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To Save and Not To Destroy: Severability, Judicial Restraint, and the Affordable Care Act

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When a statute is partially unconstitutional, courts must endeavor to save, not destroy, the rest of the law. This is the core command of severability doctrine, a firmly established tenet of judicial restraint. A court must save the valid parts of a statute unless the legislature would not have intended those parts to remain in effect absent the unconstitutional provisions.[1] Consistent with this duty to save, in 2010, in *National Federation of Independent Business v. Sebelius* ("*NFIB*"),[2] the Supreme Court held that Congress's expansion of the Medicaid program impermissibly coerced states and exceeded congressional authority under the Spending Clause, but left in place the remainder of the Affordable Care Act ("ACA" or "Act"). Chief Justice John Roberts wrote that striking down what he deemed to be the coercive parts of the Act's Medicaid expansion while saving the rest of the Act "fully remedies the constitutional violation" and accords with the congressional objective of ensuring access to quality, affordable health insurance for all Americans.[3] "We are confident," he continued, "that Congress would have wanted to preserve the rest of the Act."[4]

Now, Texas and other states opposed to the Act want another bite at the apple. In *Texas v. United States*, now pending before the United States Court of Appeals for the Fifth Circuit, one of the most conservative federal appeals courts in the nation, these states are seeking to weaponize the doctrine of severability to strike down the entire ACA.[5] *Texas v. United States* arises out of changes Congress made to the Act after *NFIB*, in which the Supreme Court upheld

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[1] *See, e.g.*, Alaska Airlines, Inc., v. Brock, 480 U.S. 678, 684 (1987); *see* David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 645–52 (2008).

[2] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2010).

[3] *Id.* at 586.

[4] *Id.* at 587.

[5] Texas v. United States, No. 19–10011 (5th Cir. argued July 9, 2019).

the ACA's so-called individual mandate as a permissible exercise of Congress's taxing power. In 2017, Congress enacted the Tax Cuts and Jobs Act of 2017, which amended the ACA by reducing the tax payment for failing to maintain health insurance to zero.[6] Despite eliminating any means of enforcing compliance with the ACA's individual mandate, Congress left the rest of the Act in place. Nonetheless, the plaintiffs in *Texas*, joined by the Trump administration, urge that, as amended, the ACA's now zeroed-out individual mandate exceeds the powers of Congress because it can no longer be justified as a tax. More shockingly, they argue that the courts should invalidate the Act in its entirety; that is, that the courts should destroy, not save, the ACA, striking down every single one of its 974 pages because of one supposedly unconstitutional provision.

These arguments rest on a perversion of severability doctrine. Severability doctrine reflects the familiar idea that the judicial remedy should match the constitutional violation, so that perfectly valid legislative enactments are not struck down. This understanding of severability also reflects basic separation of powers principles that demand that courts respect the legislature's handiwork. Thus, the doctrine says that a court's duty is to save the valid parts of a statute except in the unusual case where the statute has been so compromised that the legislature would have preferred no statute at all to the parts that are left.

Modern severability doctrine's contours have been powerfully shaped by a history of doctrinal abuse. During the Supreme Court's Lochner era in the early twentieth century,[7] a narrow majority of the Court combined severability doctrine with a cramped understanding of the power of government to regulate the economy to strike down numerous state and congressional regulatory efforts in their entirety.[8] Conservative justices of the Lochner era argued that the comprehensive regulatory statutes pushed by President Franklin Delano Roosevelt and enacted by the New Deal Congress had to fall as a whole; the parts were designed to work together and hence, they argued, the unconstitutional provisions were too interconnected with the

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[6] Pub. L. No. 115–97, § 11081, 131 Stat. 2054, 2092.

[7] During the Lochner era, which began in the final years of the nineteenth century and lasted until 1937, the Supreme Court perverted fundamental constitutional principles to strike down hundreds of federal and state economic regulations. It is one of the "great anti-precedents of the twentieth century" because the Court made freedom of contract "a preeminent constitutional value that repeatedly prevail[ed] over legislation that, in the eyes of elected representatives, serves important social purposes." David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003).

[8] *See, e.g.*, Michael D. Shumsky, *Severability, Inseverability and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 240 (2004) (discussing the Lochner era Court's severability jurisprudence that made it possible for a "politically conservative Court to strike down in its entirety state and federal regulatory legislation only partially unconstitutional in substance"); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 786 (2010) (noting that "preference-driven manipulation of severability doctrine by the judiciary is an acknowledged problem").

constitutional ones to be severed. Since then, the Court has repudiated this approach time and again, emphasizing that the guiding principle of severability doctrine is to save and not to destroy. The Court has insisted: "[W]henever 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."[9]

The severability question in *Texas v. United States* should therefore be easy. Congress's decision to leave the rest of the Act in place when it zeroed out the penalty for not complying with the individual mandate should answer the severability question. Specifically, Congress intended the ACA to remain in effect even without an enforceable individual mandate. This case is easier than most, because severability doctrine often requires courts to engage in counterfactual inquiries about what Congress would have done. Not so here. *Texas* is the rare case where Congress explicitly addressed the question and made its intent plain. Congress zeroed out the mandate and left the Act in place, disappointing members of Congress who had pushed for a repeal of the entire law. The court's obligation is clear: to respect the congressional choice and save the ACA, not destroy it.

Notably, *Texas v. United States* is just one of a host of important cases where severability will play an important role in the near future. In other cases as well, conservative legal activists are making far-reaching severability arguments in an attempt to strike down as a whole critically important federal laws. As just one example, the Supreme Court has added a severability question to this Term's docket questioning the constitutionality of the structure of the Consumer Finance Protection Bureau, asking whether—even if it holds that the leadership structure of the Bureau is unconstitutional—the rest of the Consumer Financial Protection Act should remain in place.[10] The company challenging the CFPB insists the Court should strike down the law in its entirety. As the efforts to strike down the ACA and CFPA illustrate, severability is too important to be ignored.

This Issue Brief unfolds as follows: Part I examines the basics of severability doctrine, examining its purpose, function, and the fundamental principles that underlie the doctrine. As this part shows, the modern doctrine establishes a strong presumption in favor of severability, reflecting the idea that, normally, the judicial remedy should be tailored to match the constitutional violation. By saving, not destroying, a law, courts can exercise judicial modesty and avoid gratuitously striking down the valid parts of a law. Part II discusses how the past has shaped modern severability doctrine; specifically, how severability doctrine can be abused for ideological ends. As Part II shows, this is precisely what happened during the Lochner era. This history of abuse helps account for the current doctrine's strong presumption in favor of saving

[9] Alaska Airlines, Inc., v. Brock, 480 U.S. 678, 684 (1987) (citations omitted).
[10] Seila Law LLC v. Consumer Prot. Bureau, No. 19–7, 2019 WL 5281290, at *1 (Oct. 18, 2019) (ordering parties to brief severability question).

statutes and severing unconstitutional provisions and applications. Part III then turns specifically to *Texas v. United States*, and argues that Congress answered the severability question when, in 2017, it zeroed out the penalty tied to the individual mandate, while expressly leaving in place the rest of the Act. In these circumstances, striking down the entire ACA goes against every principle of severability doctrine. A court's obligation is to save the Act, not destroy it.

I. Severability Basics

Severability has been with us since the beginnings of judicial review. Application of the doctrine is implicit in *Marbury v. Madison*, which held unconstitutional one particular section of the Judiciary Act of 1789 while leaving the remainder of the law in place.[11] The Court soon made the doctrine explicit. In 1829, in *Bank of Hamilton v. Dudley' s Lessee*, Chief Justice John Marshall wrote that "[i]f 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."[12] In the early republic, courts struck down statutes to the extent they violated the Constitution, but they went no further than that.[13]

Severability doctrine serves important purposes. Primarily, it permits the courts to save as much of the legislature's handiwork as possible and thereby protects the legislature's ability to innovate. That is because it says that courts do not have to strike down a complex, comprehensive piece of legislation simply because one provision is unconstitutional.[14] To be sure, severing a part of the statute changes the statutory scheme in some manner. But rather than throwing out the entire statute, severability doctrine insists that courts stay their hand and invalidate as little as possible.

Severability is often discussed together with the doctrine of constitutional avoidance, which asks courts to—as the name suggests—avoid answering constitutional questions if they can.[15] But the two doctrines play fundamentally different roles in constitutional adjudication. Constitutional avoidance is a form of statutory construction, albeit shaped by constitutional concerns, and precedes the court's adjudication of the constitutional claims on the merits. The court probes the text to determine if it can reasonably interpret the statute in a manner that

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[11] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–80 (1803).
[12] Bank of Hamilton v. Dudley' s Lessee, 27 U.S. (2 Pet.) 492, 526 (1829).
[13] S*ee* Walsh, *supra* note 8, at 758 (discussing early cases in which "invalidity did not extend beyond unconstitutionality, and unconstitutionality was confined to a specific application or set of applications").
[14] Gans, *supra* note 1, at 653. Michael Dorf has taken the point even further, suggesting that, without severability, a court might be forced to declare the entire U.S. Code unconstitutional because it contained a single invalid provision. *See* Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 370 (2007).
[15] For discussion and critique of this joint treatment, see Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1955–63 (1997).

avoids having to answer a constitutional question posed in a case.[16] Severability, by contrast, is a remedial doctrine. It is usually considered at the last step of a court's analysis, after the court has construed the statute, found no way to avoid the constitutional question, and found a provision or application of the statute unconstitutional. Severability, unlike avoidance, is not about interpreting a statutory provision, but how to remedy a law's constitutional defect.

For a long time now, the Supreme Court has decided severability using a legislative intent test.[17] Under this test, once a court has concluded that a statute contains unconstitutional provisions or applications, the court should sever the unconstitutional parts from the rest of the statute unless the legislature would not have intended the valid portions to stand alone. The blackletter test asks whether "the legislature [would] have preferred what is left of its statute to no statute at all?"[18] In other words, the "relevant question . . . is not whether the legislature would prefer (A+B) to B" but "whether the legislature would prefer not to have B if it could not have A as well."[19] This rule puts the thumb on the scale in favor of severance. The Court has formulated this idea in a number of different ways. It has said that the "normal rule" is that "partial, rather than facial, invalidation is the required course."[20] Hence, courts must "retain those portions" of a law "that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute."[21]

Four big ideas run through the Court's severability precedents. First, a plaintiff is normally entitled to only the narrowest available remedy—one that cures the constitutional violation without striking down other parts of the law. As the Court has said: "when confronting a

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[16] *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2332–33 (2019); *id.* at 2349–50 (Kavanaugh, J., dissenting); Nielsen v. Preap, 139 S. Ct. 954, 971–72 (2019); Clark v. Martinez, 543 U.S. 371, 381–82 (2005).

[17] The black letter law of severability does not apply across-the-board. In some contexts, the Supreme Court dispenses with severability doctrine and makes it easier for plaintiffs to invalidate statutes as a whole to better enforce constitutional rights. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2319 (2016) (refusing to apply severability principles "to pave the way for legislatures to immunize their statutes from facial review"). In many different areas of constitutional law—ranging from the First Amendment's guarantee of freedom of speech to the right to choose abortion and 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. These cases are motivated by a concern that leaving in place a law that burdens constitutional rights in a substantial number of cases will chill the exercise of constitutional rights or permit difficult to detect discrimination to fester. Rather than sever unconstitutional applications of a law, the Court will strike down the law on its face upon a showing of substantial overbreadth or that the statute violates constitutional rights in a large fraction of relevant cases. For a discussion of these doctrines, see David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1337–38 (2005).

[18] Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (2006).

[19] Leavitt v. Jane L., 518 U.S. 137, 143 (1996).

[20] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985).

[21] United States v. Booker, 543 U.S. 220, 258–59 (2005) (internal citations and quotation marks omitted).

constitutional flaw in a statute, we try to limit the solution to the problem" by severing any "problematic portions while leaving the remainder intact."[22] In other words, the court has a duty to save, not destroy, a partially valid law. Second, in devising a remedy, a court must strive to respect the legislature's handiwork. This is the core of the inquiry into legislative intent. The legislative intent test posits that "a court cannot use its remedial powers to circumvent the intent of the legislature."[23] Third, and related, the court should be mindful of the separation of powers and the judicial role. As the Court has said, "editorial freedom . . . belongs to the Legislature, not the Judiciary."[24] Courts can hold provisions to be unconstitutional, but they should not edit the law or add new terms.[25] Fourth, and finally, the presumption in favor of severability is even stronger when the statute contains a severability clause.[26] Although such a clause has not been accorded dispositive weight, courts pay respect to a legislature's "explicit textual instruction" to save a law's valid parts or applications.[27]

Modern severability law begins with the Court's 1987 ruling in *Alaska Airlines v. Brock*, in which the airline industry urged the Supreme Court to strike down federal protections for employees contained in the Airline Deregulation Act of 1978 because the Act contained an unconstitutional congressional veto over implementing regulations. The Court unanimously refused. Stressing a court's duty to avoid invalidating more of a statute than necessary, the Court agreed that the legislative veto could be severed, leaving the remainder of the Act in place. It did not matter to the Court that the removal of the veto would "necessarily alter[] the balance of powers between the Legislative and Executive Branches . . . ."[28] Because the Act created legal duties that did not depend on regulations Congress might have vetoed, the Court found that the statute would continue to "function in a *manner* consistent with the intent of Congress" without the unconstitutional veto provision.[29]

More recent cases similarly stress severability as a basic rule of judicial restraint. In 2006, in *Ayotte v. Planned Parenthood of Northern New England*, the Court unanimously held that where a

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[22] *Ayotte*, 546 U.S. at 328–29; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508 (2010); *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2148 (2016) (arguing that courts should "sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute") (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[23] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 586 (2010) (internal citation and quotation marks omitted).

[24] *Free Enter. Fund*, 561 U.S. at 510.

[25] *See id*; Randall v. Sorrell, 548 U.S. 230, 262 (2006) (refusing to sever where doing so would require us "to write words into the statute").

[26] Alaska Airlines, Inc., v. Brock, 480 U.S. 678, 686 (1987).

[27] *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 586.

[28] *Alaska Airlines*, 480 U.S. at 685.

[29] *Id.*

statute regulating abortion contained an unconstitutionally narrow medical emergency exception, the rest of the statute could stand absent the unconstitutional provision. As the Court reasoned, "invalidating the statute entirely is not always necessary or justified" because courts may employ severability doctrine "to render narrower declaratory and injunctive relief."[30] Under black letter severability law, the Court explained, courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force" or "sever its problematic portions while leaving the remainder intact."[31] Reversing a lower-court ruling invalidating the law in its entirety—what the Court called "the most blunt remedy"—the Justices instead remanded for a proper severability analysis.[32] Since "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem," a narrow remedy, if "faithful to legislative intent," was appropriate.[33]

In some situations, severability doctrine even gives courts a wide-ranging power to refashion partially invalid laws in order to save them. For instance, in *United States v. Booker*, after holding that the U.S. Sentencing Guidelines violated the Sixth Amendment, the Court employed severability doctrine to convert the mandatory scheme Congress enacted into a discretionary one. The majority approved of "severance and excision" despite, by its own admission, "significantly alter[ing] the system that Congress designed."[34] In dissent, Justice John Paul Stevens argued the government could easily apply the Act in a manner consistent with the Sixth Amendment, sparing the Court from engaging in any rewriting at all.[35] But the majority insisted that Congress would have preferred a discretionary system to a mandatory one in which judges sentence defendants based on a jury's factual findings. Altering the statute to a discretionary system, the majority insisted, "continue[d] to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."[36] That was enough, for the Court, to justify making the Guidelines discretionary.[37]

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[30] Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 323 (2006).
[31] *Id.* at 329.
[32] *Id.* at 330.
[33] *Id.* at 331.
[34] United States v. Booker, 543 U.S. 220, 246 (2005).
[35] *Id.* at 280 (Stevens, J., dissenting in part) (arguing that because the Government "can apply the Guidelines constitutionally even as written," there is "no justification for the extreme judicial remedy of total invalidation"); *id.* at 284 (rejecting majority's "wholesale rewriting of the SRA"); *id.* at 310 (Scalia, J., dissenting in part) (arguing that the creation of a new standard of appellate review "amounts to a confession that [the Court] has exceeded its powers"); *id.* at 325 (Thomas, J., dissenting in part) (arguing that applying Guidelines consistent with Sixth Amendment "does the least violence to the statutory and regulatory scheme").
[36] *Id.* at 264–65 (majority opinion).
[37] For criticism of *Booker*, see Gans, *supra* note 1, at 664–67.

The Roberts Court has continued the trend of employing severability doctrine to save partially invalid statutes, repeatedly rejecting broad holdings that would gratuitously invalidate federal laws enacted by Congress. In 2010, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court held that dual for-cause limitations on the removal of members of the Public Company Accounting Oversight Board violated separation of powers principles and severed the unconstitutional provision from the Sarbanes-Oxley Act which had created the Board. The plaintiffs had urged a sweeping holding that the Board was unconstitutional root and branch, making all power exercised by it unconstitutional. In an opinion by Chief Justice Roberts, the Court rejected such a "broad holding," insisting that it could remedy the constitutional violation and preserve the Sarbanes-Oxley Act by severing the unconstitutional tenure provision.[38] As Roberts insisted, severance was the normal rule: "'when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'"[39] Rejecting the notion that Congress would have "preferred no Board at all to a Board whose members are removable at will," the Court preserved the Board by making its members removable at will by the Securities and Exchange Commission.[40]

Similarly, in 2012, in *NFIB*, the Court, again in an opinion by Chief Justice Roberts, employed severability doctrine to save the ACA from invalidation. The entire Act did not have to fall simply because Congress had subjected states that chose not to participate in the Medicaid expansion to what the Court's majority concluded was an unconstitutionally coercive penalty. By giving the states the choice to participate or not, the Court both "fully remedie[d] the constitutional violation" and preserved the statute going forward.[41] Chief Justice Roberts thought it obvious that "Congress would have wanted to preserve the rest of the Act."[42] The Act "will remain 'fully operative as a law,'" and "will still function in a way 'consistent with Congress' basic objectives in enacting the statute.'"[43]

In a stunning joint dissent that would have revolutionized severability law, four Justices would have invalidated every last provision of the Act.[44] In the dissenters' warped view, it was more in keeping with judicial restraint to strike down hundreds of provisions of law that Congress

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[38] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508 (2010).
[39] *Id.* (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–29 (2006)).
[40] *Id.* at 509.
[41] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 586 (2010).
[42] *Id.* at 587.
[43] *Id.* at 587–88 (citations omitted); *id*. at 646 (Ginsburg, J., concurring in part and dissenting in part) (agreeing that severance was proper because "when a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislature's dominant objective").
[44] *Id.* at 707 (Scalia, Kennedy, Thomas and Alito, JJ., dissenting).

validly enacted than to sever the unconstitutional provision.[45] These arguments did not succeed, but they have inspired conservative lawyers to make far-reaching severability arguments to strike down laws they dislike.

As the Court's cases reflect, the law's presumption in favor of severability is incredibly strong, but that does not mean severability is always appropriate. Consider the 2018 ruling in *Murphy v. National Collegiate Athletic Association*.[46] *Murphy* invalidated provisions of the Professional and Amateur Sports Protection Act ("PASPA"), holding that the Act's ban on state authorization of sports gambling violated the anti-commandeering doctrine. The severability question concerned whether to sever the Act's provisions forbidding states from operating sports gambling schemes. The Court declined to leave in place PASPA's provisions forbidding states from operating, sponsoring, or promoting sports gambling, insisting that "the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted."[47] In the majority's view, state run operations "were thought more benign than other forms of gambling," making it unlikely that Congress would have singled them out for regulation and not other types of sports gambling.[48] "To the Congress that adopted PASPA, legalizing sports gambling in privately owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards."[49] In the majority's telling, then, *Murphy* was the rare case where Congress would have preferred no law at all to a law without the invalid provisions.

In sum, the Court's cases send a clear message: courts have an unflagging duty to save and not destroy partially invalid statutes. Importantly, severability is not a liberal or conservative principle. It is a principle of judicial restraint, reflecting that, in the normal case, courts should order relief that fully remedies the constitutional violation and goes no further. And courts should go further only when, as in *Murphy*, the Court concludes that Congress would have preferred no law at all to one without the invalid provisions. Legislative intent is the touchstone, and courts should not be in the business of disrupting Congress's plan by gratuitously invalidating partially constitutional statutes.

It was not always so. As the next Section discusses, the contours of severability doctrine have been shaped by the abuses of the Lochner era, when the Supreme Court, all too often, wielded the remedy of total invalidation to strike down economic and social regulation it disliked.

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[45] *Id.* at 692 (arguing that severance "can be a more extreme exercise of the judicial power than striking the whole statute").
[46] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
[47] *Id.* at 1482.
[48] *Id.*
[49] *Id.* at 1483.

II. Severability Doctrine's Cautionary Tale: The Lochner Era

In the Lochner era, the Court routinely turned severability doctrine upside down, wielding it to strike down economic and social legislation that conflicted with the Court's laissez-faire constitutional philosophy. In case after case, the Court struck down legislation, insisting that valid parts of the law were too closely related to unconstitutional provisions to stand on their own. The philosophy expressed in many of the cases, as Justice Benjamin Cardozo critically observed, was that "if the least provision of the statute . . . is to be set aside as void, the whole statute must go down . . . ."[50]

For example, in 1922, in *Lemke v. Farmers' Grain Co.*,[51] the Court, by a 6-3 vote, invalidated a North Dakota law that regulated the buying of grain. The statute required grain purchasers to hold a state license, imposed a system of grading, inspecting, and weighing grain, and regulated the price. The majority invalidated the entire statute upon finding that the price regulations violated the Dormant Commerce Clause. The other features, the majority said, "are essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold."[52] The entire statute had to fall because "[w]ithout their enforcement the plan and scope of the act fails of accomplishing its manifest purpose."[53] In dissent, Justice William Brandeis argued that striking the entire law "instead of limiting the sphere of its operation . . . leaves the farmers of North Dakota defenseless against what are asserted to be persistent, palpable frauds."[54]

In 1929, in *Williams v. Standard Oil Co. of Louisiana*,[55] the Court struck down a Tennessee statute regulating the sale of gasoline. The Court concluded that the state's effort to fix gasoline prices violated the Due Process Clause. Justice George Sutherland's majority opinion flipped the doctrinal presumption in favor of severability to a presumption in favor of *in*severability. In the absence of a severability clause, he wrote, "the presumption is that the Legislature intends an act to be effective as an entirety."[56] Strangely, the Tennessee legislature *had* inserted a severability clause in the law at issue, but that did not make a difference to the Court. The rest of the statute's provisions, the majority reasoned, were "mere adjuncts of the price-fixing provisions of the law or mere aids to their effective execution."[57] The entire statute had to be struck down.

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[50] Carter v. Carter Coal Co., 298 U.S. 238, 337 (1936) (Cardozo, J., dissenting).
[51] Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922).
[52] *Id.* at 60.
[53] *Id.*
[54] *Id.* at 65 (Brandeis, J., dissenting).
[55] Williams v. Standard Oil Co. of La., 278 U.S. 235 (1929).
[56] *Id.* at 241.
[57] *Id.* at 243.

Severability proved to be a crucial weapon in the assault on President Roosevelt's New Deal as well. In 1935, in *Railroad Retirement Board v. Alton Railroad Co.*,[58] the Court, by a 5-4 vote, struck down the Railroad Retirement Act, a New Deal measure that established a retirement and pension system for railroad workers. The majority held that a number of the Act's provisions violated the due process rights of the railroad companies, including requiring coverage of former employees, and treating all railroad owners as a single employer and pooling their assets. As a consequence, the majority held, the Act had to fall in its entirety. Although the Act contained a severability clause, the Court refused to save any part of the law. The invalid portions, the majority said, "so affect the dominant aim of the whole statute as to carry it down with them."[59] The four dissenters argued that the rest of the law should have been saved, which could have been accomplished "without destroying the measure as a whole."[60]

Likewise, in 1936, in *Carter v. Carter Coal Co.*,[61] the Court invalidated the Bituminous Coal Conservation Act of 1935, once again refusing to sever its constitutionally valid provisions. The Act sought both to regulate labor conditions and fix prices. The Court held that the Act's labor provisions exceeded Congress's power under the Commerce Clause and that the pricing regulations were not severable despite the presence of a severability clause. The labor and price-fixing regulations, the majority held, were "plainly meant to operate together and not separately . . . ."[62] They were "interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole."[63] The dissenters took the majority to task for ignoring the Act's severability clause. "The fact that the various requirements furnish to each other mutual aid and support," Chief Justice Hughes argued, "does not establish indivisibility. The purpose of Congress, plainly expressed, was that if a part of that aid were lost, the whole should not be lost."[64] In a separate dissent, Justice Cardozo stressed that Congress "announced with all the directness possible for words that they would keep what they could have if they could not have the whole. Stabilizing prices would go a long way toward stabilizing labor relations by giving the producers capacity to pay a living wage."[65]

Severability has come a long way from the dark days of the Lochner era, in which the Supreme Court repeatedly employed severability doctrine to destroy, not save, partially valid statutes. Today, severability doctrine says that courts should fully remedy the constitutional violation but should not gratuitously invalidate constitutionally valid statutory provisions. "[W]henever

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[58] R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935).
[59] *Id.* at 362.
[60] *Id.* at 389 (Hughes, C.J., dissenting).
[61] Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[62] *Id.* at 314 (majority opinion).
[63] *Id.* at 315–16.
[64] *Id.* at 322 (Hughes, C.J., dissenting in part).
[65] *Id.* at 336 (Cardozo, J., concurring in part and dissenting in part).

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."[66] And the Court has firmly discredited the idea that an entire statute must fall simply when one part is unconstitutional. This is reflected, perhaps more than any other recent case, in *NFIB*, in which the Court applied modern severability doctrine to save the ACA, rejecting the dissent's attempt to reinvigorate Lochner-style severability doctrine. As the Court in *NFIB* underscored, legal reforms that "remain 'fully operative as a law,' and will still function in a way 'consistent with Congress' basic objectives in enacting the statute,'" must be preserved, even if others are invalidated.[67] As the next Section describes, however, despite this clear modern precedent favoring severability, conservatives are still trying to get courts to strike down the entire ACA based on a single supposedly unconstitutional provision.

III. Abusing Severability: The Conservative Attack on the ACA

Sometimes severability analysis presents difficult issues because it requires courts to ask counter-factual questions about legislative intent.[68] Quite often, the legislature is entirely silent on the severability question. Legislatures usually do not think their handiwork is unconstitutional, so, quite often, there is no concrete evidence about whether the legislature would have preferred the valid parts of a statute standing alone or nothing at all.

Texas v. United States, however, presents none of these difficulties. That case presents the question of whether a zeroed-out individual mandate is unconstitutional, and if so, whether that provision is severable from the rest of the ACA. The answer to the severability question is easy because, in 2017, Congress amended the statute to reduce the "shared responsibility" payment for failing to obtain health insurance to zero.[69] At the same time, however, Congress made the judgment that the rest of the ACA should remain even without an enforceable individual mandate. Said another way, Congress eliminated the only means of enforcing the individual mandate but left the rest of the ACA intact and fully operative. Congress's decision, embodied in the 2017 amendment, answers the severability question. *Texas v. United States* is the rare case where Congress has clearly and explicitly spoken to the precise severability question presented by the plaintiffs.

The history of the 2017 amendment confirms what the text says: that Congress intended for the individual mandate to be unenforceable and for the rest of the law to remain fully operative and

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[66] Alaska Airlines, Inc., v. Brock, 480 U.S. 678, 684 (1987) (citations and internal quotation marks omitted).
[67] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 587–88 (2010) (citations omitted).
[68] *See* Kavanaugh, *supra* note 22, at 2148 (urging a default rule that courts should "sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute" because it "has the benefit of stopping judges from trying to guess what Congress would have wanted, an inherently suspect exercise").
[69] § 11081, 131 Stat. at 2092.

in place. During the Senate Finance Committee's consideration of the amendment, Chairman Orrin Hatch insisted that "[t]he bill does nothing to alter Title I of Obamacare, which includes all of the insurance mandates and requirements related to preexisting conditions and essential health benefits."[70] Senator Patrick Toomey similarly insisted that there would be "no cuts to Medicaid," "no cuts to Medicare," and that "[n]obody is disqualified from insurance."[71] And Senator Tim Scott insisted that reducing the tax to zero "take[s] nothing at all away from anyone who needs a subsidy, anyone who wants to continue their coverage," and that the bill "does not have a single letter in there about preexisting conditions or any actual health feature."[72] All the amendment would do, members of Congress who voted for the legislation stressed, was allow individuals to "cho[o]se not to enroll in health coverage once the penalty for doing so is no longer in effect."[73] Speaker after speaker insisted that the amendment would "restor[e] the freedom to make our own healthcare choices"[74] and ensure that people are "not forced" to purchase insurance.[75] Several senators explicitly argued that reducing the payment to zero effectively made the mandate a dead letter— "zero[ing] out the penalty" is "equivalent to repeal[ing]" the mandate.[76]

Moreover, Congress made this specific change to the ACA after being informed by the Congressional Budget Office (CBO) that repealing the individual mandate or reducing the tax payment to zero would not affect the viability of other reforms contained in the Act. The CBO concluded that "[n]ongroup insurance markets would continue to be stable in almost all areas of the country throughout the coming decade."[77] The CBO also found that zeroing out the tax would be "very similar" to repealing the mandate, since "only a small number of people" purchase health insurance "solely because of a willingness to comply with the law."[78] In short, Congress knew that the individual mandate would be unenforceable, but the rest of the law would remain fully operative.

For all those reasons, the severability question in *Texas v. United States* should be a no-brainer. After all, severability doctrine insists that courts save partially valid laws, rather than destroy

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[70] *Continuation of the Open Executive Session to Consider an Original Bill Entitled the Tax Cuts and Jobs Act Before the Senate Comm. on Fin.*, 115th Cong. 286 (Nov. 15, 2017).
[71] *Id.* at 71.
[72] 163 CONG. REC. S7666 (daily ed. Dec. 1, 2017) (Sen. Scott).
[73] *Continuation of the Open Executive Session*, *supra* note 70, at 106.
[74] 163 CONG. REC. H10212 (daily ed. Dec. 19, 2017) (House Speaker Ryan).
[75] *Id.* at S8153 (daily ed. Dec. 20, 2017) (Senate Majority Leader McConnell).
[76] *Id.* at S8115 (daily ed. Dec. 19, 2017) (Sen. Toomey); *see also id.* at S8078 (daily ed. Dec. 19, 2017) (Sen. Barrasso); *id.* at S8153 (daily ed. Dec. 20, 2017) (Senate Majority Leader McConnell); *id.* at S8168 (daily ed. Dec. 20, 2017) (Sen. Gardner).
[77] CONG. BUDGET OFFICE, REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE 1 (Nov. 2017).
[78] *Id.*

them. As the Supreme Court has said over and over again, the law creates a strong presumption that courts should sever unconstitutional parts of a law, limiting the solution to the problem. This allows the government to continue enforcing the valid parts of the law. In this case, there is no question that Congress would have wanted to preserve the rest of the Act—because that is exactly what it did. As the 2017 amendment demonstrates, Congress sought to preserve the ACA's critical reforms and benefits that help ensure access to quality, affordable health care for millions of Americans, even as it zeroed out the tax for failing to obtain health insurance coverage. Congress clearly expressed its intent that the ACA's many reforms would be fully operative even without an enforceable mandate. To be sure, the court in *Texas v. United States* may not reach the severability question—it could conclude that the plaintiffs lack standing to bring their challenge, or that the individual mandate remains constitutional—but if it does, saving the Act by severing an unconstitutional provision would be a textbook example of what courts applying modern severability doctrine are supposed to do.

IV. Conclusion

When a court holds a part of a statute unconstitutional, it strives to preserve, not destroy, what is left. That basic idea—as old as judicial review itself—is under attack. Conservatives are perverting basic principles of severability in urging courts to strike down statutes they dislike, even when, as in the case of the ACA, they contain hundreds of constitutionally valid provisions. These arguments make hash of an essential principle of judicial restraint. A court, of course, should fully remedy any constitutional violation it finds, but it should not gratuitously strike down laws simply because of a single unconstitutional sentence or provision. Courts have an obligation to save, not destroy, partially valid laws. The conservative attack on the ACA in *Texas v. United States* is based on wrecking this venerable principle.

About the Author

David H. Gans is the Director of the Human Rights, Civil Rights, and Citizenship Program at the Constitutional Accountability Center (CAC). An experienced constitutional litigator and scholar, Gans joined CAC after serving as Program Director of Cardozo Law School's Floersheimer Center for Constitutional Democracy and as an attorney with the Brennan Center for Justice at NYU School of Law. Previously, Gans was an Acting Assistant Professor at NYU School of Law and practiced law at Emery Cuti Brinckerhoff & Abady PC, where he litigated a wide range of constitutional and civil rights cases. Gans also served as a law clerk for the Hon. Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit. Co-author of *Religious Liberties for Corporations? Hobby Lobby, the Affordable Care Act, and the Constitution*, Gans's academic writings have appeared in the *Yale Law Journal,* the *Boston University Law Review*, the *Emory Law Journal*, the *George Washington Law Review*, and the *John Marshall Law Review*. His written commentary has also appeared in the *Washington* Post, LA *Times, USA Today,* the *New Republic*, and *Slate*. Gans received his B.A. from Columbia University and his J.D. from Yale Law School, where he served as an editor on the *Yale Law Review*.

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