CONSTITUTIONAL AVOIDANCE, SEVERABILITY, AND A NEW *ERIE* MOMENT

Suppose that you are a textualist federal judge. In front of you is a federal statute containing a provision that is best read as unconstitutional. You have two options. You can discard the best interpretation and adopt an alternative interpretation that avoids the constitutional problem. Or you can adopt the best interpretation and declare the provision unconstitutional. Then, in order to determine whether you should invalidate the statute in whole or in part, you have to speculate about whether Congress would have enacted the statute without the unconstitutional provision. Which option do you choose?

Federal judges face this choice routinely in our current regime of constitutional adjudication. Those who choose the first option—constitutional avoidance—will sometimes confront charges of having impermissibly "rewritten" the statute through interpretation, which is to say, outside Article I, Section 7's procedures. And those who choose the second option—severability—will have to gaze into a crystal ball in an attempt to determine whether Congress would have passed a version of the statute that, in all likelihood, Congress never considered. They too risk charges of having rewritten the statute.

National Federation of Independent Business v. Sebelius[1] illustrates this dilemma, in which judges must choose between two kinds of rewriting, when judges should not be rewriting at all. There the Supreme Court considered the constitutionality of the Affordable Care Act's (ACA) Individual Mandate and Medicaid Expansion.[2] Chief Justice Roberts conceded that the best reading of the Mandate was that it commanded individuals to purchase insurance.[3] But because that reading would result in a finding of unconstitutionality, he chose to read the Mandate as a tax.[4] In a joint dissent, four Justices accused Chief Justice Roberts of having rewritten the Mandate.[5]

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1. 567 U.S. 519 (2012).
2. *See id.* at 530–31.
3. *See id.* at 562.
4. *See id.* at 561–63.
5. *See id.* at 668 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

Yet the dissenters' choice to give the ACA its best reading came at a cost. Because the dissenters concluded that the Mandate and Expansion were both unconstitutional,[6] severability doctrine required them to speculate about whether Congress would have enacted the rest of the ACA without those provisions. Severing the Mandate and Expansion, though, risked rewriting the statute, they said. It was a legislative power that the Court could not exercise.[7] The dissenters thus concluded that the most restrained course of action would be to invalidate the ACA entirely.[8]

This Note argues that the Court should repudiate the avoidance and severability doctrines. Both doctrines assume the existence of an unexpressed legislative intent that judges can discover. But the rise and influence of modern textualism have challenged that assumption to such an extent that a significant portion of judges and lawyers are now skeptical of legislative intent. As a result of that skepticism, the doctrines have begun to look different. Namely, they appear to engage courts in the exercise of legislative rather than judicial power, and a judge's quest for legislative intent can appear to mask the expression of policy preferences. *The ACA Cases—NFIB* and *King v. Burwell*[9]—suggest that the prevailing judicial approach to addressing the unconstitutionality of statutes creates tension with the common textualist-inspired skepticism among judges and lawyers about legislative intent. That expanding skepticism has the effect of making avoidance and severability appear illegitimate because they seem to be forms of judicial legislation.

Changing theories of law have prompted sweeping doctrinal reform in the past. In *Swift v. Tyson*,[10] in 1842, the Court held that the Rules of Decision Act did not require federal courts sitting in diversity to apply state court decisions in matters of general common law.[11] Because Justice Story, writing for the Court, conceived of the common law as a transcendental body of law that all judges could discover, he reasoned that the Act

6. *See id.* at 647–48.
7. *See id.* at 692.
8. *See id.* at 691.
9. 135 S.Ct. 2480 (2015).
10. 41 U.S. (16 Pet.) 1 (1842).
11. *See id.* at 18–19.

authorized federal courts to provide the rule of decision themselves.[12]

But by the eve of the Court's decision in *Erie Railroad Co. v. Tompkins*,[13] in 1938, the conception of the common law reflected in *Swift* had changed. Legal positivism had challenged the notion that the common law was "discovered" as opposed to "made."[14] This shift in legal thought brought constitutional concerns into view: if the common law was made, then federal courts should not be making law in the place of state legislatures.[15] The Court declared that "[t]here is no federal general common law" and gave the power to provide the rule of decision to the states.[16]

Erie charts a two-part pattern that Professor Lawrence Lessig calls the "*Erie*-effect."[17] First, contestation of a certain practice that courts engage in makes that practice seem "illegitimate." Second, the Court reallocates the practice to another legal institution in order to avoid incurring an illegitimacy cost to courts. Thus, *Erie* reflects a development wherein legal positivism's contestation of the notion of a transcendental body of law that all judges could discover rendered illegitimate the federal courts' practice of "discovering" common law under *Swift*. The Court then reallocated the power to provide the rule of decision, from federal courts to the states.

The first part of the *Erie*-effect has already happened to the doctrines of avoidance and severability: changes in legal thought surrounding statutory interpretation have altered the appearance of these judicial doctrines so that they now seem legislative and therefore illegitimate.[18] This Note argues that

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12. *See id*.
13. 304 U.S. 64 (1938).
14. *See id.* at 79.
15. *See id.* at 80.
16. *Id.* at 78.
17. *See generally* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1400–12 (1997) [hereinafter Lessig, *Fidelity and Constraint*]; Lawrence Lessig, Erie*-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1787–95 (1997) [hereinafter Lessig, Erie-*Effects*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426–38 (1995).
18. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 24–29 (2006) (explaining that "the rise of modern textualism . . . has much in common with the shift from *Swift* to *Erie*").

the Court should complete the *Erie*-effect pattern by repudiating avoidance and severability and replacing them with a regime in which courts give statutes their best readings. If a statute is unconstitutional, the Court should invalidate the unconstitutional part. By ceding to Congress some of the power to address unconstitutional statutes, this proposal aims to reduce the illegitimacy cost that the Court incurs under our current regime.

The argument proceeds in five parts. Part I briefly introduces the doctrines of avoidance and severability. Part II argues that the rise and influence of modern textualism has challenged the doctrines' intentionalist assumptions to such an extent that the assumptions are no longer a judicial default. Part III discusses *The ACA Cases* in order to argue that because the use of avoidance and severability appears to engage the Court in judicial legislation, the doctrines impose an illegitimacy cost on the Court. Part IV argues by analogy to *Erie* that the Court should cede to Congress some of its current power to address unconstitutional statutes and proposes that the Court repudiate avoidance and severability. Part V concludes.

I. BACKGROUND

A. Constitutional avoidance

Constitutional avoidance is the principle that courts should decide cases on nonconstitutional grounds whenever possible. Three types of avoidance should be distinguished[19] for the sake of clarity:

- Procedural avoidance: "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."[20]
- Classical avoidance: "[A]s between two possible interpretations of a statute, by one of which it *would be* unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act."[21]
- Modern avoidance: "[W]here a statute is susceptible of two constructions, by one of which grave and

19. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997).
20. Escambia Cty. v. McMillan, 466 U.S. 48, 51 (1984).
21. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (emphasis added).

> doubtful constitutional *questions arise* and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter."[22]

Procedural avoidance requires a court to order the issues for adjudication so as to obviate the need for a constitutional ruling. Classical and modern avoidance each allow a court to adopt an alternative interpretation of an ambiguous statute, provided that the interpretation is plausible. They differ in the kind of doubt they require: whereas modern avoidance requires potential unconstitutionality, classical avoidance requires actual unconstitutionality. As its name connotes, modern avoidance is more prevalent today than classical avoidance.[23]

By "avoidance," this Note refers to both classical and modern avoidance, unless otherwise noted.[24]

B. Severability

Severability is the inquiry that governs how much of a partially unconstitutional statute a court should invalidate. It results in a determination either that the statute is "severable"—in which case the court invalidates only the statute's unconstitutional provisions or applications—or "inseverable"—in which case at least some of the rest of the statute is invalidated. Severance of provisions differs from severance of applications.[25] The former refers to invalidation of statutory language, whereas the latter refers to cases in which a court declares a statute unconstitutional as applied.

The current test provides that a statute is severable if (1) Congress would have enacted the remaining provisions of the statute without the unconstitutional provision, and (2) the remaining provisions of the statute can operate independently of

22. United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) (emphasis added).

23. *See* Vermeule, *supra* note 19, at 1949 n.24; *see also* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015) (arguing that academic commentators should more readily differentiate between classical and modern avoidance).

24. For a prominent scholarly discussion of procedural avoidance, see Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

25. *See, e.g.*, United States v. Booker, 543 U.S. 220, 320 (2005) (Thomas, J., dissenting in part) ("The severability issue may arise when a court strikes either a provision of a statute or an application of a provision.").

the unconstitutional provision.[26] The second prong focuses on whether the remaining provisions can operate in "a manner consistent with the intent of Congress."[27] Thus, the prongs are related: whether remaining provisions can operate independently is evidence of whether Congress would have enacted them alone.[28]

Courts often apply one or more presumptions in conducting severability analysis. Historically, courts have vacillated between presumptions of severability and inseverability, but the current practice is a general presumption of severability.[29] A presumption of severability also applies where Congress includes a severability clause in a statute. Such clauses typically state that if any provision or application of the statute is held unconstitutional, the remainder of the statute shall remain in effect.[30] However, courts generally do not accord dispositive weight to these clauses.[31]

II. MODERN TEXTUALISM'S CHALLENGE TO INTENTIONALIST ASSUMPTIONS

This Part argues that modern textualism has challenged avoidance and severability doctrines' intentionalist assumptions. Both doctrines originated in a legal discourse that assumed the existence of an unexpressed legislative intent that judges could discover. Within that discourse, a judge who invoked the doctrines could defend her actions as an interpretation of an external legislative command, and the doctrines were justified as means to further judicial restraint and legislative supremacy.

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26. *See* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932).

27. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (emphasis removed).

28. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 693–94 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

29. *See* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 218–25 (1993) (tracing the history of these presumptions).

30. *See id.*

31. *See, e.g.*, Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (stating that a severability clause "provides a rule of construction which may sometimes aid in determining [legislative] intent. But it is an aid merely; not an inexorable command"); *see also* Nagle, *supra* note 29, at 235 (proposing and rejecting justifications for nonenforcement of severability clauses).

Times have changed. Starting in the late twentieth century, textualism challenged the intentionalist approach to statutory interpretation. Other approaches also eschewed reliance on unexpressed legislative intent. In our contemporary discourse, the notion that a judge who invokes the doctrines interprets an external command is contested. As a result, the doctrines have begun to appear legislative. Ironically, judicial restraint and legislative supremacy, far from justifying the doctrines, are now reasons to doubt their legitimacy.

This Part proceeds as follows: first, I explain that avoidance and severability originated in an intentionalist legal discourse, and second, I show that textualism has challenged that discourse.

A. Avoidance and severability originated in an intentionalist legal discourse.

For much of our country's history, federal courts proclaimed that the goal of statutory interpretation is to effectuate legislative intent.[32] The hallmark of this intentionalist approach was its tendency to anthropomorphize the legislature.[33] It was commonly thought that, just as one cannot understand the meaning of human speech without considering a speaker's unexpressed intent, a judge could not interpret the meaning of a statute without considering Congress' unexpressed intent.[34]

The doctrines of avoidance and severability originated in this context. There seems to be no scholarly consensus about when a federal court first adopted what might properly be called an avoidance interpretation. Avoidance surfaced in early form even before the establishment of substantive judicial review in *Marbury v. Madison*,[35] although it probably had not attained canonical status by then. Some have pointed to Justice Brandeis'

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32. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–21, 427–30 (2005).

33. *See id.* at 423.

34. *See id.* at 419–21, 427–30; *see also* John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2404 n.28 (2017) (citing Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 52 (1804) (Marshall, C.J.) (asserting that the object of interpretation is to "discover[] the mind of the legislature")).

35. 5 U.S. (1 Cranch) 137 (1803); *see* Vermeule, *supra* note 19, at 1948.

concurrence in *Ashwander v. Tennessee Valley Authority*[36] as the moment that the practice of avoidance crystallized into canon.[37]

Federal courts have long rationalized avoidance as a means of effectuating legislative intent. For example, in the 1838 case of *United States v. Coombs*,[38] Justice Story urged that a "presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous."[39] Although the federal courts have sometimes relied on other rationales for avoidance,[40] they have continued to rely on this intentionalist rationale until today.[41]

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36. 297 U.S. 288 (1936).

37. *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 73.

38. 37 U.S. (12 Pet.) 72 (1838).

39. *Id.* at 76; *see also, e.g.*, Bd. of Sup'rs v. Brown, 112 U.S. 261, 268–69 (1884) ("[I]f there were room for two constructions . . . the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution . . . ."); Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 448–49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."); Case of Fries, 9 F. Cas. 924, 933 (C.C.D. Pa. 1800) (Chase, J.) ("It cannot be credited by dispassionate men . . . that congress will intentionally make laws in violation of the constitution, contrary to their sacred trust, and solemn obligation to support it.").

40. One such rationale sees avoidance as a tool of judicial restraint. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962) (discussing the counter-majoritarian difficulty of judicial review). The Court has sometimes expressed support for this rationale. *See, e.g.*, *Ashwander*, 297 U.S. at 345–46 (Brandeis, J., concurring); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 249 (2012) ("[T]he canon rests . . . upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2145 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("The canon is based on a theory of judicial restraint.").

41. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381 (2005) (Scalia, J.) ("[Modern avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); Rust v. Sullivan, 500 U.S. 173, 191 (1991) ("[Modern avoidance] is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[Avoidance] not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

Avoidance was part of a more general approach to statutory interpretation that sought to effectuate legislative intent. Two years after the Court decided *Coombs*, it captured the spirit of the era when, in *Brewer's Lessee v. Blougher*,[42] it declared that it had the duty "to ascertain the meaning of the legislature" and "to restrain [a statute's] operation within narrower limits than its words import, if [it was] satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."[43]

Severability doctrine lacks avoidance's historical pedigree. At the founding, the ability to invalidate entire statutes because of partial unconstitutionality was not thought to inhere in the judicial power. When a court declared a statute unconstitutional, it determined that the Constitution displaced the statute only insofar as the statute was unconstitutional.[44] Severability's unique contribution to judicial review, then, was to empower courts to invalidate entire statutes on the basis of only partial unconstitutionality.[45]

Although the founding-era practice had the same effect as severance, it is anachronistic to think of the practice in these terms.[46] The reason is that early American courts did not see judicial review as a process of excision so much as one of displacement.[47] In other words, courts saw judicial review not as creating a new law consisting of a statute "minus" its unconstitutional provisions, but instead as enforcing the partially unconstitutional statute "plus" the Constitution.[48]

Severability doctrine rose to prominence in 1854, when, in *Warren v. Mayor & Aldermen of Charlestown*,[49] Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts reasoned by analogy to contract that an unconstitutional statutory provision could render an entire statute invalid.[50] His

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42. 39 U.S. (14 Pet.) 178 (1840).

43. *Id.* at 198.

44. *See* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 768–69 (2010) (discussing the original approach to partial unconstitutionality).

45. *See id.* at 776–77.

46. *See id.*

47. *See id.* at 778.

48. *See id.*

49. 68 Mass. (2 Gray) 84 (1854).

50. *See id.* at 99–100; *see also* Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995) (critiquing the analogy to contract).

analysis centered on a counterfactual inquiry into legislative intent and on the operability of the statute's remaining provisions.[51] Severability quickly gained acceptance among the state courts and persists until today.[52]

The Court adopted severability doctrine in the 1880 case of *Allen v. Louisiana*,[53] and it rationalized the doctrine as a means of effectuating legislative intent. It said, "The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature." [54] Like avoidance, severability was part of a more general interpretive approach that sought to effectuate legislative intent.[55]

In the intentionalist discourse in which they originated, the doctrines of avoidance and severability were justifiable as means of furthering judicial restraint and legislative supremacy. If one assumes that Congress intends to legislate within constitutional bounds and that courts are capable of determining what Congress would have done had it known of a constitutional problem, then the doctrines seem not only to reduce the frequency and severity of judicial review, but also to effectuate Congress' intent.

Thus, the doctrines of avoidance and severability originated in a legal discourse that assumed the existence of an unexpressed legislative intent that judges could discover. Within that discourse, the doctrines were understood as effectuating Congress' intent and were justified as means to further judicial restraint and legislative supremacy.

B. Modern textualism challenged the intentionalist approach to statutory interpretation.

In the late twentieth century, modern textualism challenged the intentionalist approach to statutory interpretation. Its chal-

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51. *See Warren*, 68 Mass. (2 Gray) at 99–100.

52. *See* Nagle, *supra* note 29, at 213 n.54 (collecting cases).

53. 103 U.S. 80 (1880).

54. *Id.* at 84.

55. *See* Murphy v. Nat'l Collegiate Athletic Ass'n., 138 S.Ct. 1461, 1487 n. * (2018) (Thomas, J., concurring) ("This Court adopted the *Warren* formulation in the late 19th century, an era when statutory interpretation privileged Congress' unexpressed 'intent' over the enacted text." (internal citations omitted)).

lenges were pragmatic and formal.[56] Pragmatically, textualists denied the existence of an unexpressed legislative intent that judges could discover. The legislative process, they argued, was so complex and path-dependent that the notion of unexpressed legislative intent was nonsensical.[57] At least "with respect to 99.99 percent of the issues of construction reaching the courts," Justice Scalia declared, "there *is* no legislative intent."[58] Formally, textualists questioned whether reliance on unexpressed legislative intent is consistent with Article I, Section 7's requirements of bicameralism and presentment. Legal texts overcome the rigors of the legislative process, textualists emphasized; unexpressed intentions do not. Again, Justice Scalia put the point well when he declared, "It is the *law* that governs, not the intent of the lawgiver . . . Men may intend what they will; but it is only the laws that they enact which bind us."[59]

Textualism is associated with a realist concern about judicial lawmaking.[60] That is, if there is no unexpressed legislative intent for judges to discover, or if such intent is not a proper source of authority for judicial decision making, then "the invocation of 'legislative intent' merely masks a process of judicial choice that rests on *something other* than decoding Congress's instructions."[61] The realist concern is that this "something other" could be a judge's personal policy preferences.[62]

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56. In what follows, I am glossing over the gradual evolution that textualism has undergone. For an excellent account of that evolution, see John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010).

57. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable.").

58. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 32 (Amy Gutmann ed., 1997).

59. *Id.* at 17.

60. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930) ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.").

61. Manning, *supra* note 56, at 1296 (emphasis added).

62. *See* Scalia, *supra* note 58, at 17–18 ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

The doctrines are inconsistent with textualism for other reasons. Except in those rare instances when a judge is in equipoise between two interpretations, avoid-

The foregoing aspects of textualism have been broadly influential. As Professor Molot has explained in his postmortem of the "textualist revolution,"[63] the extent of textualism's influence is difficult to quantify in objective terms,[64] but empirical studies and anecdotal evidence suggest that textualism's "core observations" about the notion of unexpressed legislative intent and the propriety of relying upon it have appealed to textualists and nontextualists alike.[65]

Textualism challenged the doctrines of avoidance and severability in particular. Justice Scalia wrote that "*today*," legislative intent is a dubious rationale for avoidance because federal statutes "often all but acknowledge their questionable constitutionality with provisions for accelerated judicial review, for standing on the part of members of Congress, and even for fallback dispositions should the primary disposition be held un-

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ance causes a judge to swerve from a statute's best reading. *See* Almendarez-Torres v. United States, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) ("The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one—the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function."). Because textualists emphasize Article I, Section 7's requirements of bicameralism and presentment, any move away from a statute's best reading is a significant concession. *See* Scalia, *supra* note 58, at 28–29 ("But whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.").

Similarly, severability allows judges to disregard the plain text of severability clauses and, because it focuses on legislative intent alone, the President's role in lawmaking. *See* Movsesian, *supra* note 50, at 71. Severability's failure to account for the President is likely to become practically important. In *NFIB*, for example, the Obama administration took the position that the Mandate was not severable from the rest of the ACA. *See* Abbe R. Gluck & Michael J. Graetz, *The Severability Doctrine*, N.Y. TIMES, Mar. 23, 2012, at A29. But what if the administration had asserted that President Obama would have vetoed the ACA without the Mandate? Severability provides no occasion for the Court to consider such direct evidence of presidential intent, even though failing to consider it would seem to implicate the Court in the sort of end-run around presentment that textualists sometimes criticize.

63. Molot, *supra* note 18, at 1.

64. *See id.* at 33–34.

65. *See id.* at 32; *see also* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1912–13 (2015) ("[M]any diverse approaches—legal realism, modern pragmatism, Dworkinian constructivism, and even Legal Process purposivism—all build on the common theme that a complex, multimember body such as Congress lacks any subjective intention about the kind of difficult issues that typically find their way into court.").

constitutional."[66] Justice Scalia also opposed the kind of counterfactual inquiry into legislative intent that severability requires. While he acknowledged that a "what-would-the-legislature-have-wanted strain existed" in Anglo-American law at one time, "*today*," he wrote, "it is anomalous and philosophically indefensible as violating the separation of powers, and it produces considerable judicial mischief."[67]

As textualism challenged the doctrines of avoidance and severability, each doctrine underwent a similar transformation. Academic commentators questioned the doctrines' reliance on unexpressed legislative intent and began to characterize them as impermissibly legislative. While some commentators argued that the doctrines could be rationalized on other grounds, others called for the them to be reformed or repudiated. A general consensus emerged that judicial restraint and legislative supremacy, far from justifying the doctrines, are reasons to doubt their legitimacy.

Commentators largely rejected intentionalist rationales for the avoidance doctrine.[68] Some commentators proposed that

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66. SCALIA & GARNER, *supra* note 40 at 248–49 (emphasis added).

67. *Id.* at 349–50 (emphasis added).

68. *See, e.g.*, HENRY J. FRIENDLY, BENCHMARKS 210 (1967) ("It does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them."); 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 CALIF. L. REV. 397, 448 (2005) ("Presumably, Congress might prefer to know the limits of its power and have at least some of its controversial statutes survive intact without judicial reworking."); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2127 (2015) (noting that avoidance's intentionalist rationale has been "roundly and persuasively criticized"); Kavanaugh, *supra* note 40, at 2146 ("Of course, one initial problem with this doctrine is that Congress may have wanted to legislate right up to the constitutional line but didn't know where it was and trusted the courts to make sure Congress did not unintentionally cross the line."); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 846 (2001) ("[G]iven the complexities of the legislative process, it might well be that Congress would want a statute to be construed in a manner that makes the constitutional question unavoidable."); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 22–23 (1996) ("[T]hese assumptions are questionable in light of the multiple factors animating legislation and the complexity of the legislative process."); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 488 (1990) ("Unless there is actual evidence that Congress was concerned with some specific constitutional issue, it is unrealis-

the doctrine could be defended as a means for the Court to enforce constitutional norms[69] or to conserve its institutional capital.[70] Others were not so charitable. Judge Easterbrook, for instance, criticized modern avoidance as a "roving commission to rewrite statutes to taste."[71] Whatever view one subscribes to,

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tic to assume that Congress gave much consideration to the constitutional ramifications of a statute it enacted."); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1209–10 (2006) (agreeing with Judge Friendly's criticisms of modern avoidance); Schauer, *supra* note 37, at 92 ("[T]here is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts."); Vermeule, *supra* note 19, at 1962 (same); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1581 (2000) (stating that Judge Friendly's criticisms "surely undermine fidelity to congressional intent as an argument for the [modern] avoidance canon"). *But see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 948 (2013) ("To the extent that the avoidance canon rests on the presumption that Congress tries to legislate within constitutional bounds, our respondents' answers were consistent with it."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989) (stating that avoidance "responds to Congress' probable preference for validation over invalidation").

69. *See* Young, *supra* note 68, at 1585; *see also* Morrison, *supra* note 68, at 1212–17 (2006) ("The avoidance canon . . . guards the [constitutional] boundaries by making it more difficult for Congress even to approach them.").

70. *See* Frickey, *supra* note 68. *But see* Neal Devins, *Constitutional Avoidance and the Roberts Court*, 32 U. DAYTON L. REV. 339 (2007) (arguing that the Roberts Court need not employ constitutional avoidance techniques for this reason).

71. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405 (2002). Although commentators disagree about the desirability of rewriting through avoidance, they generally characterize it as such. *See, e.g.*, Frickey, *supra* note 68, at 402 (stating that the avoidance canon "involves judicial lawmaking, not judicial restraint"); Katyal & Schmidt, *supra* note 68, at 2121 ("In fact, avoidance often results in a rewritten law that cannot be revisited."); Kavanaugh, *supra* note 40, at 2146 (stating that Judge Easterbrook makes a "strong case[]"); Kelley, *supra* note 68, at 846 ("[I]t is no service to Congress, no great act of deference, to construe a statute in a manner contrary to its text and history in order to avoid even confronting a constitutional doubt."); Kloppenberg, *supra* note 68, at 11 ("The Supreme Court has used a wide range of formulations of [modern and classical avoidance], some limiting potential uses of the canon and others giving judges substantial latitude to rewrite statutes."); Marshall, *supra* note 68, at 487 ("[A] judge who invokes the avoidance doctrine actually rewrites the statute, thereby engaging in a relatively creative, arguably legislative, exercise of authority."); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 840 (1991) ("[S]ustaining and applying a statute that Congress never intended to enact is hardly a lesser usurpation of the legislative power than is overturning a statute on constitutional grounds."); Morrison, *supra* note 68, at 1250 (noting that, under certain circumstances, the President's invocation of the avoidance canon "is tan-

today "there seems to be consensus that the [avoidance] canon's use signals a Court that is actively engaged in shaping law and policy, not acting modestly."[72]

Commentators also sharply criticized severability doctrine's counterfactual inquiry into legislative intent.[73] When Professor Nagle published his study of severability in 1993,[74] the leading

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tamount to rewriting the legislation itself"); Schauer, *supra* note 37, at 93 ("[T]he assumption of congressional desire not to pass unconstitutional laws is in fact an imposition *on* Congress of the view that it should be the job of the courts to interpret statutes so as to *make* them constitutional."); Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299, 303 (2000) ("In the interest of preserving legislation, the court is legislating."); Sunstein, *supra* note 68, at 469 ("The mild statutory 'bending' that sometimes occurs is legitimate, for courts are not mere agents of the enacting legislature but have an obligation to the citizenry and the legal system as a whole."); Young, *supra* note 68, at 1587 ("Judges applying [avoidance] are not attempting to serve as Congress's 'agent'; instead, they are using the enterprise of statutory construction as a means of furthering values external to the legislative process itself.").

72. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 189.

73. *See, e.g.*, Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1505–06 (2011) ("While a court may lay decent claim to being able to evaluate whether a statute is capable of functioning with or without a particular provision, the court can have no real knowledge of which bargains were essential to arrive at a final legislative product."); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 291 (1994) ("Speculating whether Congress, faced with different circumstances, *would have* passed a statute it did not in fact pass is a considerably more uncertain enterprise than searching legislative history for the meaning of a statute Congress *did* pass."); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 647 (2008) (calling the inquiry "permissive"); Kavanaugh, *supra* note 40, at 2148 (calling the inquiry "an inherently suspect exercise"); Movsesian, *supra* note 50, at 71 ("Discovering the intent of the legislators who enact a statute is likely to be a far more difficult enterprise than discovering the intent of the parties who make a contract."); Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 748 (2017) ("[T]he current severability rubric poses a high risk of error because it is difficult to accurately determine what a legislature would have intended . . . ."); Nagle, *supra* note 29 at 230 ("[T]he question posed by *Champlin* is purely speculative, as many frustrated courts have acknowledged."); Sherwin, *supra* note 71, at 305 ("[H]ypothetical intent is quite speculative. It can perhaps be given some content by reference to legislative purpose, or to the 'enterprise' to which the statute belongs. But it can easily deteriorate into a question of what ought to happen, in which case 'legislative intent' adds nothing."); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 78 (1937) (citing "bad guesses by the judges as to the intent of the law makers"); Walsh, *supra* note 44, at 753 ("The hypothetical legislative intent test gets around [the] absence of any actual legislative intent to discern but does so by posing a question whose answer often calls for rank speculation.").

74. *See* Nagle, *supra* note 29.

academic article on the topic dated from 1937.[75] After Nagle's study, scholars debated severability in the law reviews, and a consensus about severability's legislative character emerged.[76] By 2010, Professor Walsh lamented that "[f]or too long" the legal community had accepted "judicial rewriting through severability doctrine."[77]

It is possible that the rise of textualism and the increased criticism of avoidance and severability doctrines are coincidental. To prove that textualism caused the doctrines to be rethought would require eliminating all of the alternate causes for the doctrines' declining favor among legal commentators. The increasing complexity of federal statutes could be one such cause. But because textualism challenged the very existence of an unexpressed legislative intent, and because the doctrines so plain-

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75. *See* Stern, *supra* note 73.

76. Scholars consider severability doctrine to be legislative in two respects. The first is that the severability *inquiry* is legislative because, by requiring the Court to determine what Congress would have done had it known of a constitutional problem, it requires the Court to make an essentially legislative judgment. *See, e.g.*, Gans, *supra* note 73, at 663 ("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."); Lea, *supra* note 73, at 748 ("[T]he speculative nature of legislative intent-based severability determinations leaves courts room to implement their own policy preferences under the cover of severability analysis."); Walsh, *supra* note 44, at 752 ("By reaching determinations about counterfactual legislative intent . . . a court reviewing a partially unconstitutional statute can expand the scope of its invalidation as widely or as narrowly as it discerns to be consistent with hypothesized legislative intent. This authority to 'excise' and 'rewrite' is effectively discretionary because the legislative intent test is almost always indeterminate."). The second is that *severing* an unconstitutional provision is legislative because it effectively creates a new law that Congress did not enact. *See, e.g.*, Campbell, *supra* note 73, at 1495 ("Courts legislate when they engage in 'severability analysis,' allowing part of a law to continue in force after having struck down other parts as unconstitutional."); Dorf, *supra* note 73, at 292 ("Shrill accusations of 'legislation from the bench' ring hollow when only the *interpretation* of the Constitution or an act of Congress is at stake, but the cries may ring true when the Court severs an invalid statutory provision."); Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 CALIF. L. REV. 915, 958 (2011) ("[T]he severing of a statute must not require such a creative or unconstrained rewriting as to constitute what the Justices apprehend as 'quintessentially legislative' rather than judicial work."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1333–34 (2000) ("Judicial lawmaking would occur . . . if the particular subrules that a court would need to specify to 'save' part of a statute would not sufficiently reflect the structure and history of the statute to be attributed to Congress, rather than the court."); Sherwin, *supra* note 71, at 303 ("In the interest of preserving legislation, the court is legislating.").

77. Walsh, *supra* note 44, at 743.

ly assume the same, it is reasonable to think that a causal relationship is at work.

Thus, the rise and influence of modern textualism has challenged the intentionalist assumptions on which the avoidance and severability doctrines rest, and, as a result, the doctrines have begun to appear legislative. Ironically, judicial restraint and legislative supremacy, far from justifying the doctrines, are now reasons to doubt their legitimacy. In the intentionalist discourse in which they originated, the doctrines seemed to reduce the frequency and severity of judicial review while also effectuating Congress' unexpressed intent. In our contemporary discourse, by contrast, doctrines that assume an unexpressed intent for the Court to discover seem outdated and anachronistic.

III. THE ILLEGITIMACY COSTS OF USING AVOIDANCE AND SEVERABILITY

This Part discusses *The ACA Cases* in order to argue that the existing allocation of power for addressing unconstitutional statutes has become improper. The Constitution vests Congress with all legislative powers therein granted.[78] Thus, as avoidance and severability have begun to appear legislative, the legitimacy of the Court invoking either doctrine has been drawn into doubt. Today, Congress has a stronger political pedigree to address unconstitutionality than the Court does when it invokes either avoidance or severability.

The result is that the Court incurs an illegitimacy cost when it invokes the doctrines. A court incurs an illegitimacy cost when it acts in ways that appear inappropriate for a court.[79] In *NFIB*, the Court applied avoidance and severability faithfully. But because the Court could not credibly claim to be interpreting an external legislative command, it appeared that the Court had impermissibly legislated. Later, in *King*, it appeared that the Court had used the doctrines to enact its own policy preferences.

This Part examines these cases in turn.

78. U.S. CONST. art. I, § 1.

79. *See* Lessig, *Fidelity and Constraint*, *supra* note 17, at 1387.

A. The doctrines of avoidance and severability risk charges that the Court has impermissibly legislated . . .

In *NFIB*, the Court considered the constitutionality of the ACA's Individual Mandate and Medicaid Expansion. The plaintiffs alleged that the Mandate exceeded Congress' powers under the Commerce Clause because it required individuals to purchase health insurance or else pay a penalty.[80] They also claimed that the Expansion was unconstitutionally coercive because it conditioned states' pre-existing Medicaid funding on their acceptance of additional funding in exchange for expanding their Medicaid coverage.[81]

The avoidance doctrine's assumption that Congress intends to legislate within constitutional bounds was not credible on the facts of the case. Curiously, the dissenters appealed to legislative history in order to assert that "Congress knew precisely what it was doing when it rejected an earlier version of [the ACA] that imposed a tax."[82] Even while invoking classical avoidance, Chief Justice Roberts conceded that "Congress thought it could enact . . . a command under the Commerce Clause, and the Government primarily defended the law on that basis."[83] Thus, Chief Justice Roberts' avoidance interpretation was difficult to justify as an effectuation of legislative intent,[84] and it appeared that the Court had impermissibly legislated. Though Chief Justice Roberts' interpretation was not particularly aggressive,[85] especially in light of the Court's other avoidance cases,[86] the dissenters claimed that there was "simp-

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80. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 539–43 (2012).

81. *See id.*

82. *Id.* at 668–69 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

83. *See id.* at 562 (opinion of Roberts, C.J.).

84. *See id.* at 561–63. The Chief Justice's use of avoidance's classical form raised eyebrows. *See id.* at 623 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Ultimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend . . . I concur in that determination, which makes the Chief Justice's Commerce Clause essay all the more puzzling.").

85. *See, e.g.*, Kevin C. Walsh, *The Limits of Reading Law in the Affordable Care Act Cases*, 92 NOTRE DAME L. REV. 1997, 1998 (2017) ("Under the Court's precedent . . . the Court was required to choose the constitutionally salvific interpretation—even over the textually superior one—as long as it was "reasonable" and "fairly possible" to read [the statute] that way. And it was.").

86. Recently, the Court has adopted avoidance interpretations so aggressive that one commentator has recommended classifying avoidance as both a canon of

ly no way, without doing violence to the fair meaning of the words used, to escape what Congress enacted: a mandate . . . enforced by a penalty."[87]

Severability doctrine's intentionalist assumption that the Court can determine what Congress would have done had it known of a constitutional problem also was not credible. The ACA is an omnibus enactment, consisting of several highly interdependent major provisions, including notably the Mandate and the Expansion, but also many minor provisions that are unrelated to expanding healthcare coverage. It was therefore difficult, if not impossible, for the Court to determine whether Congress would have enacted the ACA without its major provisions.[88] Severability doctrine thus seemed to engage the Court in an exercise of legislative power. At oral argument, for example, Justice Sotomayor responded to an argument that severing the Mandate would increase insurance premiums by noting that the Court was "not in the habit of doing legislative findings," and she suggested that the argument instead be addressed to "the people who should be fixing this, not us."[89] A similar exchange took place between Justice Kennedy and H. Bartow Farr, the advocate in favor of severing the Mandate:

> JUSTICE KENNEDY: So do you want us to write an opinion saying we have concluded that there is an insignificant risk of a substantial adverse effect on the insurance companies, that's our economic conclusion, and therefore not severable [sic]? That's what you want me to say?
>
> MR. FARR: It doesn't sound right the way you say it, Justice Kennedy.[90]

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interpretation and a remedy. *See* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016).

87. *See NFIB*, 567 U.S. at 662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (internal citations omitted).

88. At oral argument, Justice Sotomayor expressed interest in eliminating severability's counterfactual inquiry into legislative intent altogether. *See* Transcript of Oral Argument at 19–20, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (No. 11-393). Her alternative was a clear statement rule in favor of severability, which she said would let Congress "fix their problems." Also, Justice Scalia invited the advocates to oppose severability's focus on legislative intent by asking if it was "right." *Id.* at 10.

89. *Id.* at 5.

90. *Id.* at 68. Justice Kennedy's acknowledgment that severability was legislative also led him to acknowledge that severing the ACA might undermine rather than further the principles of judicial restraint and legislative supremacy. "When you

The dissenters ultimately accused the majority of rewriting the Expansion through severability doctrine. Because seven Justices agreed that the Expansion was unconstitutional, the Court confronted the question whether and how to sever it. The Court determined that the federal government could withhold the extra funding that the government had offered states to help them finance the Expansion, but could not reduce what states had received prior to the ACA's enactment. In support, Chief Justice Roberts cited a severability clause in the same title as the Expansion.[91] The dissenters claimed that the Court had "revised" the Expansion.[92] They read the severability clause to mean that if the Court found the Expansion unconstitutional, then the Court should invalidate the Expansion but let provisions *besides* the Expansion stand.[93] Again, the dissenters did not credit the assumption that Congress intends to legislate within constitutional bounds. They relied heavily on what they perceived to be Congress' textual intent to coerce the states, even though, on that reading, Congress had acted unconstitutionally.[94]

A concern about rewriting supported the dissenters' own conclusion that the Mandate and Expansion could not be severed from the rest of the ACA. "[A]n automatic or too cursory severance of statutory provisions risks rewriting a statute," they warned. It is an exercise of "the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime . . . This Court must not impose risks unintended by Congress or produce legislation Congress may have lacked the support to enact."[95] This concern compelled the dissenters to question severability doctrine itself. According to them, while the Court had "no reliable basis for knowing

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say judicial restraint," he said to an advocate, "you are echoing the earlier premise that it increases the judicial power if the judiciary strikes down other provisions of the Act. I suggest to you it might be quite the opposite . . . I just don't accept the premise." *Id.* at 36.

91. *See NFIB*, 567 U.S. at 585–86.

92. *Id.* at 690–91 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

93. *See id.*

94. *See id.* at 642 n.25 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The joint dissenters also rely heavily on Congress' perceived intent to coerce the States. We should not lightly ascribe to Congress an intent to violate the Constitution (at least as my colleagues read it).").

95. *See id.* at 692, 705 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

which pieces of the Act would have passed on their own," it was "certain that many of them would not have, and it [was] not a proper function of [the] Court to guess which."[96] But of course, severability doctrine assumes that the Court *can* guess which pieces of the Act would have passed on their own. Here, the dissenters implicitly rejected severability doctrine.

B. . . . in accordance with its own policy preferences.

The Court's next encounter with the ACA came in *King*. There the Court considered the availability of tax credits to citizens in states where the federal government set up healthcare exchanges.[97] The ACA provided that credits would be available in states where the exchange was "established by the State."[98] Chief Justice Roberts, writing for six Justices, read the term "State" to include the federal government, reasoning that the term was ambiguous and that this reading best accorded with the ACA's structure.[99]

Joined by two Justices, Justice Scalia dissented.[100] As in *NFIB*, he criticized the Court's interpretation along textualist lines, asking, for example, what made the majority "so sure that Congress 'meant' tax credits to be available everywhere."[101] Justice Scalia also stressed constitutional limitations on the Court's power to address what he called "flaw[s] in the statutory machinery" through interpretation.[102] Because Congress is vested with "all legislative powers" enumerated in the Constitution, Justice Scalia wrote, it is responsible for "both making laws *and mending them*."[103]

King did not involve avoidance or severability doctrine, but the case is still noteworthy because the dissenters' textualism gave way to realism more thoroughly than it had in *NFIB*. Justice Scalia began the dissent by accusing the majority of adherence to the overarching principle that "[t]he Affordable Care

96. *Id*. at 705.
97. *See* King v. Burwell, 135 S.Ct. 2480, 2485 (2015).
98. *Id.* at 2487.
99. *See id.* at 2491–93.
100. *See id.* at 2496 (Scalia, J., dissenting).
101. *Id.* at 2505.
102. *Id.*
103. *Id* (emphasis added).

Act must be saved."[104] And he concluded the dissent by summarizing *NFIB* in realist terms:

> In [*NFIB*], this Court revised major components of the statute in order to save them from unconstitutionality. The Act that Congress passed provides that every individual "shall" maintain insurance or else pay a "penalty." This Court, however, saw that the Commerce Clause does not authorize a federal mandate to buy health insurance. So it rewrote the mandate-cum-penalty as a tax. The Act that Congress passed also requires every State to accept an expansion of its Medicaid program, or else risk losing *all* Medicaid funding. This Court, however, saw that the Spending Clause does not authorize this coercive condition. So it rewrote the law to withhold only the *incremental* funds associated with the Medicaid expansion . . . . *We should start calling this law SCOTUScare . . . . The cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.*[105]

The previous Part noted that textualism is associated with a realist concern about judicial lawmaking. Justice Scalia's dissent in *King* marks the extension of that concern to avoidance and severability.

Together, the dissents in *NFIB* and *King* contain the suggestion that it is illegitimate for courts to respond to the unconstitutionality of a statute by resort to avoidance and severability doctrines. In *NFIB*, the Court applied the doctrines faithfully. But because the Court could not credibly claim to be effectuating legislative intent when it invoked the doctrines, it was vulnerable to the dissenters' charges that it had impermissibly legislated in accordance with its own policy preferences, and it incurred an illegitimacy cost as a result.[106]

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104. *Id.* at 2497.

105. *Id.* at 2506–07 (third emphasis added).

106. This cost does not depend on the Court misapplying avoidance or severability doctrine. However, the Court has drawn criticism for misapplying the doctrines in recent cases. *See supra* note 86. Such misapplications only increase the cost that the Court's continued adherence to the doctrines imposes. The problem is not only that the doctrines engage the Court in an exercise of legislative power, but also that the doctrines fail to provide a principle that guides and limits the Court's discretion. *Cf.* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2443–44 (2005) ("To the extent that the intelligible principle test is used to distinguish between law-implementation and a raw transfer of 'legislative' power,

Unless the Court revisits its avoidance and severability precedents, these illegitimacy costs will recur. One need not look beyond the ACA line of cases to see how. A third challenge to the ACA is currently in the lower courts. In 2017, Congress eliminated the tax for not having health insurance, but it left the other provisions of the ACA intact. The plaintiffs in *Texas v. United States*[107] argue that because the Mandate no longer generates any revenue, it can no longer be sustained as a tax.[108]

The plaintiffs go on to argue that if the Mandate is ruled unconstitutional, the rest of the ACA should be invalidated in keeping with the intent of the 2010 Congress that enacted it.[109] To this argument, amici sensibly responded that because the 2017 Congress made the Mandate unenforceable but left the rest of the ACA's provisions intact, it clearly intended the rest of the ACA to remain in effect.[110] After a judge ruled for the plaintiffs in December, one commentator denounced the decision as "raw judicial activism."[111]

IV. REALLOCATING TO CONGRESS THE POWER TO ADDRESS UNCONSTITUTIONAL STATUTES

This Note's Introduction described a model of jurisprudential change that Professor Lessig calls the "*Erie*-effect." First, contestation makes a practice within law seem illegitimate. Second, the Court reallocates the practice to another legal institution in order to avoid incurring an illegitimacy cost to courts. In *Erie*, legal positivism contested the existence of a transcendental body of law that all judges could discover, which made

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it is odd to declare that the test can be satisfied by a sweeping doctrine that grants the judiciary all-purpose authority to step into Congress's shoes and correct its apparent mistakes in any statute."); Aaron Nielson, Erie *as Nondelegation*, 72 OHIO ST. L.J. 239 (2011) (arguing that the nondelegation doctrine formed the basis for the *Erie* Court's constitutional holding).

107. 352 F. Supp. 3d 665 (N.D. Tex. 2018).

108. *See id.* at 668–69.

109. *See id.* at 669.

110. *See* Brief of Amici Curiae Jonathan H. Adler et al. in support of Intervenors-Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction at 4, Texas v. United States, 352 F. Supp. 3d 665 (N.D. Tex. 2018) (No. 4:18-cv-00167-O).

111. *See* Nicholas Bagley, Opinion, *The latest ACA ruling is raw judicial activism and impossible to defend*, WASH. POST (DEC. 15, 2018), https://www.washingtonpost.com/opinions/2018/12/15/latest-aca-ruling-is-raw-judicial-activism-impossible-defend/?noredirect=on&utm_term=.1aabcc489e45 [https://perma.cc/56DX-6W7U].

the practice of federal courts "discovering" common law under *Swift* seem illegitimate. The Court then reallocated to the states the power to provide the rule of decision.

The first part of the *Erie*-effect has already happened to the doctrines of avoidance and severability, and the Court should complete the pattern by ceding to Congress some of its current power to address unconstitutionality. The best means for the Court to do so is by repudiating avoidance and severability and replacing them with a regime in which courts give statutes their best readings. If a statute is unconstitutional, the Court should invalidate the unconstitutional part. This proposal aims to reduce the illegitimacy cost that the Court incurs under the current regime.

This Part proceeds as follows: first, I analogize textualism's challenge to the doctrines of avoidance and severability on the one hand to positivism's challenge to *Swift* on the other, and second, I argue that the Court should cede to Congress some of its current power for addressing unconstitutional statutes.

A. Much like legal positivism exposed judicial lawmaking under Swift*, textualism has exposed judicial lawmaking through the doctrines of avoidance and severability.*

Professor Lessig argues that changing theories of law explain the *Erie* Court's decision to overturn *Swift*.[112] Justice Story's rhetoric in *Swift* suggested that the common law was "discovered."[113] But, in the years following *Swift*, that rhetoric invited two sorts of skepticism.[114] First, positivists asked, discovered *where*? They insisted that "the source of the law" be named.[115] Second, realists asked, really *discovered?* They demanded proof that a judge "didn't just pretend to find it."[116]

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112. The basis for the *Erie* Court's constitutional holding is famously unclear. Professor Lessig's attempt to explain the decision is one of many, and for those who believe that legal positivism was irrelevant to the holding, my analogy to *Erie* is inapt. *See generally* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

113. *See supra* note 12 and accompanying text.

114. *See* Lessig, *Fidelity and Constraint*, *supra* note 17, at 1401.

115. *Id.*

116. *Id.*

These skepticisms first surfaced in the academy and then in the pre-*Erie* dissents of Justice Holmes.[117] In *Southern Pacific Co. v. Jensen*,[118] for example, Justice Holmes quipped that the common law is not "a brooding omnipresence in the sky."[119] And in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[120] he famously claimed that the Court's decision in *Swift* rested upon a "subtle fallacy":

> If there were . . . a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But *there is no such body of law.* The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but *law in the sense in which courts speak of it today does not exist without some authority behind it.*[121]

These dissents made the *Swift* regime contestable,[122] meaning not just that there was disagreement about it, but also that the disagreement was salient in the legal community.[123] The illegitimacy cost associated with *Swift* eventually became substantial: on the eve of the Court's decision in *Erie*, "[i]t was neither plausible that judges were really being guided by anything; nor if they were being guided, that what was guiding them was a proper source of authority."[124] The *Erie* Court overturned *Swift* as a result.

Positivism's challenge to *Swift* parallels textualism's challenge to the doctrines of avoidance and severability. Much like positivism produced skepticism about the common law's source, textualism has produced skepticism about the source of the Court's authority to invoke avoidance or severability. In his academic writings, Justice Scalia spoke the language of Holmes. Avoidance and severability each assume that there is an unexpressed legislative intent outside of any particular stat-

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117. *See id.* at 1405 (citing TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 92–99 (1981)).

118. 244 U.S. 205 (1917).

119. *See id.* at 222 (Holmes, J., dissenting).

120. 276 U.S. 518 (1928).

121. *Id.* at 533–35 (Holmes, J., dissenting) (emphasis added).

122. *See* Lessig, Erie-*Effects*, *supra* note 17, at 1807.

123. *See id.* at 1802.

124. Lessig, *Fidelity and Constraint*, *supra* note 17, at 1401.

ute that the Court can discover. But, Justice Scalia wrote, "with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent."[125] Legislative intent in the sense in which courts speak of it "today,"[126] Justice Scalia seemed to say, does not exist without some text behind it.

Further, because they contested the source of the Court's authority to engage in particular interpretive practices, positivism and textualism both invited realist questions about whether judges were simply legislating in accordance with their policy preferences.[127] Justice Holmes thought that *Swift* had masked the reality that the common law "flowed not from *facts* found but from *choices* made."[128] Justice Scalia thought that reliance on unexpressed legislative intent could mask that same reality.[129] The result in each case was a rethinking of what the Court does when it acts—from "discoverer" of the common law to "maker," and from "interpreter" of a statute to "rewriter."

This is not to say that textualism has prevailed over rival approaches to interpretation or even that it is normatively superior to them. My claim is, more modestly, that textualism has been influential enough to challenge the notion that a judge who invokes avoidance or severability is effectuating legislative intent. As Professor Lessig has explained in the context of *Erie*, "Formalists and anti-realists abounded [then], but none of that matters. Instead, the relevant change is a change from a background contested discourse, to a foreground contested discourse."[130]

Further, I am not arguing that our nineteenth century forebears were blind to the possibility that avoidance and severability doctrines could engage the Court in an exercise of legislative power; in fact, courts warned against that possibility early on.[131] In order to accept this Part's claim, one need only think

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125. *Supra* note 58.

126. *Supra* notes 66–67 and accompanying text.

127. *See generally* Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001).

128. Lessig, *Fidelity and Constraint*, *supra* note 17, at 1406.

129. *See supra* note 62.

130. Lessig, *Fidelity and Constraint*, *supra* note 17, at 1409.

131. *See, e.g.*, United States v. Reese, 92 U.S. 214, 221 (1875) ("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."); Bd. of Sup'rs v. Brown, 112 U.S. 261, 269 (1884) ("Our duty, therefore, is to adopt that construction which, without doing violence

that textualism has foregrounded such concerns about judicial legislation. This too, is consistent with Professor Lessig's explanation: scholars were arguing that judges "make" the law rather than "discover" it, a full century before the Court decided *Erie*.[132]

Thus, much like legal positivism exposed judicial lawmaking under *Swift*, textualism has exposed judicial lawmaking through the doctrines of avoidance and severability.

B. The Court should cede to Congress some of its current power for addressing unconstitutional statutes.

As judges' use of the doctrines of avoidance and severability has begun to appear legislative, our regime for addressing the unconstitutionality of statutes has increasingly become a dilemma in which judges are forced to choose between two kinds of judicial rewriting. Yet scholars have not attempted to explain the doctrines' change in appearance and, because scholars only rarely study the doctrines side-by-side,[133] they have often overlooked the dilemma that this change created.

First, if, as some scholars have suggested,[134] the Court should reform our current regime in order to avoid judicial legislation, it is important that we determine what causes the use of our judicial doctrines to appear legislative. This Note has argued that the answer lies in changes in legal thought surrounding statutory interpretation: whereas it was once assumed that avoidance and severability effectuated the legislature's unexpressed intent, modern textualism has challenged that notion, with the result that judicial reliance on the doctrines seems legislative.

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to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution.").

132. *See* Lessig, *Fidelity and Constraint*, *supra* note 17, at 1401 (quoting William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 934 (1998)) ("By the 1830s critics were railing against the legal profession and the common law as undemocratic institutions.").

133. Scholars' tendency to study one doctrine to the exclusion of the other is strange given that courts sometimes claim that "each doctrine entails the other." Vermeule, *supra* note 19. For a recent example, see Ass'n of Am. R.Rs. v. United States Dep't of Transp., 869 F.3d 539, 550 (D.C. Cir. 2018) ("[S]everability is a doctrine borne out of constitutional-avoidance principles, respect for the separation of powers, and judicial circumspection when confronting legislation duly enacted by the co-equal branches of government.").

134. *See supra* notes 68–77 and accompanying text.

If this analysis is correct, then some existing reform proposals may be counterproductive. For example, Professor Manheim's article on severability doctrine argues that because severability allows a court only two options—to invalidate in whole or in part—it inhibits the Court from effectuating legislative intent.[135] She proposes foregoing the severability framework in favor of "a fundamentally broader inquiry into legislative intent."[136] While this proposal may satisfy intentionalists, textualists may find that increasing the role of legislative intent mistakes the disease for the cure.[137]

Second, reform proposals should account for the impact that changes in one doctrine would likely have on the other.[138] For example, Neal Katyal and Thomas Schmidt's recent article argues that the Court, in order to avoid rewriting statutes, should adhere more faithfully to the avoidance doctrine's requirements that a statute be ambiguous and that alternative interpretations be plausible.[139] But by forcing the Court to declare statutes unconstitutional more frequently, their proposal would likely substitute rewriting through severability for rewriting through avoidance.

The same can be said for certain proposals to reform severability doctrine. Professor Campbell argues by analogy to the legislative and line-item veto cases that because severing a statute effectively creates a new law that Congress did not enact, severability violates Article I, Section 7's requirements of bicameralism and presentment.[140] He proposes a regime in which courts declare all partially unconstitutional statutes entirely invalid.[141] While he suggests means to temper the harsh-

135. *See* Lisa Marshall Manheim, *Beyond Severability*, 101 IOWA L. REV. 1833 (2016).

136. *Id.* at 1892.

137. The extent of this Note's disagreement with Professor Manheim's proposal depends partly on whether she would retain severability's counterfactual inquiry into legislative intent. She does not, however, take a stance on this issue in her article. *See id.* at 1840 n.38.

138. *Cf.* Richard H. Fallon, Jr., *Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006) (arguing that justiciability, substantive, and remedial doctrines are mutually interconnected).

139. *See* Katyal & Schmidt, *supra* note 68, at 2163.

140. *See* Campbell, *supra* note 73, at 1495.

141. *See id.* at 1525.

ness of this proposal,[142] he does not discuss the incentives it could create for the Court to rewrite statutes through avoidance.

Appearances matter.[143] As the Court itself has recognized, it "must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures . . . ."[144] Because the doctrines of avoidance and severability fail this test today, the Court should repudiate both and replace them with a regime in which courts give statutes their best readings. If a statute is unconstitutional, a court should invalidate the unconstitutional part.

This proposal has theoretical and practical advantages. Theoretically, it cedes to Congress some of the Court's power for addressing unconstitutional statutes. Our current regime relies heavily on judicial intervention to conform statutes to constitutional requirements in a way that effectuates Congress' unexpressed intent. Repudiating avoidance and severability would give Congress greater responsibility for legislating within constitutional bounds or drafting fallback law *ex ante* and for addressing unconstitutional statutes *ex post*. Practically, the proposal replaces flexible, open-ended standards with more easily administrable rules. As Justice Kavanaugh has persuasively argued, avoidance doctrine's threshold ambiguity finding is difficult to make in a principled way.[145] The same can be said for its requirement that interpretations be "plausible" and for severability's counterfactual inquiry into legislative intent. The result has been that the Court has not developed uniform and predictable practices for applying avoidance and severability despite many years of experience.

Repudiating the doctrines of avoidance and severability would better equip the Court to defend its decisions in controversial statutory cases as grounded truly in principle. In part

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142. *See id.* at 1516–19 ("Judicial stays, expedited action by Congress, and equitable use of the doctrine of retroactivity can all mediate any perceived hardships to the effective functioning of government.").

143. *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (arguing that the Court can and should consider appearances as part of its decision-making process).

144. *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion).

145. *See* Kavanaugh, *supra* note 40, at 2118.

because avoidance and severability rely on an outdated and anachronistic conception of legislative intent, the Court's authority to invoke either doctrine is contested. By contrast, the Court's authority to give statutes their best readings and to enforce the Constitution in individual cases is "beyond dispute."[146]

The Court's claim to be enforcing the Constitution would, in particular, be more credible. In *NFIB*, Chief Justice Roberts responded to the dissenters' charge that he had rewritten the Expansion in part by claiming that he was "merely enforcing the Constitution."[147] That claim was less persuasive than it might have been under the proposal, however, because severability doctrine requires the Court to do more than merely enforce the Constitution; the Court must also effectuate legislative intent.

The proposal also has drawbacks. There are cases in which partial invalidation itself seems legislative. The paradigmatic case is *I.N.S. v. Chadha*.[148] There Congress delegated certain legislative powers to executive agencies on the condition that a single house of Congress could veto the agencies' exercise of those powers.[149] By declaring the legislative veto provision unconstitutional and severing it from the delegation,[150] the Court arguably sheared the delegation's quid from its quo.

But one can believe that partial invalidation sometimes disrupts legislative bargains while also believing that Congress should be the legal institution to address that disruption. Further, even where partial invalidation does shear a statute's quid from its quo, if the Court repudiates severability doctrine, the law in effect after invalidation will at least be traceable to "a combination of constitutional command and legislative provision, rather than judicial supposition about what the legislature would have wanted."[151]

Next, although the proposed regime could be more administrable than the doctrines of avoidance and severability, it would not always be so. Where multiple provisions conspire to

146. *See Casey*, 505 U.S. at 865.

147. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 586 (2012) (opinion of Roberts, C.J.).

148. 462 U.S. 919 (1983).

149. *See id.* at 923.

150. *See id.* at 931–35.

151. *See* Walsh, *supra* note 44, at 743.

create a constitutional problem, it would remain unclear which provision or provisions the Court should invalidate. In *Free Enterprise Fund v. PCAOB*,[152] for example, several provisions of the Sarbanes-Oxley Act created an unconstitutional administrative structure.[153]

But the Court can address this drawback by focusing on judicial restraint as opposed to legislative intent. The Court adopted this approach in *Free Enterprise* itself. There the Court did not attempt to determine which of the possible dispositions Congress would have preferred, as severability doctrine requires. Instead, it simply chose the disposition that, in its estimation, required it to exercise the least "editorial freedom."[154] The Court then left it to Congress to pursue other, more extensive alternatives going forward.[155]

Finally, if the Court cannot invoke avoidance doctrine, judicial review would become more frequent. But without the prospect of total invalidation, review would probably be less severe than under severability, and, the frequency with which the Court addresses high-profile statutes like the ACA might actually decrease. It is difficult to imagine that cases like *Texas v. United States*, for example, would be brought as frequently if the Court lacked the power to invalidate entire statutes.

Thus, the Court should cede to Congress some of its current power to address unconstitutionality.

V. CONCLUSION

Constitutional avoidance and severability are venerable doctrines, but they are also vestigial. Both doctrines originated in a legal discourse that assumed the existence of an unexpressed legislative intent that judges could discover. But as the kind of intent skepticism commonly associated with modern textualism has challenged that assumption, judicial reliance on the doctrines has begun to appear legislative. *The ACA Cases* show that when the Court addresses unconstitutional statutes by resort to avoidance and severability, the Court incurs an illegitimacy cost.

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152. 561 U.S. 477 (2010).
153. *See id.* at 509–10.
154. *Id.*
155. *See id.*

In the interest of its legitimacy, the Court should cede to Congress some of its current power to address unconstitutional statutes. This Note has suggested one means by which the Court could do this: it can give a statute its best reading and, if the statute is unconstitutional, invalidate the unconstitutional part. Such a regime would protect the Court's legitimacy from the threat that continued adherence to avoidance and severability poses, while preserving the Court's essential role in upholding and enforcing the Constitution.

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