ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

⁴¹ *United States v. Grace*, 461 U.S. 171 (1983).

⁴² *Tennessee v. Garner*, 471 U.S. 1 (1985).

⁴³ *Wis. Right to Life*, 127 S. Ct. at 2659.

⁴⁴ *Mass. Citizens for Life*, 479 U.S. at 263–64.

⁴⁵ *Grace*, 461 U.S. at 183–84.

⁴⁶ *Garner*, 471 U.S. at 11.

ferred no statute to the Court's reconstruction.⁴⁷ Perhaps for this reason, the cases are part of the modern severance canon.⁴⁸

It is hardly surprising that the legislative-intent test proves to be such a weak limitation on the judicial power to sever. First, legislatures do not often make contingency plans for what should occur in the event a court finds a statute partially invalid,⁴⁹ and to the extent they do, legislatures prefer that their statutes be saved to the maximum extent possible.⁵⁰ Severability clauses are extremely common. Framed in broad and sweeping terms, they generally provide that, in the event of any constitutional defect—whether it pervades the statute or affects a single clause, word, or application—courts should sever the unconstitutional portion, leaving the rest intact.⁵¹ In this form,

⁴⁷ Of the four cases, *Wisconsin Right to Life* is unique in one respect. Because Congress had passed a fallback definition of corporate electioneering in case of facial invalidation, which was virtually identical to the standard the *Wisconsin Right to Life* Court imposed as a constitutional mandate, severance and facial invalidation amounted to virtually the same result. See *Wis. Right to Life*, 127 S. Ct. at 2703–04 (Souter, J., dissenting).

⁴⁸ See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995) (distinguishing *Grace*); *id.* at 488 (O'Connor, J., concurring) (reading *Grace* and *Garner* as “having involved implied severability”); *id.* at 502–03 (Rehnquist, C.J., dissenting) (relying on *Grace*); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502–03 (1985) (relying on *Grace* and *Garner*); see also *United States v. Booker*, 543 U.S. 220, 321–23 (2005) (Thomas, J., dissenting in part) (suggesting that the parties in *Grace* and *Garner* did not make a severability argument because “there was no arguable reason to defeat the presumption of severability”).

⁴⁹ See Sherwin, *supra* note 2, at 304 (observing that “severability questions are triggered by unplanned statutory failures”).

⁵⁰ See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2054 (2002) [hereinafter Elhauge, *Preference-Estimating*] (observing that “any government . . . would want a canon of severability to preserve as much of any partially invalidated statute as can be preserved without undermining the statutory scheme”). For discussion of this point in the context of the choice between constitutional avoidance and invalidation, see Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 446–48 (2005); John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1508–10 (1997); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 468–69 (1989).

⁵¹ Such clauses seem a way to settle, once and for all, the question of legislative intent. What better way to express the intent of the legislature than in a clause instructing a court about what to do in the event of partial invalidation? But courts have been wary of reading severability clauses to mean what they say. After all, how does the legislature know what portion of the statute it wants saved when it does not know what portion the courts will find objectionable? Part of the difficulty lies in how common and sweeping severability clauses are. See Stern, *supra* note 2, at 121 (“In recent years it has become the custom to attach separability clauses to almost all statutes regarded as of possibly doubtful constitutionality.”). Most severability clauses, on their face, say save as much as you can, whatever the constitutional infirmity, but courts have not been willing to take these clauses as true expressions of legislative intent. See Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 419 (1942) (“Are we really to imagine that the legislature had, as it says it has, weighed each paragraph literally and come to the conclusion that

severability clauses preserve maximum flexibility, insisting that courts save partially invalid statutes without any specific legislative precommitment about how the statute should be revised.⁵² Inseverability clauses, by contrast, are extremely rare.⁵³ Second, in the absence of any expressed intent, it seems reasonable to assume that the legislature would prefer its statute preserved as much as possible. A legislature that would prefer a court invalidate its legislation in full rather than partially save it seems quite odd. Courts often act on this reasonable assumption. Indeed, in *Wisconsin Right to Life, Massachusetts Citizens for Life, Grace, and Garner*, the Supreme Court thought it so obvious that the legislature would prefer a severed statute to an invalidated one that the Court did not analyze the matter. It simply proceeded to sever.

To be sure, a legislature might not want to give the courts the power to rewrite its statute. The legislature might care as much about jealously guarding its institutional prerogatives as about substantive policy outcomes. To preserve its lawmaking power, such a legislature might well prefer that a court invalidate its statute on its face and give the legislature the opportunity to rewrite the statute even though the statute could be saved by severance.⁵⁴ Legislatures, however, rarely

it would have enacted that paragraph if all the rest of the statute were invalid? That contradicts the ordinary experience of which every citizen takes notice.”); Stern, *supra* note 2, at 122 (“[S]uch clauses have been so indiscriminately used, that, if taken literally, they would cover situations which they were never intended to reach. The more such clauses came to be attached as a matter of course to all statutes without thought as to what their formal effect would be, the more the courts came to treat them as the formal appendages which they often were.”). For these reasons, the doctrine treats severability clauses as expressing only a presumption in favor of severability—a presumption that often exists even in the absence of a severability clause. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). For the argument that courts should enforce the text of severability clauses, see Movsesian, *supra* note 2, at 73–82; Nagle, *supra* note 1, at 232–46.

⁵² See Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 *YALE L.J.* 1185, 1188 (1986) (observing that virtually all severability clauses are framed in general terms).

⁵³ See Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 *ALB. L. REV.* 997, 1002 (2005).

⁵⁴ This is the view taken in Justice Breyer’s recent plurality opinion in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), in which the Court facially invalidated a Vermont campaign contribution statute. Noting the many constitutional defects in the statute and the “many different possible ways the legislature might respond,” Justice Breyer opined that the “Vermont Legislature would have intended us to set aside the statute’s contribution limits, leaving the legislature free to rewrite those provisions in light of the constitutional difficulties we have identified.” *Id.* at 2500 (plurality opinion). Breyer’s opinion cites no particular evidence for this position, and it is hardly clear why the Vermont Legislature would not prefer the court to save as much of the statute as it could even if that meant considerable rewriting, as that would enable the state to continue enforcing the statute. Justice Breyer’s analysis is wholly conclusory and unpersuasive.

operate in this fashion, which explains why they regularly pass sweeping severability clauses that transfer to courts the decision about how to save partially invalid statutes. Being political animals, legislators care first and foremost about winning elections and effectuating the political and ideological agendas on which they were elected to office. Preserving legislative prerogatives matters much less, if at all, especially when preserving those prerogatives requires legislators to sacrifice policy goals.⁵⁵ For this reason, legislatures generally want to preserve, as much as is possible, the statutes they enact. Thus, if severance hinges on legislative intent, courts should play an active role in rewriting statutes to save them from total invalidation.

The black-letter law of severability, however, is only part of the story. First, the Supreme Court sometimes dispenses with severability doctrine to better enforce constitutional rights. In many different areas of constitutional law—ranging from the First Amendment to the right to choose abortion to vagueness doctrine—the Court invalidates statutes on their face because a facial challenge is a better means of enforcing constitutional rights than case-by-case adjudication.⁵⁶ In this sort of facial challenge—what I have called a strategic facial challenge—the Court preempts severability doctrine to facilitate facial invalidation.⁵⁷

Second, there is a wide divide between the announced judicial doctrine of severability and the reality of what courts actually do. Severability doctrine's strictures are routinely ignored. Even courts that sever unconstitutional portions of a statute often do not mention, let alone apply, severability doctrine. For example, in *Wisconsin Right to Life, Massachusetts Citizens for Life, Grace, and Garner*, the Supreme Court simply held the statutes unconstitutional as applied and implicitly severed the invalid applications without reflecting at all on whether severance was proper. Perhaps the parties in those cases never raised the issue. Perhaps the Court thought it so obvious that the legislature would prefer its statute preserved as much as possible

If his ultimate conclusion is sound, it is only because we don't want courts to be involved in the kind of radical surgery that rewriting would require. Seen in this light, *Randall* is one with the Court's decisions in *Treasury Employees* and *ACLU*. For discussion of *Treasury Employees* and *ACLU*, see *supra* notes 14, 38.

⁵⁵ See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920, 926–32 (2005); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2317–18 (2006); Kevin M. Stack, *The President's Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263, 316–22 (2006).

⁵⁶ See David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1337 (2005).

⁵⁷ *Id.* at 1344.

that it saw no need to discuss the matter. What stands out is that the Court repeatedly ignored its obligation to apply the doctrine.

The same is true in cases in which the Supreme Court refuses to sever. When the Court holds a statute facially invalid, rarely does it explain its refusal to sever. A good example is *United States v. Morrison*,⁵⁸ in which the Court concluded that the civil penalty provision of the Violence Against Women Act (“VAWA”)⁵⁹ was invalid because it was not a proper exercise of congressional power to regulate interstate commerce or enforce the Fourteenth Amendment.⁶⁰ Although the Court’s analysis suggested that the provision was capable of constitutional applications, the Court seemingly invalidated the provision as a whole with no mention of severability.⁶¹ To be sure, a severability analysis is not always necessary. A statute may be invalid in all applications, in which case there is nothing to sever, or the Court may mandate invalidation to better enforce constitutional rights, thereby preempting the usual severability analysis.⁶² Even so, the Court’s willingness to hold statutes facially invalid without engaging severability doctrine is troubling. It raises the question of whether the doctrine comports with what courts actually do. It suggests that the doctrine may not actually capture the true limits on a court’s power to preserve statutes using severance.

Thus, we have not one but three severability regimes. In the first, represented by black-letter severability law, the Court freely severs the unconstitutional parts or applications of a statute using the legislative-intent test; in the second, the Court applies a regime of nonseverability, opting for facial invalidation to better enforce constitutional rights; and in the third, the Court decides questions of severability implicitly and on an ad hoc basis, sometimes choosing to sever and sometimes refusing to do so.

To get a better handle on the question of how the Court should treat severability—at least outside the set of cases in which it preempts the doctrine to better enforce constitutional rights—we need to know why courts have and should have the power to sever the invalid parts or applications of a statute.

⁵⁸ *United States v. Morrison*, 529 U.S. 598 (2000).

⁵⁹ The Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

⁶⁰ Specifically, the Court found the VAWA provision invalid because it did not require a nexus to interstate commerce and applied to private action, which the Fourteenth Amendment does not constrain. *Id.* at 607–27.

⁶¹ See Metzger, *supra* note 2, at 930–31 (discussing *Morrison*).

⁶² See *supra* text accompanying notes 56–57.

B. *The Normative Case for Severability*

Severability gives courts a rewriting power as a second-best solution to save as much as possible of a partially invalid statute. What justifies giving courts this power? Under conventional separation-of-powers principles, courts are not supposed to be in the game of rewriting legislation, a point repeatedly made by the Supreme Court and commentators.⁶³

The answer is twofold. First, separation of powers does not require a strict and inflexible separation between the branches but permits some overlap in the interest of creating a workable system of government.⁶⁴ For better or worse, courts need to have some power to save partially invalid legislation by severing the invalid portions and thereby reconstructing the statute. Consider the alternative: without some severance power, a court would have to invalidate a statute as a whole if even one of the statute's clauses or provisions violated the Constitution. That would be true even if the invalid provision was part of a complex statute with hundreds of sections and subsections.⁶⁵ As a consequence, the government would be unable to enforce the statute at all until the legislature reenacted the statute.⁶⁶ Courts would likely respond to the possibility of such a powerful remedy by distorting substantive constitutional protections to create an end run around such a harsh result.⁶⁷

Severability doctrine avoids this disastrous state of affairs. It permits a court to save as much as it can of the legislature's handiwork and, in so doing, reconstruct the law to govern affected parties. The chief virtue of severability is that it allows a court to create a new law quickly. We don't have to wait for the legislature to fix the constitutional defects the court identified. The court does the job itself, producing a new law itself at the very moment of invalidation. Thus, the doctrine eliminates the lag time between invalidation and legislative

⁶³ See *supra* note 14.

⁶⁴ See, e.g., Paul M. Bator, *Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 265 (1990).

⁶⁵ Michael Dorf takes this point even further, suggesting that, absent severability, a court might be forced to declare the entire U.S. Code unconstitutional because it contained a single invalid provision. See Dorf, *supra* note 19, at 370–71.

⁶⁶ See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 *YALE L.J.* 853, 890 (1991); Sherwin, *supra* note 2, at 307.

⁶⁷ On the connections between rights and remedies, see generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 *VA. L. REV.* 633 (2006); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *COLUM. L. REV.* 857 (1999).

re-enactment and ensures against the possibility that the legislature might not vote to re-enact the partially invalid statute, permitting the government to continue enforcing the valid parts of the statute without interruption.

Second, severability doctrine protects legislatures' ability to innovate. Legislators may pass laws knowing that judges will not hold them to the standard of perfection. In the event the statute is partially invalid, courts will not throw the baby out with the bath water. Put another way, severability doctrine helps avoid a chilling effect on legislative action. If legislators knew that any unconstitutional provision or application would result in their statute's total invalidation, they might become too cautious in their use of lawmaking powers.⁶⁸ Finally, forcing legislatures to spend inordinate time correcting statutes that might be saved by severance leaves them less time to spend on other matters.⁶⁹

Do these same justifications apply when a court invalidates a statute as applied to a set of facts? There is a common perception that severing invalid applications is a more dubious enterprise.⁷⁰ Certainly, it is easier to understand the concept as applied to a provision of a statute. Severance simply removes the invalid portion, leaving the remainder intact. Application severability does not work in the same manner. More often than not, a court cannot simply remove invalid applications in the way it might remove invalid words or clauses of a statute. Instead, the invalid applications are part and parcel of a statutory text that is valid in some, but not all, cases. Rather than removing parts of the statute enacted by the legislature, severing applications means adding new words to qualify what the legislature did.⁷¹ To understand application severability as a coherent form of

⁶⁸ See Fallon, *supra* note 2, at 890 (suggesting that overdeterrence may be the cost of having an overly expansive First Amendment overbreadth doctrine); Metzger, *supra* note 2, at 928 (making a similar argument against invalidation of statutes grounded in congressional authority to enforce the Fourteenth Amendment).

⁶⁹ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 409 (1991) [hereinafter Eskridge, *Overriding Decisions*] (“[T]he Court’s effort to push more items onto the legislative agenda necessarily pushes other items off of it.”).

⁷⁰ See Dorf, *supra* note 19, at 326; Metzger, *supra* note 2, at 885; Stern, *supra* note 2, at 106.

⁷¹ There was a time, in the late nineteenth century, when the Court drew a sharp distinction between text and application severability, rejecting the latter for this very reason. In *United States v. Reese*, 92 U.S. 214 (1875), the leading case of the era, the Court invalidated a Reconstruction-era civil-rights law because it could not sever the Act’s invalid applications without rewriting the statute:

The proposed effect is not to be attained by striking out or disregarding words that

severability, we have to conceive of a statute not as a written text with specific terms but in terms of the full spectrum of applications that the text produces. Only when we think of a statute not as a text but simply as a set of applications—what Richard Fallon calls subrules⁷²—does severing invalid applications make sense.

Whatever the force of these difficulties, courts need the power to sever both invalid applications and text. Take a statute that is valid in ninety-nine percent of cases and invalid in one percent. Without some kind of application severability, the government could not enforce the remaining ninety-nine percent of constitutional applications until the legislature wrote a new statute. Severability doctrine avoids this result, permitting the government to continue enforcing the valid applications of the statute without interruption. At the same time, it allows courts to vindicate as-applied challenges without triggering an impossibly harsh remedy. Courts would likely be very stingy about holding statutes invalid as applied if the consequence was always the statute's total invalidation. The result would be the distortion of the substance of constitutional rights.

Application severance also protects the ability of legislatures to innovate by allowing courts to trim off unconstitutional applications, preserving the statute's valid core. If legislatures were held to a standard of constitutional perfection, they would find it much harder to survive the prospect of judicial review. Consider *Gonzales v. Carhart*,⁷³ which rejected a facial challenge to the Partial Birth Abortion Ban Act,⁷⁴ and left open as-applied challenges to deal with excep-

are in the section, but by inserting those that are not now there. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

Id. at 221. For later cases following *Reese's* approach, see *Hill v. Wallace*, 259 U.S. 44, 70–71 (1922); *Butts v. Merchs. & Miners Transp. Co.*, 230 U.S. 126, 133–38 (1913); *Ill. Cent. R.R. v. McKendree*, 203 U.S. 514, 528–29 (1906); *Trade-Mark Cases*, 100 U.S. 82, 98–99 (1879). *Reese* was explicitly overruled in *United States v. Raines*, 362 U.S. 17, 24 (1960), and the law now permits both severance of invalid words, phrases, clauses, and applications. See *supra* Part I.A.

⁷² See Fallon, *supra* note 2, at 1334–35 (discussing subrules as they relate to as-applied challenges). For analysis and critique of Fallon's model, see generally Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1409 (2000) (critiquing the "Fallon Model" as "inconsistent with the ordinary account of statutory interpretation" because it "does not conceptualize a rule as a single, dynamic entity" but as "a set (perhaps a large set) of subrules that are distinct from each other in their language and scope, but nonetheless coexist over time").

⁷³ *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

⁷⁴ Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. III 2003)).

tional cases.⁷⁵ Without some form of application severability, the Court's facial validation of the Act could be effectively nullified if a subsequent court found the statute unconstitutional in a single set of circumstances. As-applied challenges would always offer an end run around the doctrine of *stare decisis*.⁷⁶ Under such a system, legislators would have a difficult time passing laws that implicate constitutional rights. At least some of the time, they might shrink from passing legislation they thought necessary and desirable, concluding that the game was not worth the candle.

Thus, we need some form of severability doctrine, even though it makes courts partners with legislatures in writing legislation. That raises the question of how courts should decide questions of severability. Should courts use the legislative-intent test, as the doctrine currently demands? Or is the legislative-intent test too forgiving? Does it give courts too much discretion whether and how to sever the unconstitutional portions or applications of a partially valid statute? I take up these questions in the next two Parts.

II. Severability as a Remedial Doctrine

In evaluating current doctrine's legislative-intent test, we first have to consider how to characterize the act of severance. If severability is properly analyzed as a form of statutory construction, as many claim it should be,⁷⁷ the legislative-intent test would be close to unimpeachable because legislative intent is a well-recognized tool of statutory interpretation.⁷⁸ Thus, to evaluate the propriety of current doctrine, we have to decide whether severability is an act of statutory interpretation.

⁷⁵ *Id.* at 1639.

⁷⁶ The Court's recent decision in *Wisconsin Right to Life* illustrates that a successful as-applied challenge can accomplish such an end run. By recognizing a broad First Amendment right to run campaign issue advertisements, the Court gutted the statutory scheme that had been upheld in *McConnell v. FEC*, 540 U.S. 93 (2003), recreating the "magic words" loophole that *McConnell* had permitted Congress to close. See *FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2702 (2007) (Souter, J., dissenting) (complaining that the Court "effectively reinstates the same toothless 'magic words' criterion of regulable electioneering that led Congress to enact BCRA in the first place"). Framing the case as one concerning the standard for an as-applied challenge enabled Chief Justice Roberts's opinion to effectively overrule *McConnell* without considering *stare decisis*. *Id.* at 2683 n.7 (Scalia, J., concurring) ("This faux judicial restraint is judicial obfuscation."); *id.* at 2687 (Souter, J., dissenting) (claiming that *McConnell* "is effectively, and unjustifiably, overruled today").

⁷⁷ See *supra* note 15 (collecting authorities).

⁷⁸ The only available challenge might be the textualist critique that the doctrine does not require courts to adhere to the plain meaning of the text of statutory severability clauses. See *supra* note 28.

The interpretative account of severability springs from the theory that severability and the canon of constitutional avoidance, which commands that courts construe statutes to avoid substantial constitutional questions, should be treated jointly under the general rubric of savings constructions.⁷⁹ “The cardinal principle of statutory construction is to save and not to destroy.”⁸⁰ Under this reading, both avoidance and severability are doctrines of statutory construction that permit a court to preserve a statute in the face of constitutional objections. Both doctrines permit a similar result: a court can save a statute from facial invalidation either by interpreting the statute to avoid the constitutional difficulties or by severing the invalid parts and reforming the statute to render it constitutional. In that sense, there is some justification for treating the doctrines together.

But only avoidance is truly an act of statutory interpretation. Avoidance is simultaneously constitutional interpretation and statutory construction, requiring a court to decide the meaning of the statute’s text in light of constitutional principles.⁸¹ It requires a court to avoid, if possible, a construction of the challenged statute that raises serious constitutional questions on the theory that constitutional concerns must be taken into account in deciding the best reading of a statute.⁸² Once the canon is applied, the statute bears the same construction for all cases, not simply in cases in which the statute implicates constitutional concerns.⁸³ Severability, by contrast, does not ask a court to parse the words of the text to determine its meaning. It permits an act of statutory reconstruction—reforming a partially invalid statute by eliminating the invalid portions—that could not be obtained were the court honestly applying traditional tools of statutory interpretation.

The temporal position of both doctrines in the process of judicial review underscores this point. Questions of statutory construction, including avoidance, precede a court’s resolution of a constitutional challenge when the court considers the meaning of the statute’s words. A court’s first task in resolving a constitutional challenge is to *interpret*

⁷⁹ For discussion and critique of this joint treatment, see Vermeule, *supra* note 2, at 1955–63.

⁸⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

⁸¹ On avoidance as a form of constitutional interpretation, see Frickey, *supra* note 50, at 442–55; Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 86–88; Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1584–99 (2000).

⁸² See Young, *supra* note 81, at 1588–89.

⁸³ See *Clark v. Martinez*, 543 U.S. 371, 380–82 (2005).

the challenged statute so that it can assess whether the statute comports with constitutional limitations. In doing so, the avoidance canon instructs that it should, if fairly possible, interpret the challenged statute so as to avoid serious constitutional questions.⁸⁴ In choosing between otherwise plausible readings of a statute, the court should adopt the construction that avoids the constitutional question.⁸⁵ But this is no license to rewrite the statute to conform it to constitutional requirements.⁸⁶ A court engaged in statutory interpretation is supposed to determine the meaning of the statute, not rewrite it.

To be sure, what counts as a fair or reasonable interpretation of statutory language is often in the eye of the beholder, and the judicial invocation of avoidance sometimes seems more like an act of alteration than interpretation.⁸⁷ But that should not change the character of the avoidance canon. It only proves that avoidance, like all legal doctrines, may be abused. Under the doctrine, the judicial role is to interpret the statute, requiring the court to take constitutional principles into account in deciding the best reading of the statute.

The opposite is true of severability, which permits a judicial amendment, not an act of interpretation. At the time a court considers whether or not to sever, it has already construed the statute, concluded that constitutional adjudication is unavoidable, and found that

⁸⁴ *E.g., id.*; *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As a general matter, the canon is somewhat more difficult to invoke when state statutes are at issue because federal courts lack the power to issue authoritative constructions of state statutes, making them less willing to avoid a constitutional issue by interpreting it away. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 944–45 (2000); *City of Chi. v. Morales*, 527 U.S. 41, 61 (1999).

⁸⁵ *See Clark*, 543 U.S. at 385 (“The canon of constitutional avoidance comes into play only when, after application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.”); *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (“[T]he statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a ‘fair’ one.”).

⁸⁶ *See Salinas v. United States*, 522 U.S. 52, 59–60 (1997) (“[W]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.” (quotation omitted)); *Chapman v. United States*, 500 U.S. 453, 464 (1991) (explaining that avoidance canon “is not a license for the judiciary to rewrite language enacted by the legislature” (quotation omitted)); *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988) (“[W]e will not rewrite a state law to conform it to constitutional requirements.”).

⁸⁷ *See, e.g., Frickey, supra* note 50, at 459–60 (discussing cases in which “a majority of Justices was willing to invoke the canon even when faced with what would ordinarily be viewed as an unambiguous statute”). Indeed, as Frickey observes, there is a substantial body of literature that criticizes avoidance for giving courts too much authority to rewrite statutes. *Id.* at 399–400 & nn.6–7 (collecting cases and articles).

the statute violated the challenger's constitutional rights.⁸⁸ Because the court has already construed the statute prior to reaching the merits of the constitutional claim and has concluded that it could not limit the statute to avoid the constitutional claim, it makes little sense to view severance as a further act of statutory interpretation. Rather, severability doctrine authorizes a court to revise a partially invalid statute so that it may be enforced to the full extent the Constitution permits.⁸⁹

Grace illustrates these differences between statutory interpretation and severability doctrines. There, the Supreme Court invalidated a statute criminalizing a wide range of expressive activities in the Supreme Court building and grounds as applied to picketing and leafletting on the public sidewalks surrounding the Court.⁹⁰ The Court first considered whether it could construe the statute to avoid the plaintiffs' First Amendment claim. Relying on the plain text of the statute, which spelled out in excruciating detail what city streets were a part of the "Supreme Court grounds,"⁹¹ the Court saw no way to narrow the statute to permit the plaintiffs' protected activity.⁹² But what was not possible as a matter of statutory interpretation was easily accomplished by the Court's implicit severance.⁹³ No longer confined by the need to honor principles of statutory interpretation, the Court created an exception to the ban for the public sidewalks surrounding the Court by severing the statute's invalid application to sidewalk speech, effectively rewriting the statutory definition of "Supreme Court grounds."

⁸⁸ See Vermeule, *supra* note 2, at 1957 ("[S]everability . . . comes into play only when a constitutional judgment on the merits has already proven unavoidable and has already been rendered."). The exception that proves the rule is *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court decided the severability question first because it was inextricably intertwined with the jurisdictional question of Chadha's standing to sue. See *id.* at 919. For discussion of the circumstances in *Chadha*, see Vermeule, *supra* note 2, at 1957 n.71.

⁸⁹ See Vermeule, *supra* note 2, at 1963 (arguing that severability "rests on the . . . norm of legislative supremacy: duly enacted statutes take effect to the full extent that the Constitution allows").

⁹⁰ *United States v. Grace*, 461 U.S. 171, 178–79 (1983).

⁹¹ *Id.* at 179 n.8 (quoting 40 U.S.C. § 13p (2000) (current version at 40 U.S.C. § 6101 (Supp. IV 2000))).

⁹² Compare *id.* at 175–76 (holding that statute applied to the conduct in which plaintiffs had engaged), and *id.* at 179 n.9 (holding that, because of the statutory definition of "Supreme Court grounds," the statute "cannot be construed to exclude the sidewalks"), with *id.* at 188–89 (Stevens, J., concurring in part, dissenting in part) (urging application of avoidance canon to hold that Congress did not intend to abridge free expression).

⁹³ See *supra* text accompanying notes 45–47 (discussing *Grace* as a case of implicit severance).

The argument for treating severability as a remedial doctrine is simple and straightforward: severability doctrine is remedial because it shapes the relief a court will enter after finding the statute unconstitutional in part.⁹⁴ It controls the breadth of a court's invalidation, determining whether the court will invalidate the statute as a whole or in part. Like virtually all remedial questions, it comes at the tail end of judicial review, after a court has assured itself that the plaintiff presents a justiciable controversy and that the statute violates his or her constitutional rights.⁹⁵ What drives the doctrine's presumptions in favor of severance is the familiar remedial rule that the judicial remedy should match the constitutional violation.⁹⁶

Treating severability doctrine as a species of federal constitutional remedial law is normatively attractive as well, because it permits courts to calibrate severability doctrine to take into account both the costs and benefits of severance. Unlike the statutory-construction account of severability, which naturally gives primacy to the legislative judgment, the remedial model lets the federal judiciary set the doctrine's contours. The law of constitutional remedies is almost entirely a matter of judge-made federal "constitutional common law,"⁹⁷ informed largely by the twin aims of redressing constitutional violations on an individual level and ensuring that government officials obey constitutional norms.⁹⁸ To be sure, in deciding what remedies are appropriate, the Supreme Court has long been sensitive to how majoritarian institutions will react to a particular remedy,⁹⁹ but by and

⁹⁴ See Fallon, *supra* note 67, at 645 ("Remedial issues are those bearing on the availability of particular forms of relief for parties who have presented justiciable claims and whose rights have been violated.").

⁹⁵ *Id.* at 634 (noting the traditional division of a lawsuit into the three stages of justiciability, merits, and remedy).

⁹⁶ See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006) ("[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem."). As Barry Friedman notes, this principle imposes a "'fit' requirement: the remedy must fit the right violated, exceeding it in neither scope nor nature." Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 743 (1992). For critique of the fit principle's inconsistent application, see *id.* at 743–45.

⁹⁷ This phrase comes from Henry Monaghan's path-breaking *Harvard Law Review* foreword. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

⁹⁸ For a discussion of these two principles, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1787–91 (1991).

⁹⁹ See Friedman, *supra* note 96, at 741–43. Friedman argues that the Court's willingness to consider how legislatures and other majoritarian bodies will react to a court's imposed remedy is a good thing because it makes possible a dialogue between the judicial branch and the more democratically accountable bodies. *Id.* at 767–73.

large the decision about what remedy to craft is virtually always a judicial one. Legislatures very rarely get into the mix in setting remedies, especially when injunctive relief is at issue.¹⁰⁰

As a remedial doctrine, severability mediates between two conceptions of the proper judicial role in constitutional adjudication, both traceable all the way back to *Marbury v. Madison*.¹⁰¹ The first—which calls for courts to refuse to enforce unconstitutional statutes to vindicate the rights of the parties—leads directly to partial invalidation and severance; the second—which insists that courts have a special role in ensuring legislative obedience to the Constitution—supports a broader invalidation.¹⁰²

As a number of scholars have recognized, *Marbury* presents a Janus-faced picture of constitutional adjudication. On the one hand, *Marbury* justified judicial review as a matter of necessity in resolving a dispute between the parties. So conceived, when a court finds a statute violates constitutional rights, it refuses to enforce the statute against the party who challenged it, but should go no further.¹⁰³ As the Supreme Court later put it, “the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.”¹⁰⁴ Viewed in these terms, the appropriate judicial response to a constitutional violation is a narrow invalidation, tied to the wrong done to the plaintiff. That is the result that severability doctrine facilitates.

But *Marbury* simultaneously adopts a broader reading of the role of courts in judicial review—one that supports a more active remedial

¹⁰⁰ In constitutional tort cases, legislatures tend to have a greater role in fixing remedies, a consequence of their power to substitute the remedy courts would impose with an effective alternative of their own design. See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1547–50, 1552–53 (1972); Fallon & Meltzer, *supra* note 98, at 1787; Friedman, *supra* note 96, at 752, 779.

¹⁰¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁰² For discussion of these different conceptions of judicial review, see Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 12–16 (2003); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 77–78, 94, 122–24 (2007); and William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 34–38.

¹⁰³ See Fallon, *supra* note 102, at 12–14 (discussing private-rights model of judicial review); Monaghan, *supra* note 102, at 1365–68 (same); see also Van Alstyne, *supra* note 102, at 34 (discussing *Marbury* as an instance of “defensive” judicial review).

¹⁰⁴ *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

role. *Marbury* emphasizes that courts have a responsibility to make sure legislatures obey constitutional limits, a duty that transcends the obligation to resolve a specific case.¹⁰⁵ Courts engaging in constitutional review are not simply resolving individual disputes; they are policing legislatures to ensure compliance with constitutional norms, “reinforc[ing] structural values, including those underlying the separation of powers and the rule of law.”¹⁰⁶ For that reason, the narrowest remedy that resolves the specific case is not always the correct one. Accordingly, we cannot assume that severance is always the right remedy because it is the narrowest. In some circumstances, we may want a court to invalidate a statute to promote structural constitutional values, even if it might be possible to protect the challenger’s rights by severing the statute’s invalid parts and reforming the statute.

We are thus left with the normative question of whether the legislative-intent test provides the right set of tools to make the remedial choice between severance and invalidation. Treating severance as remedial in character does not necessarily commit us to any particular doctrinal test for choosing whether or not to sever a statute’s invalid parts. In fact, the legislative-intent test might well be appropriate, not because the doctrine is interpretative, but because it best promotes the goal of saving partially invalid statutes. The next Part takes up this question.

III. Against Legislative Intent

The case for the legislative-intent test rests on the overriding importance of saving partially invalid statutes. The test allows courts to do just that, while honoring the remedial principle that the judicial remedy should match the scope of the constitutional violation. Courts invalidate the statute only to the extent it violates the challenger’s constitutional rights and leave the remainder intact, so long as the enacting legislature would have preferred the judicially-reconstructed statute to none at all. Further, the test does not interfere with the ability of courts to protect constitutional rights, for courts may preempt severability doctrine where necessary to better enforce constitutional rights.¹⁰⁷

¹⁰⁵ See Fallon, *supra* note 102, at 15–16; Monaghan, *supra* note 102, at 1370–71.

¹⁰⁶ See Fallon & Meltzer, *supra* note 98, at 1787; see also Siegel, *supra* note 102, at 123 (“[C]ourts do have the special function of enforcing the Constitution and the laws, and ensuring that government behaves lawfully.”).

¹⁰⁷ See *supra* notes 56–57 and accompanying text.

In its broad outlines, this is an attractive account of judicial power. Courts do need significant authority to sever. Quite often, the proper remedy will be to override the unconstitutional parts of the statute and enforce the remainder. At the same time, structural rule-of-law and separation-of-powers principles require effective limits on the power to sever—limits that the legislative-intent test does not provide. The test imposes virtually no constraints on the judicial power to sever. It gives courts something close to *carte blanche* to sever, imposing only a very weak constraint on severance. As a result, courts possess a tremendous power to rewrite partially invalid statutes.

From a structural perspective, this lack of meaningful constraint is troubling. First, it gives courts extensive power to rewrite statutes, and it does so in a way that makes after-the-fact legislative correction unlikely. Second, it signals to legislatures that courts will go to extremes to save their handiwork, and this warps legislatures' incentives to obey constitutional norms *ex ante*. Third, it allows courts to make vague law without thinking about it. I examine these in turn.

A. *Severability as Aggressive Judicial Lawmaking*

Severability's chief cost is easily stated. The doctrine gives courts a wide-ranging power to rewrite statutes, and this regularly enmeshes the judiciary in making policy choices that are better left to the legislature. The focus on legislative intent obscures this. When courts rewrite statutes via severance, they do so without the ability to investigate the problem and find facts in the ways legislatures can, without the power to consider the full range of policy choices that might be open to the legislature, and without any accountability to or understanding of the wishes of the electorate.¹⁰⁸ All of this should come as little surprise. Judges, in our constitutional system, are not meant to write laws. Yet, severability doctrine gives them this role.

This intrusion into the lawmaking process is worrying on a second level. Severability doctrine tends to shut down any possibility of dialogue between the Supreme Court and legislatures concerning the proper scope of constitutional guarantees.¹⁰⁹ In most constitutional litigation, there is no single right way to respond to a judgment invali-

¹⁰⁸ See Sherwin, *supra* note 2, at 315 (discussing reasons that legislatures are superior to courts as rulemaking institutions).

¹⁰⁹ On the value of dialogue, see generally Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

dating a statute. A legislature might accept the Court's resolution of the constitutional question and enact a statute that, in its view, avoids the constitutional defect identified by the Court. The legislature will typically have a vast array of statutory schemes that will accomplish this goal.¹¹⁰ Or, the legislature might make minor changes to the invalidated statute in the hopes that tinkering with the statutory language will change the outcome or force the Court to revisit its initial holding.¹¹¹ Finally, the legislature might simply reenact the invalidated statute and precipitate a constitutional confrontation between the branches in the hope that the Court will back down.¹¹² Severability doctrine cuts off the possibility of interbranch dialogue before it starts by instructing courts to rewrite the statute before the legislature has a chance to do so itself.¹¹³

The point here is not that rewriting statutes is inconsistent with separation of powers, requiring severability doctrine to be scrapped root and branch. As we have seen, to have a workable system of judicial review, courts need the power to rewrite statutes by severing unconstitutional parts and applications. Rather, the point is that severance gives courts a rewriting power as a second-best solution, and that basic separation-of-powers principles demand that this power come with some effective constraints. Everyone concedes that courts must have some power to sever. The question is whether they should sever as a matter of course simply because the legislature prefers that result.

It is difficult to find a better example of the kind of aggressive judicial lawmaking that the legislative-intent test licenses than the

¹¹⁰ See *Randall v. Sorrell*, 126 S. Ct. 2479, 2500 (2006) (making this observation in declining to sever).

¹¹¹ Arguably, the federal statute banning so-called partial-birth abortions, upheld in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), is an example of this kind of legislative response. Compare *id.* at 1630–31 (detailing the ways in which “Congress sought . . . to meet the Court’s objections to the state statute considered in *Stenberg*”), with *id.* at 1641 (Ginsburg, J., dissenting) (arguing that the majority “refuses to take . . . *Stenberg* seriously”).

¹¹² See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (invalidating congressional statute that directly contravened prior Supreme Court precedent). The majority and dissent split on which institutional actor had the better constitutional interpretation of the Fifth Amendment. The majority followed the Court’s constitutional rule enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966), *id.*, whereas the dissent thought that the congressional statute better expressed the Fifth Amendment’s true meaning, *id.* at 461 (Scalia, J., dissenting); see also Dorf, *supra* note 19, at 342–47 (discussing President Abraham Lincoln’s view that Supreme Court decisions bind the parties but not the President and Congress, who may act on a contrary view of the Constitution in future controversies).

¹¹³ Cf. Dorf, *supra* note 19, at 348 (making a similar point about fallback law that specifies the law to be applied in the event of invalidation).

Court's recent decision in *Booker*.¹¹⁴ Three facets of *Booker* stand out.

First, *Booker* effected a radical transformation of our federal criminal-sentencing laws and installed its new sentencing scheme without any consideration of its merits as policy or the likely result of making the Sentencing Guidelines discretionary. The Court's opinion lavished great attention on why Congress would not have wanted the scheme it enacted with a jury-trial requirement grafted onto it; it spent almost no attention on why Congress would want a discretionary sentencing scheme.¹¹⁵ All that the Court said was that its newly minted discretionary scheme was consistent with the enacting Congress's intent to reduce sentencing disparities,¹¹⁶ which is not to say much at all. One could imagine a great many legislative schemes that "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."¹¹⁷ One searches the *Booker* remedial majority opinion in vain for the reasons why the Court enacted its chosen reform. The net result is that, post-*Booker*, we have a federal sentencing regime that does not represent the policy choices of any of the three branches of government.

Second, and related, severability doctrine gives courts a limited set of options to save a partially invalid statute. *Booker* views severability in binary terms. Severability doctrine presents a choice between two remedies: the Act's mandatory scheme plus the Constitution's jury-trial requirements or a discretionary scheme (the Act minus the severed provisions making the Sentencing Guidelines mandatory). To make this choice, the Court must decide which of

¹¹⁴ *United States v. Booker*, 543 U.S. 220 (2005). *Booker*, admittedly, could be viewed as an extreme case. The Court's remedial majority rewrote the statute to preserve some semblance of stability in federal criminal sentencing and saw its fix as the best and easiest solution among the second-best options available to it. See, e.g., Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 679 (2006) ("One might interpret the remedial holding as a pragmatic attempt . . . to patch together a workable sentencing system as close to the Guidelines as was possible under the circumstances."); Metzger, *supra* note 2, at 891 (noting "tremendous disruptive potential of total invalidation of the federal sentencing system"). But the *Booker* remedial opinion does not treat its remedy as a special case, invoked because of the compelling importance of avoiding chaos in federal sentencing. It treats its choice of remedy as compelled by traditional severability principles. See *Booker*, 543 U.S. at 247 (disclaiming intent "to create a new kind of severability analysis").

¹¹⁵ Compare *Booker*, 543 U.S. at 249–58 (explaining why Congress would not have wanted its system with an added jury-trial requirement), with *id.* at 264–65 (explaining why the system it puts into place is consistent with the enacting legislature's intent).

¹¹⁶ *Id.* at 264–65.

¹¹⁷ *Id.* at 265.

these two remedies “would deviate less radically from Congress’s intended system.”¹¹⁸ But, of course, these two choices hardly exhaust the range of ways a legislature might respond to the Court’s holding that the Sentencing Guidelines, as written, violate the Sixth Amendment’s jury-trial guarantee. So the Court is thrust into the job of re-writing the statute from a position of severe constraint. It must create a new sentencing regime by process of elimination, hewing as closely as possible to the intent of the enacting legislature. Perhaps the most that can be said for the Court’s chosen remedy is that it was easy to make the Guidelines discretionary by deleting the requirement that trial and appellate courts “shall” follow the Guidelines.¹¹⁹ Whatever one’s views of what makes for sensible sentencing policy, this seems like an extraordinarily bad way to craft a new regime that comports with the Sixth Amendment.

Third, completely absent from the Court’s severability calculus is the question of which branch of government should have the initial crack at designing a new sentencing regime. The Court gives no weight to the fact that sentencing policy is an extraordinarily complicated matter. It discounts that the Court, as an institution, is poorly suited to rewrite statutes, and, for that reason, should not have the authority to make such far-reaching and fundamental changes to the legislature’s handiwork in the name of severance. The Court’s remedial majority hardly pauses at all before engaging in massive restructuring of the Guidelines.

Booker illustrates the dangers that occur when a court uses severability doctrine to make fundamental changes to a legislature’s work and the need for better doctrinal tools in this area. When a court affects significant change via severance, it effectively legislates without any of the tools that make for sound legislation. It has little access to information about how new legal regimes might work and cannot consider the full range of options and strategies to correct the unconstitutional statute. It can strike out invalid parts or applications of the old statute, but that is all. This is a pathological way to rewrite invalid legislation. The legislative-intent test hardly reins in the impulse towards far-reaching statutory revisions. It makes radical surgery on a

¹¹⁸ *Id.* at 247.

¹¹⁹ More than converting the Guidelines from mandatory to discretionary, in fact, was required. The Court needed to create a new standard of appellate review, which it did on the far-fetched theory that the new standard was actually implicit in what was left of the Guidelines. *Booker*, 543 U.S. at 260–62. Only in “Wonderland,” Justice Scalia commented, could a court “use[] the power of implication to fill a gap created by the Court’s own removal of an explicit standard.” *Id.* at 309–10 (Scalia, J., dissenting).

statute easy to justify and allows a court to sidestep the institutional questions about whether the judiciary or the legislature should have the first crack at rewriting the statute. And finally, it imposes no constraints at all on *how* a court accomplishes severance. The doctrine does not require a court to reconstruct the statute in the least intrusive way possible. It does not require a court to think about whether the rewritten statute is clear or not. It only requires a court to conclude that its chosen severance is consistent with legislative intent.

A second example reinforces this point. In *Buckley v. Valeo*,¹²⁰ the Supreme Court held the Federal Election Campaign Act (“FECA”)¹²¹ partially invalid and severed its unconstitutional provisions restricting campaign spending.¹²² The result was to transform a comprehensive regulation of campaign financing into one that left candidates free to spend as much as they could but limited the amount a single person or entity could contribute.¹²³ The Court’s rewrite left the federal campaign statutes with an arbitrary distinction between expenditures and contributions that has deformed modern politics, creating a prisoner’s dilemma that effectively requires candidates to amass huge war chests to remain competitive while hobbling their efforts to do so.¹²⁴ As in *Booker*, the court-imposed system has a democratic deficit. No branch chose this system on the merits.¹²⁵ In fact, the Court imposed it without any real consideration of the changes it would make and the pressures it would impose on politicians to devote nearly every waking hour to fundraising.¹²⁶ Coming at the tail

¹²⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹²¹ Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–456 (2000).

¹²² *Buckley*, 424 U.S. at 108–09, 143 (per curiam). The Court never explicitly addressed whether FECA should be invalidated as a whole because of the unconstitutionality of the spending provisions, although Chief Justice Burger advocated that result in dissent. *Id.* at 252–55 (Burger, J., concurring in part, dissenting in part). Its discussion of severability was exceptionally brief, confined to a single paragraph. *See id.* at 108–09 (per curiam). In that discussion, the Court thought it obvious that FECA’s provisions concerning public financing of elections should not fall because of the Court’s invalidation of FECA’s expenditure provisions. *Id.*

¹²³ *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 312–13.

¹²⁴ *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1284–89 (1994); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1710–11, 1736 (1999).

¹²⁵ *See* *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 407 (2000) (Kennedy, J., dissenting) (observing that our campaign finance system did not “evolve[] from a deliberate legislative choice; . . . its unhappy origins are in our earlier decree in *Buckley*, which by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures) created a misshapen system”).

¹²⁶ *See* Blasi, *supra* note 124, at 1284–89.

end of a very complicated First Amendment analysis, the Court gave short shrift to severability analysis and did not seriously consider the implications of the remedial scheme it created.

Of course, not every instance of severance comes with these flaws. We might contrast *Booker* and *Buckley* with the Supreme Court's decision in *United States v. Grace*, in which the Court saved a federal statute prohibiting certain expressive activities on the Supreme Court's building and grounds by carving out an exception to the ban on the sidewalks outside the Court.¹²⁷

Grace, unlike *Booker* and *Buckley*, made only the smallest of changes to Congress's statutory scheme, rewriting the statutory definition of the Supreme Court's grounds to exclude the adjoining public streets that the First Amendment required be open to all speakers.¹²⁸ This, of course, was still an act of rewriting, but it did not force the Court into any significant policymaking role. Given the Court's conclusion that Congress could not close the streets surrounding the Court to free speech, this was the obvious and, for all practical purposes, the only way to remedy the defect. In fact, it is hard to imagine any other suitable remedy that matched the First Amendment infirmity the Court identified. Of course, the Court could have invalidated the statute as a whole, forcing Congress to rewrite it, as Justice Marshall's dissent insisted.¹²⁹ But facial invalidation would have prevented the government from enforcing the statute across the board, even in the case of First Amendment activities inside the Court itself, until Congress could pass a new statute. This would have prevented the government from enforcing many constitutional applications of the statute with little justification or added benefit. In light of the statute's limited infirmity and the ease of the judicial fix, the Court was justified in rewriting the statute itself. And, it is hard to imagine a Congress doing anything other than what the Court did—amending the definition of grounds to exclude the public streets. Severance fixed the defect faster than requiring new legislation from Congress and without displacing or modifying in any significant way the policy judgment Congress had made in enacting the statute.

¹²⁷ See *United States v. Grace*, 461 U.S. 171, 179 (1983).

¹²⁸ *Id.* at 179–84 (finding that the statute violated the rights of speakers because the statutory definition of “grounds” covered “not only the building, the plaza and surrounding promenade, lawn area, and steps, but also the sidewalks” and there was no substantial governmental interest in suppressing speech on the public sidewalks).

¹²⁹ *Id.* at 185–88 (Marshall, J., concurring in part, dissenting in part).

Current doctrine's legislative-intent test does not provide sufficient tools to distinguish *Booker* and *Grace*. Under the black-letter doctrine, legislative intent is all that matters. As *Booker* illustrates, it is quite easy for a court to justify radical surgery of a statute in the name of preserving the intent of the enacting legislature. Legislative intent, as a test, does little to constrain courts from using severability doctrine to rewrite statutes in substantial fashion. In fact, to the extent we can accurately gauge what the legislature actually intended in the event of partial unconstitutionality,¹³⁰ legislatures would most likely prefer courts to save their statutes by revising them rather than have the courts invalidate their work and force them to start anew. That suggests that, if we're serious about legislative intent, we want the courts to be active rewriters. For the reasons discussed above, that would be a bad idea. In short, we need to develop a better severability doctrine—one that puts effective limits on the authority of courts to rewrite statutes.

A critic might object that we should not be so worried that courts will use severability doctrine to rewrite statutes, even in fairly radical ways, because the judicial legislation that results from severance is merely an interim solution, which the legislature is free to revisit. *Booker* exemplifies this idea. As Justice Breyer's remedial opinion put it: "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system . . . that Congress judges best for the federal system of justice."¹³¹ The Court's implicit message is

¹³⁰ Compare Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) ("[J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses."), with Elhauge, *Preference-Estimating*, *supra* note 50, at 2065 (rejecting Easterbrook's views as "somewhat extreme" because a judge only considers "which among some limited set of interpretive options the legislature is likely to have chosen").

¹³¹ *United States v. Booker*, 543 U.S. 220, 265 (2005); see also *Cunningham v. California*, 127 S. Ct. 856, 867–68 (2007) (stressing "the provisional character of the *Booker* remedy"); Metzger, *supra* note 2, at 891 (noting that "[a]s an interim measure, the [*Booker*] majority's approach has much to recommend it; sentencing will proceed largely as before, albeit with the major caveat that judges will now have the freedom to deviate from Guidelines ranges that they previously lacked, but with some protection against radical departures"). Justice Ginsburg, in a speech given nearly a quarter of a century earlier, made a similar point in defending the power of courts to rewrite statutes to extend government benefits to groups unconstitutionally excluded from those benefits. See Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 317 (1979) ("If [the court] declares the statute unconstitutional as written, the remaining task is essentially legislative. The legislature, however, cannot be convened on the spot. The interim solution, therefore, must come from the court. The court's function, then, is to serve as short-term surrogate for the legislature."). This

that the legislature is perfectly capable of putting in place a different regime; if it does not, we should take that as an indication that it approves of our rewrite. In either case, we should not put additional limits on courts' power to sever.

Justice Breyer's opinion views the Court's rewriting as the opening move in a dialogue between the Court and Congress, and his point holds up if *Booker* is actually a dialogue-creating decision. But it is doubtful that the judicial reconstruction severability authorizes actually makes for dialogue between court and legislature in the run of cases. More often than not, it leads courts to supplant the legislature's lawmaking authority on a long-term basis. In short, when a court invokes severability to rewrite a statute, the result is often a permanent change, not an interim one. "The hoped for colloquy between the courts and Congress virtually always ends up as a judicial soliloquy."¹³² Thus, the possibility of legislative correction after the fact does not justify giving courts such a wide-ranging power to sever.

There are several reasons why this is so. First, there is the familiar point that "veto gates" often prevent the passage of legislation.¹³³ Even assuming the legislature would pass an amended statute to replace the one the court wrote, the legislature may not have the opportunity to vote on a final bill. Individual legislators may ensure the bill dies in committee. Even if a bill makes it out of committee, legislators opposed to the bill may filibuster and so prevent a vote on the floor of the legislature. Even if a statute survives all the veto gates in the legislature, the President or Governor may veto the legislation, stopping it in its tracks unless the bill passed with a veto-proof majority.

Second, once a court has revised a statute, legislative inertia makes it much less likely that the legislature will respond to displace the court's handiwork. Unlike the situation in which a court invalidates a statute and renders it unenforceable, when a court severs and rewrites, it leaves some usable and enforceable law in place. The legislature, then, has to decide not simply whether it wants an enforcea-

history helps explain why Justice Ginsburg joined with the four dissenters in rewriting the Sentencing Guidelines to save them to the extent possible.

¹³² See Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHL.-KENT L. REV. 481, 485 (1990).

¹³³ On veto gates, see, for example, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1341-42 (2001); Frank H. Easterbrook, *The Role of Original Intent in Statutory Interpretation*, 11 HARV. J.L. & PUB. POL'Y 59, 64-65 (1988); John F. Manning, *What Separates Textualists from Purposivists*, 106 COLUM. L. REV. 70, 103 (2006). Although these writers discuss veto gates in Congress, many of the same institutional features are present in state and local legislatures as well.

ble statute on the books, but whether it wants a statute that has sufficiently different contours from the one the court has constructed using severability doctrine.

Undoubtedly, in some cases, the legislature will conclude that it needs to replace what the court has done. But in many (and likely most) cases, the legislature will probably take the view that the rewritten statute's defects are not serious enough to justify opening up the statute for another round of revisions.¹³⁴ In making this calculation, legislators will consider how important it is to revisit the statute and the political points to be gained or lost in doing so. Legislators do not have enough time to enact every bill that a majority would support.¹³⁵ If the legislature wants to rewrite a statute that a court has already rewritten, some other piece of legislation may have to wait until another session. These dynamics—whether or not they are a good thing—make it difficult to rely on legislative override as a corrective mechanism to improper use of severance.

Bill Eskridge's empirical work on congressional overruling of Supreme Court statutory precedents reinforces these conclusions. Eskridge's study, which examined congressional rejections of Supreme Court rulings from 1967–1990, found that Congress only occasionally amended its statutes to reject statutory precedents.¹³⁶ Congress takes a less active role in overruling the Court, he suggests, because Congress has a limited agenda, and it tends to buck the Court only when the political interests favoring the Court's ruling are weak.¹³⁷ The result, as he sees it, is that “the Court is often able to read its prefer-

¹³⁴ See Elhauge, *Preference-Estimating*, *supra* note 50, at 2100 (“[L]egislative override is far less likely than legislative nonresponse.”).

¹³⁵ See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 98–99 (1988) [hereinafter Eskridge, *Interpreting Inaction*] (arguing that “[t]he legislative agenda is severely limited” such that “to gain a place on that agenda, a measure must not only have substantial support, but be considered urgent by key people”); Eskridge, *Overriding Decisions*, *supra* note 69, at 409 (making the point that “Congress does not have an infinitely elastic agenda”).

¹³⁶ Eskridge, *Interpreting Inaction*, *supra* note 135, at 338.

¹³⁷ See *id.* at 377 & n.140; see also Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2179 (2002) [hereinafter Elhauge, *Preference-Eliciting*] (“If there is conflicted demand for legislation, then no matter who is in office, Republicans or Democrats, and no matter which side of the conflict each favors, a court cannot have confidence about legislative correction”); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 605 (1995) (“At least in the absence of strong political demand for a statutory amendment, legislators have a strong incentive to avoid taking up a question that has been provisionally settled by a court and have little incentive to spend precious political capital vindicating the claimed ‘real’ intention of the prior legislature that enacted the law.”).

ences into statutes, against the desires of our nationally elected officials.”¹³⁸ Part of the reason, Eskridge suggests, is strategic behavior on the Court’s part. The Court often has a good idea of what it can get away with, and by paying close attention to the thinking of the current Congress and President, the Court can minimize the chance that Congress will revisit its handiwork.¹³⁹ Indeed, Einer Elhauge argues that the Court is right to track these current legislative preferences.¹⁴⁰

Booker, in fact, helps us see why legislatures will, more often than not, acquiesce in a judicially-severed and rewritten statute. Let us compare *Booker*’s remedial judgment with a hypothetical opinion invalidating the Sentencing Guidelines. Had the *Booker* Court invalidated the Sentencing Guidelines in their entirety, Congress would have no choice but to intervene to establish a new sentencing regime for the thousands of defendants in the system. The Court’s solution removed the need for a congressional response. First, it left in place a statutory scheme on which courts and prosecutors could rely to sentence defendants. Congress did not have to worry that the Court’s decision would result in a legal limbo that would bring federal criminal law to its knees. Second, the vagueness of *Booker*’s new regime made it unlikely that Congress would respond. The Court’s opinion permits judges to enter the exact sentences demanded by the Guidelines so long as the court, in its discretion, chooses that sentence. Because *Booker* left sentencing decisions to the discretion of district court judges, it made it difficult for lawmakers to predict how and if sentences would actually change. That made it hard for political forces to press Congress to pass a new sentencing statute. In this respect, *Booker*’s settlement was tailor-made to produce legislative acquiescence.

The conventional wisdom—expressed in *Booker* and elsewhere—is that facial invalidation is more of an intrusion than severing the

¹³⁸ See Eskridge, *Overriding Decisions*, *supra* note 69, at 378; *id.* at 416 (noting “the significant power of the Court to read its own raw preferences into statutes without congressional override”).

¹³⁹ See *id.* at 390–403; see also Frickey, *supra* note 50, at 449 (“[T]he Court may be able to entrench its result by rewriting the statute in question in a manner that effectively renders Congress politically unlikely to override it.”).

¹⁴⁰ See Elhauge, *Preference-Estimating*, *supra* note 50, at 2049. Legislative override, Elhauge argues, is most likely in cases in which there is a “one-sided political demand for legislation,” Elhauge, *Preference-Eliciting*, *supra* note 137, at 2179, and in those cases, Elhauge would permit courts to force the legislature to clarify its preferences rather than estimate current preferences, *id.* at 2263.

invalid parts or applications of a statute.¹⁴¹ In a certain sense, that is obviously correct. Facial invalidation eliminates the statute in its entirety, whereas severance leaves something of the legislature's handiwork in place. But, if we focus on the institutional relationship between the judicial and legislative branches, the conventional wisdom is wrong.

Facial invalidation functions like a remand to the legislature. It tells the legislature that its chosen policy is unconstitutional, and that, should it wish to regulate, it needs to go back to the drawing board. It returns the legal landscape to the status quo that existed before the legislature enacted the statute. That void gives the legislature an incentive to consider whether it needs a new statute, and, if it so decides, to enact one into law.¹⁴²

But where a court revises the statute by severing its invalid parts or applications, the legislature is much less likely to act, even in cases in which the legislature would not have enacted the court's scheme into law. Without the urgency of a legal vacuum, the court's rewrite—enacted without a thought to whether it is wise policy—will, quite often, become a permanent statutory change, either because the matter is not sufficiently urgent to warrant new legislation, or a proposed bill falls subject to any of a number of veto gates.¹⁴³ But the problem goes even deeper than that. “For it is not just that the writers of laws may not have sufficient time or interest to correct interpretive mistakes, the structure of the legislative process will, in many instances, make it *impossible* for them to do so.”¹⁴⁴ As Jerry Mashaw shows, once a court has rewritten the statute (or, in his terms, “misconstrued” it), any single institutional actor in the lawmaking process who prefers

¹⁴¹ See, e.g., Marc Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 360–61 (1998) (arguing that facial challenges are disfavored and exceptional because of their greater intrusiveness).

¹⁴² See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 254–55 (“If the Court disturbs a legislative outcome by invalidating a statute, that action . . . returns matters to the prestatutory status quo. The legislature might well reenact a policy relatively close to the one invalidated, since the process of reenactment, like the original enactment process, requires bargaining among all three constitutionally relevant actors (the House, the Senate, and the President).”); see also *United States v. Booker*, 543 U.S. 220, 292 (2005) (Stevens, J., dissenting in part) (observing that total invalidation “would give Congress a clean slate on which to write an entirely new law”).

¹⁴³ For a discussion of this point in the literature on constitutional avoidance, see Marshall, *supra* note 132, at 485–86 (“When [invalidation] happens, Congress may not have the luxury of letting the status quo remain, as it does when the Court has taken upon itself to rewrite the statute in a manner that avoids possible constitutional difficulties.”).

¹⁴⁴ JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 101–02 (1997).

the judicial rewrite can ensure that the court's supposedly interim solution becomes a permanent one.¹⁴⁵

In the last twenty years, many scholars have criticized the avoidance canon of statutory construction on these exact grounds, arguing that the canon allows courts to rewrite statutes in the guise of avoidance and creating a rich literature exploring the costs of avoidance.¹⁴⁶ Yet, there is virtually no parallel literature detailing severability's costs, and virtually all the extant literature on severability uncritically approves the legislative-intent test that makes it so easy for courts to engage in aggressive lawmaking.¹⁴⁷

This difference, in part, may reflect that the rewriting that occurs under the guise of the avoidance canon is more pernicious than that demanded by severability doctrine. When a court invokes the avoidance canon, it purports to be interpreting a statute, which is fundamentally inconsistent with rewriting it. Indeed, if a court can rewrite a statute to avoid constitutional doubts, the entire practice of constitutional adjudication may be unnecessary.¹⁴⁸ We never have to decide any constitutional disputes because a court can always interpret the statute to avoid the constitutional difficulties.¹⁴⁹ Severance, on the other hand, is saving, not interpreting, a statute, and that makes judicial rewriting seem more justifiable. But if some rewriting is appropriate that hardly means that courts should have a freewheeling power to

¹⁴⁵ *Id.* at 105; see also Manning, *supra* note 132, at 255 (“If . . . a court misconstrues a statute to avoid grave constitutional doubts, the misinterpretation will remain in place if any one of those three actors prefers it to the likely outcome of corrective legislation.”).

¹⁴⁶ See, e.g., MASHAW, *supra* note 144, at 105; Frickey, *supra* note 50, at 448–50; Manning, *supra* note 142, at 247–60; Marshall, *supra* note 132, at 486–88.

¹⁴⁷ Cf. Dorf, *supra* note 2, at 293 (raising the question of “whether severability law should be substantially reformed” and concluding that “it should not”). One exception is Emily Sherwin’s argument for a rule-oriented severability analysis, which rejects legislative intent as too speculative and calls on courts to examine how the severed statute functions as a rule. See Sherwin, *supra* note 2, at 305, 307–08, 312.

¹⁴⁸ See *Clark v. Martinez*, 543 U.S. 371, 384 (2005) (“If we were . . . free to ‘interpret’ statutes as becoming inoperative when they ‘approach constitutional limits,’ we would be able to spare ourselves the necessity of ever finding a statute unconstitutional as applied.”); *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 481 (1989) (Kennedy, J., concurring) (“If [the avoidance canon authorized ignoring the plain meaning of the statute], then the power of judicial review of legislation could be made unnecessary, for whenever the application of a statute would have potential inconsistency with the Constitution, we could merely opine that the statute did not cover the conduct in question because it would be discomfoting or even absurd to think that Congress intended to act in an unconstitutional manner.”).

¹⁴⁹ In response, the canon’s most cogent defenders do not defend the canon as a form of permissible judicial rewriting. Rather, they insist that constitutional concerns should play a normative role in deciding what constitutes the best interpretation of a particular statute. See, e.g., Young, *supra* note 81, at 1588–91.

rewrite statutes via severance. The aggressive judicial lawmaking the doctrine currently permits cannot be squared with basic separation-of-powers principles that assign the lawmaking task to the legislative branch.

B. Severability and the Legislature's Incentives to Obey Constitutional Norms

The legislative-intent test is doubly flawed from a structural perspective. Requiring courts to sever whenever the legislature would prefer that course creates the wrong incentives for legislatures—an important concern for any constitutional remedial doctrine.

Severability doctrine implicates two related incentives and needs to pay attention to both. First, severability promotes legislative innovation. Legislatures do not have to foresee perfectly the constitutional rulings courts will make in considering challenges to the statutes they enact. Courts will save challenged statutes by severing their invalid parts and leaving the remainder intact. Protecting innovation is one reason courts should and do have the power to sever.¹⁵⁰ Second, severability affects legislatures' incentives to consider constitutional norms *ex ante* when drafting legislation. Under a rule of automatic severance, legislatures would have little incentive to consider constitutional norms when drafting legislation. They could pass whatever legislation they desired, protected by the fact that the courts would save what could not be sustained. Courts, not legislatures, would tailor the legislation to constitutional principles.¹⁵¹ To balance the twin goals of promoting innovation and adherence to constitutional norms *ex ante*, the doctrine needs to contain effective limits on the power to sever.

The doctrine's legislative-intent test does not achieve this balance. It dramatically overprotects legislatures' freedom to innovate and gives no weight at all to the goal of ensuring that legislatures tailor their laws to comply with constitutional norms. By instructing

¹⁵⁰ See *supra* text accompanying notes 64–65.

¹⁵¹ In the late nineteenth century, the Supreme Court stressed this point in sharply curbing courts' power to sever. "It would certainly be dangerous," Chief Justice Waite wrote for the Court, "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v. Reese*, 92 U.S. 214, 221 (1875). *Reese*, however, took this concern too far, invoking it in support of the argument that a court should never sever a statute's invalid applications. See *supra* note 71. *Reese's* discussion remains relevant in considering the criteria a court should consider in deciding between severance and invalidation. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997) (invoking *Reese* in refusing to sever).

courts to sever whenever the legislature prefers that course, the doctrine signals to legislatures that courts will trim laws that sweep too broadly to fit constitutional limits. In this respect, the doctrine operates much like a rule of automatic severance, permitting a legislature to sidestep questions of constitutionality and focus on policy, without regard to constitutional validity.

The real bite of the legislative-intent test is that it protects legislative innovation when the legislature has made major as well as minor deviations from constitutional norms. Even in cases in which the legislature has passed a statute riddled with constitutional flaws, the legislative-intent test demands that courts save the statute, no matter how much judicial rewriting this entails. The goal of encouraging innovation should not be pursued to these extremes. To protect innovation, legislatures need assurance that their statutes will not be invalidated in toto simply because they contain minor constitutional flaws. That result induces legislatures to consider constitutional norms *ex ante* when enacting legislation, and permits the statute's enforcement, even if the legislature's constitutional judgment was not entirely correct. Saving statutes that are riddled with constitutional flaws alters this balance for the worse. It substantially reduces the legislature's need to take into account constitutional principles ahead of time, and, at best, contributes marginally to the goal of encouraging legislative innovation. Legislators are not so timid that they will shrink from passing legislation in the public interest simply because courts invalidate laws with serious constitutional flaws.

To be sure, Justice O'Connor's opinion in *Ayotte* recognizes the incentive problem, specifically calling for courts to be "wary of legislatures who would rely on our intervention."¹⁵² But what exactly is this wariness Justice O'Connor prescribes? *Ayotte* insists that legislative intent is the touchstone of severability analysis. This test provides no clear means for courts to be wary of legislative abdication. It gives legislatures the power to determine whether or not courts will sever any invalid parts or application of a statute by making legislative intent controlling. If we are worried that legislatures will not tailor their statutes to constitutional norms if courts agree to rewrite them after the fact, it makes little sense to make legislative intent the critical inquiry. Legislatures have every reason to enjoy the institutional arrangement severability makes possible. It allows the legislature to pass the statute it wants, knowing that a court will trim any excess fat

¹⁵² *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006).

later on. Making legislative intent the touchstone of analysis is very much like giving the fox the key to the chicken coop.¹⁵³

This account, a skeptic might charge, privileges constitutional interpretation by the courts. So what if the law does not create a special incentive for legislatures to tailor their statutes to constitutional norms? After all, the legislature is a coordinate branch of government whose members, like the judiciary, swear to uphold the Constitution and have a responsibility to comport with its mandates, and we should not presume that the legislature will not conscientiously discharge its duty to obey the Constitution.¹⁵⁴ Moreover, severability does create incentives for legislatures. It sends a clear message: if you don't comport with constitutional requirements, courts will feel free to revise the statutes you enacted to save them. That tells legislatures that they must hew to constitutional standards to avoid invalidation or a judicial edit.

This is a serious objection to consider, especially given recent scholarly concern with constitutional interpretation outside the courts. But it misses the difference between the respective roles of courts and legislatures as constitutional interpreters. If legislatures and courts both engage in constitutional interpretation, there is a critical difference between them. Legislators must stand for election, whereas judges generally do not. Legislators win and lose elections for the policies they promise to pursue, not their records as constitutional interpreters.¹⁵⁵ Voters tend to reward politicians for pursuing the policies

¹⁵³ Justice O'Connor's opinion recognizes that we need to be wary that legislatures will rely on the availability of a judicial rewrite, but her opinion does not give courts the tools to put such wariness into practice. She writes: "[W]e restrain ourselves from rewrit[ing] state law to conform it to constitutional requirements even as we strive to salvage it." *Id.* at 329 (quotation omitted). But severance virtually always involves some kind of rewriting, which makes it difficult to understand how this principle qualifies the legislative-intent test she establishes as the touchstone of analysis. At best, she seems to suggest that courts cannot engage in "quintessential[] legislative work," *id.*, but she offers little in the way of clues about how to distinguish permissible severance from forbidden rewriting. Her opinion makes clear that courts should sever invalid applications when the legislature would prefer it but gives no meaningful guidance about when courts should decline to sever. In fact, her remand instructions speak exclusively to legislative intent and not at all to the "no-rewriting principle." What we need, and what Justice O'Connor does not give us, is some coherent and intelligible criteria to guide courts in choosing between severance and facial invalidation that do not simply give legislatures the choice between the two remedies.

¹⁵⁴ In recent years, there has been an explosion of academic interest in constitutional interpretation by legislatures and other non-judicial actors. *E.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

¹⁵⁵ See Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 *GA. L. REV.* 57, 83 (1986) ("[W]e usually expect legislators to be interested and partisan. If we are skeptical about the capacity of judges to set aside their social and political

they prefer, even when those policies do not comport with constitutional guarantees. Consequently, legislators have good reason not to worry that the legislation they wish to enact conflicts with the latest word from the Supreme Court.¹⁵⁶ In the absence of any controlling precedent, legislators may choose to assume that the legislation they pass is valid, leaving it to the courts to say otherwise. Even when the Supreme Court or lower courts have previously invalidated the legislation at hand, legislators may prefer to challenge the courts, hoping that they will revisit the unfavorable precedent. Even if the courts do not, legislators may relish the political points to be gained by passing policies the voters desire and blaming the courts for standing in the way of the laws the people want. In fact, bucking the Supreme Court's precedents may be a win-win legislative strategy. If the Court relents, the legislature's policy is in force; if it does not, legislators have the opportunity to remind voters that the Court has frustrated the majority's will.

Additional institutional differences are also relevant. Courts have a "heavy obligation" to decide claims of constitutional right presented to them,¹⁵⁷ and provide reasoned justifications for their constitutional ruling; legislatures do not. Legislators need not address questions about the constitutionality of a piece of proposed legislation, much less explain their reasoning on the matter; if they do, they establish no binding precedent or norms.¹⁵⁸ These differences make it easy for legislatures to focus first and foremost on questions of policy and leave questions of constitutional validity to the courts.

views, . . . many would view the claim that *legislators* have this capacity with utter incredulity."); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979) ("Legislatures . . . are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people—what they want and what they believe should be done."); Levinson & Pildes, *supra* note 133, at 2317–18 (making the point that members of Congress are generally more interested in winning elections and pursuing policies they favor than defending the branch's constitutional prerogatives from encroachment by the executive); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 606 (1983) ("While constitutional rhetoric occasionally finds its way into the legislative history of a statute . . . , for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment.").

¹⁵⁶ See Mikva, *supra* note 153, at 609–10; Schauer, *supra* note 81, at 92–93.

¹⁵⁷ See *Colo. River Water Conserv'n Dist. v. United States*, 424 U.S. 800, 820 (1976).

¹⁵⁸ See Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 430 (2007); Jonathan R. Siegel, *Political Questions and Political Remedies*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 254–57 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007).

This is not to say that legislators are purely opportunistic and politically-motivated in their appraisal of the legislation they wish to pass. Many are trained lawyers and take seriously their duty to obey constitutional mandates. Sometimes, they cannot help but confront head-on questions of constitutionality. Social movements quite often press legislatures to pass laws to protect constitutional rights that courts are unwilling or hesitant to recognize, and legislators have to decide whether they should supplement judicially-enforced constitutional law.¹⁵⁹ Some matters are political questions committed to the legislature's judgment, such as Congress's power to impeach and approve judicial nominations.¹⁶⁰ And sometimes constitutional objections make good arguments for defeating unwise legislation. But, much of the time, constitutional law does not significantly constrain legislators from pursuing the policies they think best.

The Constitution, by and large, does not set out clear rules; the document's rights-guaranteeing provisions are framed in general and majestic terms, giving the Supreme Court an enormous role in making the meaning of those terms concrete and framing doctrinal rules for their judicial enforcement.¹⁶¹ Most constitutional tests require courts to make judgment calls, typically about the kind of burden a statute imposes, the weight of the governmental interest and purposes served by the statute, and the fit between legislative means and ends.¹⁶² Not surprisingly, legislators convinced that a particular statute represents good public policy can readily come up with good-faith reasonable arguments about why a statute's burden is slight and the interests it serves significant. Even when the Supreme Court's precedents seem to foreclose a piece of legislation, legislators often can turn to the Constitution's "first principles"—text, structure, and history among

¹⁵⁹ On social movements and their influence on constitutional law, see generally Jack M. Balkin, *How Social Movements Change (or Fail to Change) The Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987060; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

¹⁶⁰ See Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1337–46, 1381–92 (2001) (discussing these two examples).

¹⁶¹ See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1297–98 (2006); see also Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 67–74 (1997) [hereinafter, Fallon, *Implementing the Constitution*] (discussing various doctrinal tests employed by courts).

¹⁶² See Fallon, *Implementing the Constitution*, *supra* note 161, at 77–83, 88–102 (discussing balancing tests used in constitutional adjudication).

them—to provide reasons why a court should uphold the law.¹⁶³ In fact, cases in which legislators favor a piece of legislation on public policy grounds but oppose its enactment on constitutional grounds are close to nonexistent.¹⁶⁴ For these reasons, there is a long history of skepticism, dating back to the Founding, of the ability of legislatures to critically evaluate the constitutionality of their enactments.¹⁶⁵

Of course, Congress and the state legislatures might take a more proactive role in determining the constitutionality of their own enactments. Legislatures might take more seriously their job of ensuring that the laws they enact are constitutional rather than simply presuming their validity and leaving it to courts to hold otherwise. But legislatures have little incentive or reason to do so. With the Supreme Court ready and willing and having the last word over the Constitution's meaning (at least when it comes to the Court's judgments),¹⁶⁶ it makes political sense for legislatures to pass the buck to the Court. This was James Bradley Thayer's great fear of judicial review. As courts invalidated legislation more regularly, Thayer bemoaned, legislatures would lose the habit of scrutinizing their own work for constitutionality and would "insensibly fall into the habit of assuming that whatever they can constitutionally do they may do,—as if honor and fair dealing and common honesty were not relevant to their inquiries."¹⁶⁷ The result, Thayer thought, was that judicial review would

¹⁶³ For a discussion of different modes of constitutional interpretation, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–209 (1987).

¹⁶⁴ See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1635 (2005) (reviewing KRAMER, *supra* note 154) ("It will be far too difficult . . . for Congress to reach and stand by a judgment that a vague standard—say, what is 'necessary and proper' for 'regulating commerce among the several states'—requires it to forego enacting legislation that its constituents desire and that it believes is good for the nation. It is a rare person and a rare institution that on its own can reliably abide by second-order constraints on its first-order policy preferences.").

¹⁶⁵ THE FEDERALIST NO. 78 (Alexander Hamilton); Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 420–25 (1996) (discussing the Framers' concerns that "only courts could fairly adjudicate cases challenging an Act of Congress" based on the "rule-of-law maxim that 'no man ought certainly to be a judge in his own cause'" (quoting THE FEDERALIST NO. 80 (Alexander Hamilton))).

¹⁶⁶ See Saikrishna Prakash & John Yoo, *Against Interpretative Supremacy*, 103 MICH. L. REV. 1539, 1542 (2006) (reviewing KRAMER, *supra* note 154) (arguing that the political branches have a duty to enforce the Supreme Court's judgments).

¹⁶⁷ See JAMES BRADLEY THAYER, JOHN MARSHALL (1901), *reprinted in* JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 83–84 (1967); see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155 (1893) [hereinafter Thayer, *Origin and Scope*] ("No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right,

“dwarf the political capacity of the people and . . . deaden its sense of moral responsibility.”¹⁶⁸ Mark Tushnet—our century’s leading Thayerite—makes a similar point. Judicial review, he writes, distorts what legislatures say about the Constitution, creating what he calls the judicial overhang.¹⁶⁹ Legislatures, he writes, “may define their jobs as excluding consideration of the Constitution precisely because courts are there.”¹⁷⁰

Thayer’s answer to this problem was to call on courts to act in a radically minimalist fashion. Courts, he urged, should confine themselves to the narrow role of deciding litigated cases, bearing in mind that the legislature is the “body which is charged, primarily, with the duty of judging the constitutionality of its work.”¹⁷¹ Thayer thus called for courts to intrude only in the rare case of clear mistake, maintaining that this hands-off policy would “powerfully help to bring the people and their representatives to a sense of their own responsibility.”¹⁷² In practice, this would leave extremely little room for judicial intervention as few constitutional questions are so open and shut as Thayer’s rule would require.¹⁷³ Mark Tushnet goes one step further by explicitly calling for the end of judicial review. As the title of his book suggests, Tushnet wants to take the Constitution and the job of interpreting and enforcing it away from the courts, thus “return[ing] all constitutional decision-making to the people acting politically.”¹⁷⁴

These proposals ignore the multitude of reasons we have judicial review: its textual foundation in Articles III and VI; our nation’s long-term acceptance of the institution; the stability, certainty, and predictability it permits; and an independent judiciary’s relative strength and ability to enforce our nation’s fundamental constitutional values and commitments.¹⁷⁵ But we can accept Thayer’s insights about how judi-

and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows.”).

¹⁶⁸ THAYER, *supra* note 167, at 86.

¹⁶⁹ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–58 (1999).

¹⁷⁰ *Id.* at 58.

¹⁷¹ THAYER, *supra* note 167, at 87.

¹⁷² *Id.* at 88; *see* Thayer, *Origin and Scope*, *supra* note 167, at 139–52 (discussing doctrine of clear mistake). Under Thayer’s clear mistake rule, courts only invalidate the legislature’s work “when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.” Thayer, *Origin and Scope*, *supra* note 167, at 144.

¹⁷³ *See* CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 202–08 (1960) (arguing that Thayer’s theory would constitute a withdrawal by courts from the function of judicial review).

¹⁷⁴ TUSHNET, *supra* note 169, at 154.

¹⁷⁵ The literature on judicial review, of course, is enormous. For some works sounding

cial review distorts the legislative function without signing on to his prescriptions for judicial review. Thayer's chief point is that incentives matter; we need to pay attention to the incentives our system of judicial review creates for legislatures. So, the question arises, how should we structure judicial review to ensure that legislatures have the right incentives to internalize constitutional norms *ex ante* in enacting legislation?

One answer lies in the law of constitutional remedies. By and large, as Thayer feared, legislatures often do not worry about whether the legislation they pass will be validated by the courts. Legislators are not on the hook for damages for passing unconstitutional statutes¹⁷⁶ and are unlikely to face political problems because they believe that the legislation they wish to enact is constitutional.¹⁷⁷ The voters may send them packing because they dislike the substantive policies the legislators pursue; they rarely do so because of their constitutional judgments. Legislators' main incentive to hew closely to the judiciary's constitutional pronouncements is threat of facial invalidation. When a court invalidates a statute on its face, it effectively nullifies it, preventing the government from enforcing it in all of its applications.¹⁷⁸ That means that the legislature has to go back to the drawing board and pass a new statute to put into effect its desired policy. In a best-case scenario, this means delay. In a worst-case scenario, legislators may find their ability to enact the legislation they desire stymied, whether because of changes in the political make-up of the legislature or the inability to come to agreement on a revised statute that meets the court's objections. That creates a significant incentive to pass a valid statute in the first instance. If the legislature fails to do so, its policy may never go into effect.¹⁷⁹

these themes, see, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); BLACK, *supra* note 173; Alexander & Solum, *supra* note 164.

¹⁷⁶ *Tenney v. Brandhove*, 341 U.S. 367, 372–78 (1951); see also *Bogan v. Scott-Harris*, 523 U.S. 44, 48–54 (1998) (noting state and local legislators' immunity from liability under § 1983).

¹⁷⁷ See Vermeule, *supra* note 2, at 1962 (“[O]ur political system rarely penalizes legislators for supporting policies that please the electorate yet fail judicial scrutiny.”).

¹⁷⁸ See Gans, *supra* note 56, at 1334–35.

¹⁷⁹ In fact, the Supreme Court's opinions often demand facial invalidation to prod legislatures to honor constitutional mandates. Consider First Amendment overbreadth doctrine. One of the reasons courts facially invalidate substantially overbroad laws prohibiting expression is to create incentives for legislatures. When a legislature considers what legislation to enact *ex ante*, overbreadth doctrine gives legislatures a strong incentive to hew closely to judicially-announced constitutional principles because courts will facially invalidate statutes that abridge protected speech in a substantial number of cases. See *Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989)

In short, facial invalidation is the main tool in the judicial arsenal to ensure that legislatures take seriously constitutional commands *ex ante* in drafting statutes, and that makes it important to pay attention to the incentives severability doctrine creates. Rather than the current doctrine's one-sided focus on innovation, we need a severability doctrine that balances both the goals of encouraging innovation and ensuring *ex ante* obedience to constitutional norms. Striking that balance requires placing real limits on the power to sever.

C. *The Problem of Serial Rewriting*

If the rewriting power that severability doctrine gives to judges is troubling, the problem is all the greater in cases in which the court cannot create a new legal regime quickly with minimal line drawing. When that is the case, the legal regime the court installs will emerge only over an extended period of time. This adds two additional costs. First, in the interim, regulated parties must tolerate a significant lack of clarity. Second, courts have to spend judicial resources fleshing out the new regime—resources that might be saved were the court to shift to the legislative branch the task of crafting a new statute. The legislative-intent test does not require courts to give thought to whether the severed statute is clear or not, so long as the new statute comports with legislative intent. This enables courts to make vague law without thinking about it.

Booker aptly illustrates the problem. The *Booker* Court rewrote the Sentencing Guidelines but said very little about the new regime it installed. In essence, the Court outlined its new sentencing system, delegating to the lower courts the task of making it into a workable system with little in the way of explanation to district courts and federal courts of appeal of their roles under the new rewritten Guidelines. As Justice Scalia caustically observed in dissent:

Sentencing courts are told to 'provide just punishment' . . . , and appellate courts are told to ensure that district judges are not 'unreasonable.' The worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines and 'unreasonableness' review will function in practice.¹⁸⁰

(Scalia, J., concurring in part, dissenting in part); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 888 (1991); Gans, *supra* note 56, at 1344.

¹⁸⁰ United States v. Booker, 543 U.S. 220, 311 (2005) (Scalia, J., dissenting in part); *see also* Cunningham v. California, 127 S. Ct. 856, 880 n.11 (2007) (Alito, J., dissenting) (noting the "murky contours of the post-*Booker* landscape"); United States v. Pickett, 475 F.3d 1347, 1353 (D.C. Cir. 2007) ("While *Booker* . . . instruct[s] sentencing courts to consider . . . multiple and

Whether the new regime was clear or not did not play any role in the Court's severability analysis.

Three years and three Supreme Court decisions on the issue later,¹⁸¹ the bare outlines of *Booker's* advisory system are now in place, but important questions that go to the heart of the new system still await resolution. Under the Court's trilogy, the Guidelines appear to be merely a soft norm. District courts must consider the Guideline sentence, but now they have substantial discretion to fashion a different sentence if they conclude that a Guideline sentence is "greater than necessary" to satisfy the vaguely-worded statutory sentencing objectives.¹⁸² Combined with deferential appellate review, this suggests that district courts will have a large measure of freedom to sentence as they please.

But even this conclusion may be premature. Despite the Court's talk of deference, its opinions raise questions about just how soft a norm the post-*Booker* Guidelines are. *Kimbrough v. United States*¹⁸³ and *Gall v. United States*¹⁸⁴ both recognize that a trial court's departure from the Guidelines is most entitled to "respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'"¹⁸⁵ But what if a district judge simply finds the Guidelines too harsh even though the case cannot be fairly described as outside the heartland? *Kimbrough's* dicta explains that "closer review may be in order" when a court departs because "the Guidelines range fails properly to reflect [statutory sentencing] considerations even in a mine-run case."¹⁸⁶

What exactly is this "close review?" Does it resemble intermediate or strict scrutiny used in constitutional cases? Bound up in these

vague factors, neither the Supreme Court nor the statute assigns any weight or ranking to the factors. So how is a court to determine how much influence the factor we are concerned with . . . should have in sentencing a particular defendant?" (internal quotations and citations omitted)).

¹⁸¹ See *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Rita v. United States*, 127 S. Ct. 2456 (2007).

¹⁸² See *Kimbrough*, 128 S. Ct. at 570 ("The statute, as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing [W]hile the statute still requires a court to give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'" (quoting *Booker*, 543 U.S. at 245-46)); see also *Gall*, 128 S. Ct. at 594.

¹⁸³ *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

¹⁸⁴ *Gall v. United States*, 128 S. Ct. 586 (2007).

¹⁸⁵ *Kimbrough*, 128 S. Ct. at 575 (quotation omitted); see also *Gall*, 128 S. Ct. at 593, 608-09 (emphasizing facts taking *Gall's* case out of the heartland).

¹⁸⁶ *Kimbrough*, 128 S. Ct. at 563 (quotation omitted).

questions is the nature of the Court's advisory Guidelines themselves. If the Court's "close review" primarily gives trial courts freedom to depart from the Guidelines outside heartland cases, the Guidelines begin to look more like a hard norm in what the Court calls "mine-run cases." If so, *Booker* and its progeny merely expand the trial court's power to make upward or downward departures for special circumstances. On the other hand, were trial courts free to reject the Guidelines across the board based on their own views of just sentencing policy, the advisory system might lead to the kind of disparities that led to the creation of the Sentencing Guidelines in the first place.¹⁸⁷

In a real sense, then, the Court still has to confront a set of fundamental questions about exactly the kind of federal sentencing system we should have—questions the large majorities in all three cases left open. As Justice Thomas rightly observed, there is a real question about whether and how legal doctrines can provide answers to what are quintessential sentencing policy matters.¹⁸⁸ Inevitably, however, the Court will need to take and decide more cases to sort these details out, raising the specter of "yet another major revision of Guidelines practices to which the district courts and courts of appeals will have to adjust."¹⁸⁹ *Booker* promises years of more litigation before we have anything like clarity in the system of federal sentencing.

Perhaps none of this should trouble us. Legislatures often leave gaps in the statutes they enact, and when they do we often turn to the courts to fill those gaps. When that occurs, it takes time—sometimes a substantial amount of time—before regulated parties know the full contours of the legal system that regulates their conduct. There is nothing impermissible or unconstitutional about this delegation of lawmaking power to courts.¹⁹⁰ Every day, courts in our legal system fill gaps left by legislatures, and that gap-filling work looks quite similar to that which severability doctrine sometimes necessitates.

This superficial similarity, however, masks a critical difference. When a legislature enacts a statute that uses vague or opaque terms or

¹⁸⁷ See *Rita v. United States*, 127 S. Ct. 2456, 2487 (2007) (Souter, J., dissenting) ("If district judges treated the now-discretionary Guidelines simply as worthy of consideration but open to rejection in any given case, the *Booker* remedy would threaten a return to the old sentencing regime and would presumably produce the apparent disuniformity that convinced Congress to adopt Guidelines sentencing in the first place.").

¹⁸⁸ See *Kimbrough*, 128 S. Ct. at 578 (Thomas, J., dissenting).

¹⁸⁹ *Rita*, 127 S. Ct. at 2484 (Scalia, J., concurring).

¹⁹⁰ For a discussion of legislative delegations to courts, see Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. (forthcoming 2008).

leaves critical terms undefined, it does so by choice, a consensual element entirely lacking when a court does the rewriting. A legislature that enacts this kind of statute may do so to delegate to the judiciary the power to fill those gaps over time, and, in so doing, flesh out the contours of the statute on which the legislature was silent.¹⁹¹ At the very least, the legislature acquiesces in giving the judiciary this power, aware that its silence may invite the judiciary to fill in the gaps through the process of case-by-case adjudication.

There are many reasons why a legislature might make this choice. In some cases, the legislature may prefer open-ended language to better deter regulated parties. A broad text prevents defendants from making the argument that the statute's plain terms exclude their conduct.¹⁹² In others, the legislature may think, *ex ante*, that it will be difficult to draft a clearly defined rule, and, for that reason, it is preferable to have an ambiguous rule that courts can clarify *ex post*.¹⁹³ Or, possibly, legislators could only pass the statute in a more opaque form. Had legislators tried to clarify the statutory meaning, the bill might have gone down to defeat, and a vague statute was better than no statute at all. The important point is that, in all these cases, the legislature has decided that it cannot, whether for reasons of policy or political reality, specify the statute's meaning in substantial detail in the text at the time of the statute's enactment and so chooses to enter into or, at the least, accept a partnership with the courts in which the courts will fill the gaps the legislature left in the statute.

¹⁹¹ See Elhauge, *Preference-Eliciting*, *supra* note 137, at 2173 (observing that a "statutory gap or ambiguity . . . may sometimes signal an intentional delegation of lawmaking power to the courts"). Where the legislature has created an administrative agency to enforce the statute, that agency may supplant the courts as the institution charged with the task of gap-filling. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984). But that is not necessarily true across the board. For example, the Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Act of 1964, yet the Supreme Court, more than the agency, has set the contours of Title VII's prohibition on employment discrimination. For discussion and critique of this state of affairs, see Julie Chi-Hye Suk, *An Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 405–06, 438–44, 467–73.

¹⁹² See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 63 (1992) ("[B]right-line rules allow the 'bad man' to engage in socially unacceptable behavior right up to the line; on a pessimistic view of human nature, the chilling effect of standards can be a good thing."); see also Sherwin, *supra* note 2, at 310 (observing that "[t]he determinate form of the rule makes circumvention possible").

¹⁹³ This is one of the classic reasons for choosing a more open-ended standard over a crisp rule. See Sullivan, *supra* note 192, at 66 (observing that standards may sometimes be preferable to rules because they are "flexible and permit decision-makers to adapt them to changing circumstances over time").

When a court rewrites a partially invalid statute via severance and replaces the legislative scheme with an open-ended one of its own creation, the consensual element is absent. The court enters into a partnership with itself, effectively writing a new law and then leaving itself to flesh out that new statutory scheme over time. The legislature—the branch supposedly in charge of the lawmaking function—is entirely out of the picture, with the court arrogating to itself both the power to make the law and fill the gaps left to make a fully-specified statute. As a political matter, quite often, the legislature may be quite happy with this arrangement, so long as the resulting statute is not objectionable on political or policy grounds. For the reasons I discussed above, so long as one government actor prefers the judicial solution, it will be difficult for the political branches of government to overturn the revised law and put in place one of its own.¹⁹⁴

Severability doctrine, with its exclusive focus on legislative intent, ignores the costs of serial rewriting. It does not consider the harm to regulated parties who have to tolerate an uncertain legal regime invented by the court. It does not consider the drain on judicial resources occasioned by the need to engage in serial rewriting. It does not consider whether it would be preferable to force the legislature to step in to take on the task of rewriting the statute rather than having the court do so over a drawn-out period of time. It only asks whether the enacting legislature would have preferred severance (and the rewriting that entails) to total invalidation. Given that legislatures will generally prefer that as much of their handiwork be saved as possible, this test leaves courts without adequate tools to choose between severance and invalidation.

IV. Towards a Better Severability Doctrine

A. Rewriting Severability Doctrine

As Part III shows, a rule that permits severance on the legislature's cue, even when it entails radical surgery, is inconsistent with structural constitutional principles because: (1) it regularly enmeshes courts in what is quintessentially legislative policy work, and does so in a way that makes legislative correction unlikely after the fact; (2) it signals to legislatures that courts will go to extremes to save their handiwork, and this warps legislatures' incentives to take into account constitutional norms *ex ante*; and (3) it allows courts to create a vague legal regime without thinking about it.

¹⁹⁴ See *supra* text accompanying notes 161–70.

Severability doctrine should not confer on courts such a free-wheeling remedial lawmaking power. The judicial power to sever must be understood against the background of separation-of-powers principles. For that reason, severability should not turn on legislative intent but on the extent of the rewriting necessary to save the statute. Even though courts have the power to sever a statute's invalid parts, structural concerns still remain relevant in deciding whether or not courts should sever in any particular case.

The Supreme Court's recent First Amendment decisions analyzing severability doctrine provide helpful guidance.¹⁹⁵ Notably, in these First Amendment cases, the Court neither applied overbreadth doctrine's rule of nonseverability nor traditional severability doctrine's forgiving legislative-intent test.¹⁹⁶ Rejecting these two extremes, the Court used a remedial approach to severability, deciding whether it *should* sever—not what the legislature would have wanted done—by asking how much rewriting was necessary to save the statute.¹⁹⁷ This approach permits a court to fine-tune legislation to save it but denies the judiciary a freewheeling power to rewrite. This Article's analysis shows why the Court should use this approach to severability across the board.

Three basic inquiries are relevant: (1) how much of the statute would be affected by the court's declaration of unconstitutionality?; (2) does severance fundamentally alter or fine-tune the partially invalid legislation?; (3) does severance leave a clear line capable of providing fair warning to persons subject to the law's commands or does it introduce substantial vagueness into the legislature's scheme?¹⁹⁸

¹⁹⁵ Compare *Randall v. Sorrell*, 126 S. Ct. 2479, 2500 (2006) (rejecting severance because it required substantial rewriting of the statute), *Reno v. ACLU*, 521 U.S. 844, 884–85 & n.26 (1997) (same), and *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 478–79 (1995) (same), with *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–07 (1985) (mandating severance to cure minor constitutional flaw), and *United States v. Grace*, 461 U.S. 171, 178–84 (1983) (implicitly reaching the same result). For further discussion, see *supra* notes 38 and 54 and text accompanying notes 31–34, 43–48, and 90–93.

¹⁹⁶ The arguable exception is *Randall*, which purports to apply the legislative-intent test, but actually rests on the conclusion that severability would not be an appropriate remedy because it would require substantial rewriting of the statute. For discussion, see *supra* text accompanying note 54.

¹⁹⁷ See *Randall*, 126 S. Ct. at 2500 (refusing to “write words into the statute” or “leave gaping loopholes” or “to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found”); *Treasury Employees*, 513 U.S. at 479 n.26 (finding that the line-drawing needed to reconstruct the statute would involve a “serious invasion of the legislative domain”).

¹⁹⁸ These three inquiries should be considered contextually. The nature of the particular constitutional right and the challenged statute bears on how courts will assess the questions.

Taken together, these three inquiries provide guideposts to allow a court to assess whether severance amounts to unacceptable remedial lawmaking. They help ensure that the judicial power to sever is constrained by separation-of-powers principles.

The first inquiry asks how much of the statute a court has held unconstitutional. The more pervasive the statute's unconstitutionality, the stronger the case for facial invalidation. The greater the statute's defects, the greater the likelihood that severance will require drastic alteration of the statutory scheme, and the fewer valid parts or applications there are to save. By contrast, as the number of statutory provisions or applications affected by the court's ruling decreases, the case for severance becomes correspondingly stronger. When only isolated parts or applications of a statute are invalid, not only does severance pose less of a risk of involving the judiciary in sensitive line-drawing, but facial invalidation and a remand to the legislature would be extremely costly, forbidding enforcement of a statute that is valid in many instances pending legislative reconsideration.¹⁹⁹

Second, courts should ask whether severance substantially revises the legislature's basic statutory scheme or merely fine-tunes it. This is the core of the severability inquiry. Under a separation-of-powers analysis, courts must examine how severance changes the legislative scheme, focusing on the extent to which severance invades legislative policymaking prerogatives. Thus, severance will usually be appropriate when a court can preserve a statute with only minimal changes to the legislature's scheme. Courts should be more cautious about invoking severability doctrine when severance results in more significant change to the legislative scheme. Severance should rarely, if ever, be deployed if radical surgery is necessary to save a statute.

The final inquiry addresses the problem of serial rewriting, asking whether the proposed severance leaves a clear line or introduces substantial vagueness into the legislature's scheme. The case for severance is at its strongest when a court can easily supply a clear line to

¹⁹⁹ This logic underlies First Amendment overbreadth doctrine and the other substantiality tests the Court employs to facilitate facial invalidation, all of which require a showing that a statute is invalid in a substantial number of cases before permitting facial invalidation. For discussion of these doctrines, see Gans, *supra* note 56, at 1344–47, 1353–54, 1359–61. As these doctrines reflect, the case for facial invalidation grows stronger the more pervasive the statute's constitutional flaws. The analysis proposed here, however, does not simply duplicate these doctrines. Whereas overbreadth focuses solely on substantiality, the extent of unconstitutionality is only one factor in the severability analysis that this Article proposes.

serve as the basis for the new rule.²⁰⁰ Severance, in these circumstances, both permits the state to continue to enforce the remainder of the statute and gives notice to regulated parties of the new legal regime. By contrast, where no clear line is readily available, severance may result in substantial uncertainty about the contours of the new legal regime, forcing regulated parties to wait years until the courts produce a clear statutory scheme.²⁰¹ In these cases, facial invalidation may be a more attractive remedy because it may prompt the legislature to supply a new legal rule quickly.

To clarify how this Article's proposal works in practice, let us examine how it would apply to three actual cases: *Booker*, *Ayotte*, and *City of Boerne v. Flores*,²⁰² which held that the Religious Freedom Restoration Act ("RFRA")²⁰³ was unconstitutional as applied to state governmental action and implicitly severed those applications, permitting RFRA's application to federal actors.²⁰⁴

Under the approach proposed here, the Court would have declined to sever in *Booker*. *Booker* required the Court to engage in the kind of radical surgery severability doctrine ought to foreclose. The factors discussed above all point towards this conclusion. First, the Court's constitutional holding rendered the Sentencing Guidelines invalid in all cases in which a court sentences a defendant, based on judicial fact-finding, to a longer sentence than authorized by the jury's verdict.²⁰⁵ This was a significant constitutional defect in the statutory scheme, affecting a substantial number of sentences. Second, the Court's severance fundamentally altered the statutory scheme, transforming the Sentencing Guidelines from mandatory rules to advice for

²⁰⁰ See, e.g., *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329–30 (2006); *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997).

²⁰¹ Cf. *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964) (declining to abstain because "[i]t is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the [loyalty] oath within the bounds of permissible constitutional certainty").

²⁰² *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁰³ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

²⁰⁴ *Boerne*, 521 U.S. at 536. Arguably, the Court's implicit severance is in tension with its earlier ruling in *Butts v. Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913), in which the Court held that the Civil Rights Act of 1875, invalidated in the *Civil Rights Cases*, 109 U.S. 3, 25–26 (1883), could not be applied to American vessels on the high seas because the invalid applications could not be severed without impermissible rewriting. *Butts*, 230 U.S. at 133 ("[H]ow can the manifest purpose to establish a uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction?").

²⁰⁵ See *United States v. Booker*, 543 U.S. 220, 230–37 (2005).

sentencing judges. Unquestionably, this was a deep intrusion on Congress's policymaking turf, preempting a wide range of alternative ways it might have responded to *Booker's* Sixth Amendment analysis.²⁰⁶ Third, *Booker* left the Sentencing Guidelines in disarray while establishing only "murky contours"²⁰⁷ of a new system, giving precious little guidance to courts, lawyers, and criminal defendants about how its new system of advisory guidelines is supposed to work. Indeed, three years after *Booker*, we are still a long way from clarity as to exactly how advisory guidelines should work in practice and how the courts of appeal should review sentences under *Booker*.²⁰⁸ Unquestionably, further rewriting will be necessary before a well-defined system of federal criminal sentencing is in place. These features make *Booker's* severance triply flawed.²⁰⁹

Booker's best (and perhaps only) defense is that severance was the lesser of evils and substantial rewriting was justified to preserve a system of federal criminal sentencing. Had the Court invalidated the Guidelines on their face, so the argument might go, the Court would have created unbelievable chaos, making it impossible to sentence any criminal defendants, even those with no colorable Sixth Amendment claim, until Congress had enacted a new sentencing statute. This argument has obvious appeal. There is no question that invalidation of the Guidelines would have resulted in substantial disarray and confusion. In the short run, it seems like a good idea to have the Court avoid this chaos with a judicial rewrite. But, in the long run, vesting the Supreme Court (as well as the lower federal courts) with the power to make such far-reaching and fundamental legislative change compromises basic separation-of-powers principles with long-term negative consequences. The Court is not equipped to engage in legislative work, and the tools severability gives it are too limiting to lead to thoughtful legislation. Worse still, once the Court intervenes, it becomes much less likely that Congress will respond with corrective legislation of its own. Even the valuable goal of maintaining a workable

²⁰⁶ See *supra* text accompanying notes 114–18.

²⁰⁷ See *Cunningham v. California*, 127 S. Ct. 856, 880 n.11 (2007) (Alito, J., dissenting).

²⁰⁸ See *supra* text accompanying notes 186–98.

²⁰⁹ It is a closer question whether the dissenting Justices' lesser remedy of applying the Guidelines and respecting the Sixth Amendment jury-trial guarantee, see *Booker*, 543 U.S. at 284–85 (Stevens, J., dissenting in part); *id.* at 320–26 (Thomas, J., dissenting in part), was also improper. Although the dissenters' remedy would have left the Guidelines intact, it would have dramatically altered the respective roles of the judge and jury in the Guideline system, making it difficult in many cases for judges to sentence defendants based on their real conduct without very extensive fact-finding by the jury. *Id.* at 249–58 (majority opinion) (critiquing the dissent's remedy). For these reasons, invalidation was the preferable remedy.

sentencing regime cannot justify judicial seizure of Congress's legislative power.

In fact, it is precisely in cases in which facial invalidation has momentous consequences that we can reasonably expect the legislature to react in a timely manner. Had the *Booker* Court invalidated the Sentencing Guidelines, Congress would have had a powerful incentive to enact a new statute. In all likelihood, Congress would have created a new sentencing regime, which would govern sentencing today. Instead, the Court created the advisory system—not because it was best as a policy matter, but because it was a solution the Court could readily implement through severability doctrine—with vague contours in need of further clarification, making the sorts of policymaking choices that are supposed to reside with the legislature. *Booker* avoided chaos on the front end but added it to the back end, forcing courts to commit vast resources to the Sisyphean task of divining how *Booker*'s advisory system should work in practice.

Other, better options are available to minimize disarray and confusion in the interim. When invalidation of a statute risks system-wide chaos, the Supreme Court has often stayed its invalidation of the statute for a several month period, giving the legislature the chance to write a new statute while avoiding immediate chaos. The Court did so in both *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,²¹⁰ after holding that Congress could not assign Article III jurisdiction to bankruptcy judges, and *Buckley*, after holding that the Federal Election Commission was constituted in violation of the Appointments Clause.²¹¹ It follows a similar rule in redistricting cases, ordering judicial relief only after the legislature fails to reapportion after being given an adequate opportunity to do so.²¹² The *Booker* Court could have followed a similar course. Given this option, *Booker*'s radical surgery cannot be justified on the grounds that judicial legislation was the lesser evil.

Ayotte, by contrast, presents a much stronger case for severance. The Court's holding that the parental-notification statute was unconstitutional in cases of health emergencies affects a fairly small number

²¹⁰ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

²¹¹ *See N. Pipeline*, 458 U.S. at 88–89 (entering “limited stay” to “afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws”); *Buckley v. Valeo*, 424 U.S. 1, 142–43 (1976) (issuing similar stay).

²¹² *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585–86 (1964); *see also Buckley*, 424 U.S. at 142–43 (citing the “Court’s practice in the apportionment and voting rights cases” in support of stay).

of the statute's applications.²¹³ Severance does not require any rewriting of the parental notification requirement, and thus the core of the statute survives intact. It requires a court to create a medical-emergency exception that the legislature did not enact, and, in so doing, decide whether to write a broader or narrower exception,²¹⁴ a task that would ordinarily be for the legislature. Relatively speaking, the rewriting required to save the statute is modest.

The most formidable argument for facial invalidation in the face of these costs is that severing invalid applications will subject physicians to an uncertain legal regime while courts flesh out the meaning of the newly-minted emergency exception. This is a real concern, but it does not justify refusing to sever because courts should be able to flesh out the contours of the emergency exception fairly quickly. *Ayotte* leaves open important questions about the kind of emergency exception a court might create—questions primarily about the kind of health risk necessary to trigger the emergency exception—but there is no reason courts should not be able to answer these questions quickly, either simultaneously with severance or in the first post-severance case to arise. This is especially true if courts, as they should, pay attention to the problem of serial rewriting in deciding how to sever.

Boerne represents a much closer judgment call than either *Booker* or *Ayotte*. On the one hand, *Boerne*'s holding that RFRA cannot be applied to any state or local government actors makes much of RFRA unconstitutional. It leaves a statute that is a tattered shell of its former self. Normally, in these circumstances, the Court should be reluctant to sever. As a general rule, rewriting a statute that is riddled with constitutional flaws is best left to the legislature. But *Boerne* might be a good case for an exception. Severance does not require the Court to touch at all Congress's judgment that governments should have to justify burdens they impose on religious freedoms with a compelling state interest. That command survives unscathed in federal cases. Moreover, severance does not pose any line-drawing

²¹³ See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006) (observing that need for an emergency exception arises in "some very small percentage of cases" when "pregnant minors . . . need immediate abortions to avert serious and often irreversible damage to their health"); *id.* at 331 ("Only a few applications of New Hampshire's parental notification statute would present a constitutional problem.").

²¹⁴ Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879–80 (1992) (rejecting argument that medical emergency exception was too narrow because it required "serious risk of substantial and irreversible impairment of a major bodily function"), with *United States v. Vuitch*, 402 U.S. 62, 71–72 (1971) (defining "health" broadly to encompass "psychological as well as physical well-being").

problems, making it easy work for the Court to create a valid statute with one stroke of the judicial pen. These two features provide a compelling reason for saving RFRA.

B. The Role of Severability Clauses

If severability is treated as a species of the law of constitutional remedies, severability clauses—at least the sweeping, open-ended clauses so common today—largely fall out of the picture. This is normatively attractive and avoids current law's tension with basic textualist method. If legislative intent is the correct inquiry, it is exceedingly difficult to justify refusing to honor legislatures' textually-expressed directions to sever. Current doctrine's refusal to enforce the terms of severability clauses makes sense only once we reject the idea that severability analysis is a matter of divining the intent of the legislature. And that is exactly right.

Severability clauses should have little, if any, import in severability doctrine. First, whether a statute has a severability clause or not, there is a substantial interest in saving the statute, which courts will consider. Second, whether or not legislatures have inserted a severability clause, we can assume, as a matter of common sense, that they prefer that courts save, rather than destroy, their statutes wherever possible.²¹⁵ This common-sense judgment explains why severability clauses are so rampant in statutes.

But that underlying legislative intent or preference should begin, not end, the relevant inquiry. Whether a court should sever or invalidate a statute in its entirety depends not on which of the two remedies the legislature wants, but on whether severance is consistent with the balance of powers between courts and legislatures. That a legislature would prefer severance is hardly license for a court to perform radical surgery on a statute in violation of basic structural constitutional principles. With severability doctrine conceptualized in constitutional terms, it is apparent why severability doctrine does not and should not require courts to enforce severability clauses according to their terms. Requiring courts to sever in all circumstances would lead to extensive impermissible judicial rewriting of statutes and would skew the legislature's incentives to obey constitutional mandates.

In short, the problem with severability clauses is that they command courts to sever across the board and irrespective of the constitutional violation identified by the court, and they do not commit the

²¹⁵ See *supra* text accompanying notes 29–30.

legislature to any particular statutory fix. This feature is exactly why legislatures find severability clauses so appealing. They offer the promise that a court will save a partially invalid statute without requiring any hard legislative choices about the replacement. The legislature cannot, however, require a court to perform this task free of the separation-of-powers norms that constrain both the legislative and judicial branches.

This does not entirely disarm legislatures from insuring against the possibility that a court may find a statute partially invalid; it simply means that legislatures need to think about other forms of insurance. One possible solution is what Michael Dorf calls a fallback law, which provides for a new provision to take effect in the event of judicial invalidation.²¹⁶ Another is an entirely different and new kind of severability clause—a super-specific severability clause—that directs a court to sever a single, specific part of a statute in the event of invalidation. By removing a single piece of the enactment, the legislature creates the functional equivalent of a fallback law.

Both devices not only direct the court to save a partially invalid statute, they also spell out the exact remedy to be implemented in the event of partial invalidation, leaving the court no discretion. Unlike the severability clauses that are so widespread today, these devices require that a legislature make a statutory precommitment about what will occur in the event of invalidation. Consequently, these provisions neither require rewriting on the courts' part nor require the courts to tailor the statute to constitutional principles. To be sure, these clauses raise a host of thorny policy issues, and legislatures may not always want to make the precommitment they require.²¹⁷ They do, however, offer an important benefit. By precommitting to the replacement for a partially invalid statute, the legislature can provide for a more fundamental alteration in the statutory scheme than a court can provide under severability doctrine.

Conclusion

Severability doctrine, long misunderstood and ignored, deserves our renewed interest, study, and analysis. The doctrine raises fundamental questions about the courts' role in constitutional adjudication

²¹⁶ For discussion of fallback laws, see Dorf, *supra* note 19.

²¹⁷ *Id.* at 352–69 (discussing how to craft and implement fallback laws). The constitutional barriers Dorf identifies—fallback laws must cure the taint of the initial unconstitutional law and may not be unduly coercive, *id.* at 310–24, 327–42—are fairly narrow and should not prevent enforcement of most fallback provisions.

and the balance of power between courts and legislatures. Yet, a virtual tide of case law and commentary treats severability merely as a form of statutory interpretation, making it easy to obscure these critical questions. This reading is incorrect. The doctrine does not call for statutory interpretation; it requires a remedial judgment after the court has construed the challenged statute, determined a constitutional question was unavoidable, and found the statute partially invalid. Plain and simple, the doctrine calls for judicial rewriting. It asks whether the court should save the statute by rewriting it or invalidate the statute as a whole.

This remedial question should not turn on legislative intent as current doctrine provides. Legislatures, as a general rule, prefer that courts save the statutes they enact. But that does not mean that courts should follow suit. Courts, simply put, are not equipped to rewrite legislation. They are not appointed to be policymakers, they have none of the resources legislatures have, and the doctrine gives them only limited options to undertake the task. Giving courts an extensive power to rewrite statutes not only compromises separation-of-powers principles, but it also distorts legislatures' incentives to comply with constitutional norms *ex ante* when drafting legislation. If courts will readily rewrite statutes to render them constitutional, legislatures have much less of a reason to tailor their statutes to constitutional principles rather than simply writing the statute they desire.

This does not mean we should abandon severability doctrine. The doctrine serves the important purpose of saving partially invalid statutes. We could not have a workable system of judicial review without some form of severability doctrine. But we should not have the doctrine in its current form. Severability should not be treated as a legislative question to be answered by inspecting the intent of the enacting legislature. Instead, it is a remedial question for the courts to be considered in light of structural constitutional principles, including separation of powers. Courts have to ensure that severance does not entail unacceptable judicial lawmaking.

This analysis sheds light on the proper role of facial and as-applied challenges in constitutional adjudication and suggests further reason to doubt the persistent claim—made by Justices and scholars alike—that as-applied challenges should be the “‘basic building blocks of constitutional adjudication.’”²¹⁸ As-applied challenges are best used to trim the fat off of otherwise constitutional statutes. In those

²¹⁸ *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (quoting Fallon, *supra* note 2, at 1328).

circumstances, as-applied challenges are a permissible way of fine-tuning a partially invalid statutory scheme. Using as-applied adjudication as the normal method of constitutional adjudication, to be utilized across the board, is flawed. As this Article shows, overreliance on as-applied challenges may force courts to perform radical surgery on the statutes they invalidate, a task for which they are ill equipped. For this reason, when a court finds a statute riddled with constitutional flaws, it should generally invalidate that statute on its face. Not only does facial invalidation promise to do a better job of protecting constitutional rights,²¹⁹ it avoids forcing the court to rewrite the statute and creates incentives for the legislature—the body best suited to revise the statute—to do so.

²¹⁹ See Gans, *supra* note 56, at 1345.