Judicial Amendment of Statutes

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Abstract

When courts engage in judicial review they do not merely invalidate or "strike down" unconstitutional statutes. Instead, they rewrite such statutes in order to make them constitutionally valid. They can do this in a variety of ways—by deleting words from a statute, adding words to a statute, or declaring that a statute will be read contrary to its apparent meaning. Such judicial amendments do not change the actual words that appear in the legislative code—only a legislature can do that. Rather, they create a situation where the full "text" of a statute includes both the provisions the legislature enacted and the judicial opinions changing those provisions' meaning on constitutional grounds. For example, if a statute provides that "marriage shall be between one man and one woman," and a court orders that this statute must be expanded to include same-sex marriage, then that order effectively rewrites the statute just as a legislative amendment would. Thus, the Supreme Court in Obergefell v. Hodges *did not "strike down" state marriage statutes that excluded same-sex marriages—doing so would have abolished marriage for everyone. Rather, it effectively inserted text into those statutes by declaring that they must include same-sex marriages.*

Rejecting the invalidation assumption and embracing this judicial amendment model has profound consequences for the practice of judicial review. It means that judges are not restricted to invalidating existing statutory text, but can effectively rewrite an unconstitutional statute in any way that will render it constitutionally valid. The judicial amendment model also forces us to fundamentally rethink severability doctrine, as well as the use of facial challenges and the constitutional avoidance canon. And it strengthens the case for judicial federalism: if judicial review is a lawmaking act—rewriting a statute in light of a constitutional holding—then state courts should be the ones that decide how to fix unconstitutional state statutes.

Table of Contents

Introduction 564
I. Beyond Invalidation 568
A. *The "Invalidation" Model and Current Doctrine* 568
B. *The "Judicial Amendment" Model* 573
C. *Judicial Amendment Applied to Real Cases* 576
II. Strategies for Maintaining Judicial Legitimacy 581
A. *Interbranch Dialogue* 582
B. *Constraint Through Doctrine* 585

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May 2016 Vol. 84 No. 3

C. *The Noble Lie Strategy* 589
III. THE PRACTICAL IMPLICATIONS OF JUDICIAL AMENDMENT 591
A. *Revising a Judicial Amendment* 591
B. *Severability* 593
C. *Facial Challenges* 598
IV. REWRITING STATUTES AND JUDICIAL FEDERALISM 600
CONCLUSION 604

INTRODUCTION

Last term, in *Obergefell v. Hodges*,[1] the Supreme Court declared it unconstitutional for states to grant marriage rights to heterosexual couples without also granting them to homosexual couples.[2] Justice Anthony Kennedy's majority opinion stated that the challenged state laws were "now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[3] The Court thus struck down the marriage laws of all of the states that did not allow gay marriages. Or . . . did it? "Striking down" a law means invalidating that law. Declaring that it will have no effect. But the Supreme Court did not abolish the legal institution of marriage in any state. It actually *expanded* statutory marriage rights—in states where gay couples could not be married before the Court decided *Obergefell*, they now can be. So then what, exactly, did the Supreme Court do to those states' marriage statutes?

Consider Kentucky, one of the state defendants in *Obergefell*. Kentucky's marriage statute reads as follows: "As used and recognized in the law of the Commonwealth, 'marriage' refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life . . . ."[4] In deciding that Kentucky must permit gay marriage, the Supreme Court effectively expanded this statute by adding the words "or one (1) man and one (1) man, or one (1) woman and one (1) woman." Of course, the Court did not literally rewrite the Kentucky legislative code—only the Kentucky legislature has the power to do that.[5] But the Court did require that the Kentucky mar-

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1 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2 *Id.* at 2607–08.

3 *Id.* at 2605.

4 KY. REV. STAT. ANN. § 402.005 (West 2015).

5 Indeed, there are many examples of statutes that remain textually unchanged despite being held unconstitutional by courts. *See, e.g.*, 18 U.S.C. § 700 (2012) (establishing criminal penalties for defacing the American flag), *invalidated by* United States v. Eichman, 496 U.S. 310, 312, 319 (1990); KY. REV. STAT. ANN. § 510.100 (West 1990) ("A person is guilty of sodomy in

riage statute be enforced as though it contained those additional words. The Court thus added an atextual amendment to the Kentucky marriage statute. The statute's text continues to permit only heterosexual marriage,[6] but the Supreme Court has mandated that it be read contrary to its actual words.

The conventional understanding of judicial review in the United States is that a court does not "amend" unconstitutional statutes—it only strikes them down. For example the Supreme Court has stated that "we will not rewrite a state law to conform it to constitutional requirements."[7] And constitutional scholars from Alexander Hamilton to Alexander Bickel have framed judicial review as the "striking down" or "invalidation" of statutes that violate the Constitution.[8] However, this conventional understanding of judicial review does not reflect its actual practice. The Supreme Court does in fact rewrite unconstitutional statutes. In a series of 1970s sex equality cases—*Frontiero v. Richardson*,[9] *Weinberger v. Wiesenfeld*,[10] and *Califano v. Westcott*[11]—the Court effectively added language to several welfare laws so as to equalize the level of benefits received by men and women.[12] For example, in *Weinberger* the Court reviewed a social security law that gave payments to widows with dependent children, but not to widowers.[13] The Court remedied this sex discrimination by writing widower fathers into the statute.[14] Last term's decision in *Obergefell* is only the most recent example of this kind of remedial rewriting. And there is no way to make sense of such cases within the conventional invalidation model.

Indeed, the distinction between judges "invalidating" statutory language and "rewriting" statutes does not withstand critical scrutiny. It turns entirely on arbitrary legislative drafting decisions. Consider

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the fourth degree when he engages in deviate sexual intercourse with another person of the same sex."), *invalidated by* Lawrence v. Texas, 539 U.S. 558, 558, 578–79 (2003) *and* Commonwealth v. Wasson, 842 S.W.2d 487, 491–92 (Ky. 1992).

6 *See* KY. REV. STAT. ANN. § 402.005 (West 2015) (showing that the text is unchanged, but that the law has been held unconstitutional by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

7 Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988).

8 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 29 (2d ed. 1986); THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST NO. 78].

9 Frontiero v. Richardson, 411 U.S. 677 (1973).

10 Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

11 Califano v. Westcott, 443 U.S. 76 (1979).

12 *See id.* at 89–93; *Weinberger*, 420 U.S. at 648–53; *Frontiero*, 411 U.S. at 690–91.

13 *See Weinberger*, 420 U.S. at 637–38.

14 *See id.* at 653.

two possible marriage statutes. Statute One, the "Exclusive Statute," provides: "Marriage is a civil contract between any two people. However, no two people of the same sex can be married." Statute Two, the "Inclusive Statute," provides: "Marriage is a civil contract between one man and one woman." The constitutional holding in *Obergefell v. Hodges* can be implemented by invalidating the second sentence of the Exclusive Statute. But it cannot be implemented by invalidating any text in the Inclusive Statute because no text can be deleted from that statute to create a right to same-sex marriage. To implement *Obergefell* in a state with the Inclusive Statute (e.g., Kentucky), a court would have to add language to the statute (or abolish marriage altogether). Yet there is no substantive difference between these two statutes. Both do exactly the same thing. The Canadian Supreme Court has recognized the absurdity of distinguishing between statutes like these for remedial purposes, noting "[i]t would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy."[15] Yet American doctrine assumes that "invalidation" and "rewriting" are qualitatively different remedies.

This Article proposes a different theoretical model of judicial review that better fits with our actual practice. Judges do not "invalidate" unconstitutional statutes. Rather, judges amend them. That is to say, when a judge finds a statute unconstitutional, the judge then issues a remedial order that changes the statute's meaning so as to make it constitutionally valid. Such orders can add language to a statute, remove language, or instruct that the statute must be read contrary to its textual meaning. Indeed, the entire menu of constitutional remedies—striking down a statute, severing part of a statute, striking down an application, adopting an avoidance interpretation, and adding language to a statute—fits neatly within this model. Judicial amendments do not change the actual words that appear in the legislative code. Instead, they create a situation where the full "text" of a statute can only be found by looking at both the literal statutory text and the judicial opinions changing that text's meaning on constitutional grounds. And, unlike the invalidation model, judicial amendment makes sense of the Supreme Court's remedial decisions in *Obergefell v. Hodges*, the 1970s sex equality cases, and the many other constitutional rulings that add language to statutes. The argument for judicial amendment proceeds in four Parts.

15 Schachter v. Canada, [1992] 2 S.C.R. 679, 698 (Can.).

Part I explores the current conventional wisdom about judicial review—that it involves judges "invalidating" statutes or parts of statutes in order to fix constitutional violations. It looks at how the current doctrine deals with questions of severability, as-applied challenges, and constitutional avoidance interpretations. Part I then proposes "judicial amendment" as an alternative model, and shows how it better fits with the actual practice of judicial review in the United States, as well as how it incorporates the full diversity of constitutional remedies into a single unified account. Part I closes by examining how "judicial amendment" helps us to make sense of four particularly difficult constitutional law cases: *Califano v. Westcott*, *United States v. Booker*,[16] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[17] and *Shelby County v. Holder*.[18]

Part II considers various strategies for mitigating the most serious problem with the judicial amendment model—that it forces courts to make fundamentally legislative decisions. First, judges can engage in interbranch dialogue by sending cases back to Congress (or to an executive branch agency) and requesting (or demanding) that they make the relevant amendment. Second, judges can develop doctrinal principles that will guide their use of discretion to make it seem less like legislating. Third, judges can employ a "noble lie" strategy, pretending that judicial review is merely the invalidation of unconstitutional statutes, and simply not explaining how courts can impose remedies like the one in *Obergefell*. Indeed, this third strategy is the one currently being employed.

Part III shows that the distinction between invalidation and judicial amendment is not merely a semantic one. It does so by considering a number of different practical implications of the judicial amendment model. First, it describes how a judicial amendment can be modified in situations where the constitutional violation has been fixed through subsequent legal changes. For example, if a court finds a statute unconstitutional, and a constitutional amendment is enacted to make the statute constitutionally valid again, the court can simply undo its prior remedial order (meaning that the legislature does not have to reenact the statute). Second, Part III shows that the judicial amendment model forces us to fundamentally rethink severability doctrine. If judges "amend" statutes rather than invalidating them, then the question of whether one part of a statute can be "severed"

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

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

18 Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

from the rest is misframed. The proper question, instead, is whether a court that has made one amendment to a statute (either adding or deleting language) is then forced to make a subsequent amendment (either adding or deleting more language). Third, Part III shows that a statute can be *extended* through either "as-applied" or "facial" challenges, and not just invalidated through them. That is, a court that expands an underinclusive statute can do so by extending it to only certain specific, constitutionally mandated applications, or by extending it to a broad new category of cases, only some of which are constitutionally mandated.

Finally, Part IV looks at the implications of the judicial amendment model for the relationship between state and federal courts in constitutional review cases. If fixing unconstitutional statutes does indeed require exercising legislative power by rewriting them, then state courts should be the ones to fix state statutes. Federal courts should not usurp states' power to rewrite their own laws. This means that federal courts should send constitutional remedy questions to state supreme courts, either through remands or certifications.

I. Beyond Invalidation

A. *The "Invalidation" Model and Current Doctrine*

The standard account of judicial review in the United States goes as follows. The Constitution is the supreme law of the land, and no ordinary statutory law can supersede it. Thus if Congress or any state legislature passes a statute that conflicts with the Constitution, that statute is void because it was beyond the power of the legislature to enact. The role of the courts is to determine whether a particular statute does in fact conflict with the Constitution, and in cases where a conflict is found, to invalidate the offending statute. This version of judicial review has deep roots in our constitutional history. In *Federalist 78*, Alexander Hamilton wrote that "whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."[19] Chief Justice Marshall declared in *Marbury v. Madison*[20] that "a law repugnant to the constitution is void" and "*courts*, as well as other departments, are bound by that instrument."[21] Justice Sutherland described judicial review as "little more than the negative power to disregard an

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19 Federalist No. 78, *supra* note 8, at 468.

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

21 *Id.* at 180.

unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right."[22] Alexander Bickel wrote in *The Least Dangerous Branch* that "[j]udicial review means not only that the Court may strike down a legislative action as unconstitutional but also that it may validate it as within constitutionally granted powers . . . ."[23] And most recently, Justice Stephen Breyer has explained judicial review as the principle that "[t]he Supreme Court can strike down statutes that violate the Constitution as the Court understands it."[24] This framing of judicial review is thoroughly engrained in our legal culture. When judges find a statute unconstitutional, they are suddenly sent on a mission of destruction. They must "invalidate" the statute, "disregard" it, "strike it down," declare it "void." The Constitution is King, and all statutes that offend the King must be removed.[25]

This invalidation model becomes a bit more complicated when we start dealing with statutes that are only partly unconstitutional. For these the model needs a doctrine of severability—a way to explain when courts should strike down only the repugnant sections of a statute, and when they should strike down additional sections as well. The Supreme Court's current approach to this problem is somewhat disjointed.[26] The Court employs a presumption of severability, such that an unconstitutional statutory provision is severable by default.[27] This presumption seems to control the outcome in the great majority of cases, as findings of inseverability are quite rare.[28] However the Court's doctrine also provides that the presumption of severability can

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

23 BICKEL, *supra* note 8, at 29.

24 STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 3 (2010).

25 Some contemporary scholars have also put an interpretive gloss on this invalidation model, arguing that it merely requires courts to resolve interpretive contradictions between a statute and the higher law of the Constitution. Under this understanding of the model judges are not actually making changes to the law; they are merely interpreting all of the existing law—statute plus Constitution—to determine what is preempted and what remains valid. *See, e.g.*, John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 81–89 (2014); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 25–26 (1984); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 740–43, 755–68, 776–94 (2010).

26 For a fuller account of the Supreme Court's current severability doctrine, see Eric S. Fish, *Severability as Conditionality*, 64 EMORY L.J. 1293, 1300–09 (2015).

27 *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–29 (2006); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987); Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (plurality opinion).

28 By my count, since 1940 the Supreme Court has found only one federal statute inseverable, and only six state statutes. *See* Fish, *supra* note 26, at 1303–04, 1304 n.36.

be overcome by looking at the hypothetical intentions of the enacting legislature.[29] So if a legislature passes a law that contains both provision *A* and provision *B*, and a court strikes down provision *A* as unconstitutional, then the validity of provision *B* depends on whether or not the legislature would hypothetically have wanted *B* without *A*. It seems a bit strange to employ a strong presumption of severability, but then allow it to be overcome through such a broad inquiry. But that is the Supreme Court's current doctrine. It should be noted, though, that this is not the only approach to severability that would be consistent with the invalidation model. Scholars have proposed a number of alternative approaches that would give courts greater or less power to declare statutes inseverable.[30]

The invalidation model is also complicated by the possibility of as-applied challenges. These involve a litigant arguing that the relevant statute is unconstitutional, but only as applied to people in the litigant's particular circumstances. For example, in *Federal Election Commission v. Wisconsin Right to Life*,[31] the Supreme Court considered a First Amendment challenge to a prohibition on the use of electioneering advertisements in the months preceding an election.[32] The Court held that the prohibition was unconstitutional, but only as applied to "issue-advocacy advertisements" that do not expressly endorse the election or defeat of any particular candidate.[33] Holdings like this one carve out exceptions that do not appear in the statute's text. If a statute by its own terms applies to "all of the letters of the alphabet," for instance, then an as-applied challenge allows a court to

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29 *See Alaska Airlines*, 480 U.S. at 685.

30 *See generally, e.g.*, Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011) (advocating that statutory provisions never be treated as severable); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (arguing for a default presumption of inseverability); Fish, *supra* note 26 (arguing for a default rule of severability unless a legislature has made one statutory provision conditional on another); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008) (advocating inseverability if severing a provision would substantially change the statute); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995) (arguing for a default presumption of severability); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993) (same); Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227 (2004) (same); Tribe, *supra* note 25 (arguing that every unconstitutional provision should be held severable unless Congress has provided an explicit inseverability clause); Walsh, *supra* note 25 (arguing for a "displacement without inferred fallback" approach); Rachel J. Ezzell, Note, *Statutory Interdependence in Severability Analysis*, 111 MICH. L. REV. 1481 (2013) (proposing a "qualified clear statement rule" for determining when provisions are interdependent).

31 FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

32 *Id.* at 457–58.

33 *Id.*

carve out an atextual exception for vowels. Legal scholars and Supreme Court Justices commonly discuss the choice between facial and as-applied challenges as a type of severability analysis.[34] Just as a court can "sever" a textual section from a statute, it can also "sever" an application. But in fact the Supreme Court's doctrine concerning as-applied challenges differs significantly from its severability doctrine. In *United States v. Salerno*[35] the Court announced a rule strictly preferring as-applied challenges over facial challenges in all but a narrow set of circumstances. To succeed with a facial challenge, a party "must establish that no set of circumstances exists under which the Act would be valid."[36] So if some hypothetical case exists where a statute could be constitutionally applied, then the party challenging the statute can only bring an as-applied challenge. But the Supreme Court does not actually follow this rigid test in practice. As a number of scholars and Supreme Court Justices have pointed out, the Court frequently permits facial challenges in a wide variety of circumstances.[37] And just as with severability, the invalidation model is consistent with a number of different approaches to deciding when to strike down a statutory application versus the entire statute.[38]

Finally, courts also sometimes resolve constitutional challenges by adopting "avoidance interpretations," that is, by creatively interpreting statutes so as to remove constitutional infirmities. For exam-

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34 *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–31 (2006); United States v. Booker, 543 U.S. 220, 320 (2005) (Thomas, J., dissenting in part); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 182 (5th ed. 2003); Dorf, *supra* note 30, at 249–51; Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 886–87 (2005); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 77–79 (1937); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1950 n.26 (1997).

35 United States v. Salerno, 481 U.S. 739 (1987).

36 *Id.* at 745.

37 *See, e.g.*, Shelby Cty. v. Holder, 133 S. Ct. 2612, 2648 (2013) (Ginsburg, J., dissenting); Citizens United v. FEC, 558 U.S. 310, 398–405 (2010) (Stevens, J., concurring in part and dissenting in part); Gonzales v. Carhart, 550 U.S. 124, 187 (2007) (Ginsburg, J., dissenting); City of Chicago v. Morales, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting); Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of certiorari); Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1011–12 (1992) (Scalia, J., dissenting from denial of certiorari); Dorf, *supra* note 30, at 236, 238; Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1322–23 (2000); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 918 (2011) [hereinafter Fallon, *Fact and Fiction*]; Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 439 (1998).

38 *See, e.g.*, Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. Rev. 322, 356 (2016) (describing an approach to as-applied challenges that would focus on legislative intent).

ple, in *National Federation of Independent Business v. Sebelius*[39] the Supreme Court held that the individual mandate, a provision of the Affordable Care Act requiring individuals to purchase health insurance, should be read not as a "command" but rather as a "tax."[40] This is because interpreting the provision as a "command" would render it unconstitutional. Chief Justice Roberts's majority opinion noted that "the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it," and concluded that "it is only because we have a duty to construe a statute to save it, if fairly possible, that [the individual mandate] can be interpreted as a tax."[41] The Court thus read the statute against its "mo[st] natural[ ]" meaning, in order to avoid a constitutional violation.[42] This is a common method of fixing constitutional problems. Judges presume that Congress does not intend to write statutes that conflict with the Constitution, and so they bend their interpretations to avoid this possibility. Indeed, in a number of cases the Supreme Court has used this avoidance presumption to adopt statutory interpretations that are simply not plausible.[43] The Court has thereby used constitutional avoidance to actually *change* the meanings of statutes, reading them in ways that clearly conflict with statutory text and legislative intentions. But the invalidation model does not let judges acknowledge having rewritten a statute through an avoidance interpretation. Officially, judges can only change statutes by invalidating them in whole or in part. Thus judges embrace the fiction that avoidance interpretations—no matter how implausible—are good-faith attempts to discern statutory meaning, rather than tools for rewriting statutes in order to fix constitutional problems.[44]

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39 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

40 *Id.* at 2600–01.

41 *Id.*

42 *Id.*

43 *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2088–94 (2014); Skilling v. United States, 561 U.S. 358, 405–07 (2010); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197, 204–06 (2009); *see also* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. (forthcoming 2016) (manuscript at 4–7) (on file with *The George Washington Law Review*); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. L. REV. 181, 187–88.

44 *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381 (2005) ("[Constitutional 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."); *see also* Fish, *supra* note 43, at 13–17.

B. *The "Judicial Amendment" Model*

The basic idea behind the judicial amendment model is that judges can change unconstitutional statutes in any way that will render them constitutional. Judges are not limited to invalidating statutory text or applications, but can also add language to a statute or instruct that it be interpreted in a way that conflicts with its actual words. Indeed, under the judicial amendment model all of these remedies amount to the same thing: they are simply different ways of telling the world how a statute's operational meaning is going to differ from its textual meaning. Of course judicial amendments are not literal amendments—they are court orders. They do not change the words that appear in the actual legislative code, but rather provide a judicial gloss on those words that changes their legal effect.[45] Judicial amendments are thus an exercise in statutory *construction* as opposed to statutory *interpretation*. That is, they determine the legal consequences that the statute will have, irrespective of the statute's linguistic meaning.[46]

The judicial amendment model allows us to make sense of the many cases where courts have remedied constitutional violations by rewriting statutes. Such remedies simply do not fit within the conventional invalidation model because they do not involve striking anything down or declaring anything void. They involve adding to statutes, not taking away from statutes. An example will help illustrate this problem. Up until the 1980s, New York's rape statute provided that only men could be guilty of rape, and only women could be victims. The statute's text read: "A male is guilty of rape in the first degree when he engages in sexual intercourse with a female . . . [b]y forcible compulsion . . . ."[47] In 1984 a man convicted of rape challenged this statute before New York's highest appellate court, arguing that it unconstitutionally discriminated on the basis of sex.[48] The court agreed. But rather than striking down New York's rape statute (and thereby making rape no longer a crime in New York), the court issued an order *expanding* the statute so that women could be found guilty of rape, and men could be victims.[49] Under the invalidation model this

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45 There is an interesting parallel between atextual statutory amendments and Bruce Ackerman's idea of "[c]onstitutional moments,"—which are effectively atextual constitutional amendments. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 346 (1998).

46 *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010).

47 N.Y. PENAL LAW § 130.35 (McKinney 1984).

48 People v. Liberta, 474 N.E.2d 567, 570 (N.Y. 1984).

49 *Id.* at 577–79.

would not have been possible because nothing could have been invalidated to make the statute gender-neutral. The New York court effectively rewrote the law. And this type of remedy is surprisingly common in American constitutional law. The Supreme Court has applied it in a number of equal protection cases, beginning in the 1970s,[50] and most recently the Court used it in *Obergefell v. Hodges*.[51] Lower federal courts have also rewritten statutes to enforce other constitutional equality principles like the Dormant Commerce Clause and the First Amendment's content-neutrality rule.[52] Indeed, as recently as 2015, the U.S. Court of Appeals for the Second Circuit rewrote a federal immigration statute that restricted the citizenship rights of people born to noncitizen fathers.[53] There is simply no way to describe what courts did in these cases as "invalidating" or "striking down" statutes. These cases therefore pose a fundamental challenge to the invalidation model of constitutional review. Indeed, the late appearance of these cases in our constitutional history (as a product of sex-based equal protection challenges in the 1970s) probably helps to explain the long perdurance of the invalidation model in the American legal imagination.

Furthermore, even the "invalidation" of unconstitutional statutes can be understood as a type of judicial amendment. Deleting language, after all, is one way of amending statutes. When a court strikes down a statute, in whole or in part, the invalidated text does not actually disappear from the legislative code.[54] The statute just gains a little red flag on Westlaw, alongside the words "held unconstitutional." Thus striking down statutory language is in practice not so different from adding statutory language. In both cases, the judge is simply describing how the statute's legal effect will differ from its literal text. The remedial order will provide either that "this statute shall be enforced as though it lacked the following words . . ." or that "this statute shall be enforced as though it contained the following words . . . ." And indeed, as discussed in the Introduction, the difference between striking down language and adding language turns entirely on arbi-

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50 *See* Heckler v. Mathews, 465 U.S. 728, 738 (1984); Califano v. Westcott, 443 U.S. 76, 93 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636, 652–53 (1975); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973).

51 Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

52 *See, e.g.*, Freeman v. Corzine, 629 F.3d 146, 164 (3d Cir. 2010) (Dormant Commerce Clause); Wiesmueller v. Kosobucki, 571 F.3d 699, 702 (7th Cir. 2009) (same); Rappa v. New Castle Cty., 18 F.3d 1043, 1073 (3d Cir. 1994) (First Amendment content neutrality).

53 Morales-Santana v. Lynch, 804 F.3d 520, 535–38 (2d Cir. 2015).

54 *See supra* note 5 and accompanying text.

trary legislative drafting choices.[55] If the law defines a right broadly and includes an explicit textual exception, then that exception can be struck down to expand the right. But if the exception is built into the textual definition of the right, then judges must add language to expand the right to a new group. Because no text disappears from the legislative code in either case, it seems very strange to distinguish between eliminating textual exceptions and eliminating atextual exceptions. Further, in the context of as-applied invalidation, there is no difference between eliminating an application and adding statutory text. When a court declares that a statute will not apply to a particular group, what else is the court doing but writing an exception for that group into the statute? In short, when judges invalidate statutory text or statutory applications, they effectively rewrite the relevant statute through a judicial order. Thus, in the judicial review context, the distinction between "rewriting" and "invalidating" a statute is illusory. Both are forms of judicial amendment.

The judicial amendment model can also incorporate cases where courts use the canon of constitutional avoidance to effectively rewrite statutes. I have argued in a previous article that the avoidance canon should be understood as two distinct judicial tools: (1) a principle of statutory interpretation, and (2) a constitutional remedy.[56] As a principle of interpretation, the canon can be used to resolve statutory ambiguities. Where a law's meaning is unclear courts can, as a general rule of thumb, assume that Congress does not intend to act unconstitutionally, and then read the statute in light of that assumption.[57] But as a constitutional remedy, avoidance can be used to actually *change* a statute's meaning after a court has found it unconstitutional. This is no longer "avoidance" in the conventional sense, as the court is in fact making a constitutional holding rather than "avoiding" one. Rather, this is a mechanism for changing a statute's meaning in order to render it constitutionally valid. Take, for example, the Supreme Court's holding in *Bond v. United States*.[58] That case involved a woman who was prosecuted under the Chemical Weapons Convention for attempting to poison her neighbor with arsenic.[59] The Convention, as incorporated into domestic law, makes it a crime for any person

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55 *See supra* note 15 and accompanying text.

56 *See generally* Fish, *supra* note 43.

57 *See id.* at 35–38; *see also* Rust v. Sullivan, 500 U.S. 173, 191 (1991) ("This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.").

58 Bond v. United States, 134 S. Ct. 2077 (2014).

59 *Id.* at 2085.

knowingly to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[60] Because arsenic qualifies as a chemical weapon, the defendant in *Bond* violated the plain terms of this statute.[61] But the Supreme Court, invoking the avoidance canon, read an exception into the statute for individual acts of poisoning.[62] The Court presented this holding as a matter of interpretation—Congress must have intended this atextual exception, because the statute would likely be unconstitutional without it.[63] But such creative interpretations, when motivated by the need to avoid a constitutional violation, are better understood as judicial amendments. They do not involve "interpretation" in the normal sense, as they change the statute's meaning in the same way that adding or deleting language does. Rather, when a court uses the avoidance canon to generate an implausible interpretation of a statute, the court is effectively ordering that the statute shall be read contrary to its conventional meaning. Such uses of the avoidance canon are properly understood as judicial amendments.

C. *Judicial Amendment Applied to Real Cases*

The preceding sketch of the judicial amendment model shows the many different remedial options that are available to judges. When judges find a statute unconstitutional, they can then change that statute's meaning in a variety of ways. They can add language, delete language, carve out an exception, or adopt a creative interpretation of the statute in order to fix the constitutional defect. But the judicial amendment model does not, in itself, instruct judges *which* of these remedies they should select in any particular case. Judges must answer that question by operationalizing constitutional review through particular doctrinal principles. A judge could, for example, choose the remedy that is most in line with the purpose of the statute, choose the remedy that is most in line with the purpose of the constitutional provision being enforced, or choose the remedy that seems to involve the least exercise of legislative power by the judiciary.[64] To get a better idea of the different principles that judges might adopt, it will be help-

60 18 U.S.C. § 229(a)(1) (2012).

61 *Bond*, 134 S. Ct. at 2088.

62 *Id.* at 2088, 2093–94.

63 *See id.* at 2087–88.

64 *See generally* Fish, *supra* note 38 (discussing two different approaches to crafting constitutional remedies—"Editorial Restraint" and "Purpose Preservation").

ful to examine several constitutional review cases in which the Supreme Court chose between multiple possible remedies.

In *Califano v. Westcott*, the Supreme Court considered a challenge to a section of the Social Security Act that provided monetary benefits to families with a "needy child . . . who has been deprived of parental support or care by reason of the unemployment . . . of his father."[65] The plaintiffs in *Califano* argued that restricting these benefits to only families with unemployed fathers was unconstitutional sex discrimination.[66] The Court unanimously agreed with this argument, but split five to four on the question of remedy.[67] The majority opinion expanded the statute to families with unemployed female breadwinners by effectively adding the words "or mother."[68] It did so on the grounds that extension better fit with Congress's intentions when enacting the statute, noting that "[a]pproximately 300,000 needy children currently receive AFDC–UF benefits . . . and an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect."[69] The partial dissent argued that the statute should instead be struck down, and that Congress should then implement its own preferred solution, because the Court had no way of knowing whether Congress would have enacted the statute in the first place "if it had known that ultimately payments would be made whenever either parent became unemployed."[70] Thus the majority extended the statute in light of the legislature's purpose, while the dissenters argued for striking the statute down in order to provoke a legislative override. Then-attorney Ruth Bader Ginsburg, the principal architect of the Supreme Court's sex equality jurisprudence, wrote a law review article in 1979 defending the remedy in *Califano*.[71] Ginsburg noted that prominent legal scholars had criticized cases like *Califano* on the grounds that the Supreme Court usurped legislative power by expanding the statute and making Congress allocate more money to welfare benefits.[72] Ginsburg argued, to the contrary, that "[t]he courts act legitimately . . . when they employ common sense and sound judgment to preserve a law by mod-

65 Califano v. Westcott, 443 U.S. 76, 79–80 (1979) (quoting 42 U.S.C. § 607(a)).

66 *See id.* at 81.

67 *See id.* at 93–94 (Powell, J., concurring in part and dissenting in part).

68 *See id.* at 89–90 (majority opinion).

69 *Id.* at 90.

70 *Id.* at 95–96 (Powell, J., concurring in part and dissenting in part).

71 Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 314–18 (1979).

72 *See id.* at 303.

erate extension where tearing it down would be far more destructive of the legislature's will."[73] Thus, according to Ginsburg and the *Califano* majority, the Supreme Court should adopt the remedy that best fits with what it believes to be the legislature's goals, even if that remedy sometimes involves adding to the statute.

In *United States v. Booker*, the Supreme Court considered a Sixth Amendment challenge to the U.S. Sentencing Commission Guidelines.[74] Under the Guidelines judges were instructed to conduct fact-finding at sentencing, and if a judge found that certain factors listed in the Guidelines had been met, the Guidelines would trigger an increase in the defendant's sentence.[75] The Court in *Booker* found that this system of judge-determined sentence enhancements violated the constitutional right to a jury trial, because any fact leading to an increase in the sentence must be proven to a jury beyond a reasonable doubt.[76] The Court then disagreed over how to remedy this constitutional violation. Writing for the majority on the remedy issue, Justice Breyer struck down certain provisions of the Sentencing Reform Act that made the Guidelines mandatory, with the consequence that the Guidelines are now nonbinding for federal judges.[77] This solved the Sixth Amendment problem because it meant that judge-found facts no longer caused mandatory sentence increases—judges would have discretion to disregard the Guidelines. Justice Stevens's dissent instead called for the Court to adopt an avoidance interpretation, such that the words "the court" in the Sentencing Reform Act would be interpreted not as meaning "the sentencing judge" but instead as meaning "the judge and the jury."[78] Under this approach the Guidelines would have remained mandatory, and any facts leading to an increased sentence would have needed to be proven to a jury beyond a reasonable doubt. Justices Stevens and Breyer each defended their preferred remedy by arguing that it better fit with Congress's goals, and that the alternative remedy contradicted the policy choices Congress had made when enacting the Guidelines.[79] Justice Stevens also invoked the con-

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73 *Id.* at 324.

74 United States v. Booker, 543 U.S. 220, 226 (2005).

75 *Id.* at 226–29.

76 *Id.* at 243–44.

77 *Id.* at 258–65 (Breyer, J., delivering the opinion of the Court in part).

78 *Id.* at 286 (Stevens, J., dissenting in part) ("As a textual matter, the word 'court' can certainly be read to include a judge's selection of a sentence as supported by a jury verdict—this reading is plausible either as a pure matter of statutory construction or under principles of constitutional avoidance.").

79 *Id.* at 292; *id.* at 247–49 (Breyer, J., delivering the opinion of the Court in part).

stitutional avoidance canon, pointing out that his approach did not require striking down any of the words in the statute, merely reinterpreting the words "the court."[80] Justice Breyer countered this argument by asserting that Justice Stevens's interpretation of the statute was not plausible because Congress would have preferred no Guidelines at all to Guidelines that required jury sentencing.[81] The Justices' debate over the proper remedy in *Booker* thus concerned two distinct issues—first, defining the purposes of the Sentencing Reform Act, and second, determining the type of intervention that the Court should make when fixing the constitutional defect (whether it be striking a provision down or adopting an avoidance reading).

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Supreme Court considered an Article III challenge to the system of federal bankruptcy courts that was established by the Bankruptcy Act of 1978.[82] This Act gave bankruptcy judges jurisdiction over "all civil proceedings arising under title 11 [the Bankruptcy Code] or arising in or related to cases under title 11."[83] However, it denied such judges the protections of Article III, such as life tenure (bankruptcy judges were instead appointed to fourteen-year terms).[84] The Supreme Court held in *Northern Pipeline* that Congress could not constitutionally grant bankruptcy judges the power to decide state-law contract claims without also extending to them the protections of Article III.[85] However, the question of how exactly to remedy this constitutional violation became quite complex. For one thing, the Court decided to strike down *all* of the bankruptcy courts' jurisdiction, rather than striking down only their jurisdiction over state-law contract claims.[86] The Court made this choice on the grounds that Congress would not have wanted piecemeal litigation over the constitutionality of the remainder of the bankruptcy courts' jurisdiction.[87] Thus the Court determined that it was better to strike down the entire jurisdictional grant facially and try to provoke an override, rather than carving it up through as-applied holdings. But rather than immediately destroying the existing system of bankruptcy adjudication, the Court delayed its remedy for three months in order to give

80 *Id.* at 286–87 (Stevens, J., dissenting in part).

81 *Id.* at 252–54 (Breyer, J., delivering the opinion of the Court in part).

82 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52 (1982).

83 28 U.S.C. § 1471(b) (Supp. IV 1976); *N. Pipeline Constr. Co.*, 458 U.S. at 54.

84 *See* 28 U.S.C. § 152(a)(1) (2012).

85 *N. Pipeline Constr. Co.*, 458 U.S. at 84–87.

86 *Id.* at 87 n.40.

87 *See id.*

Congress a chance to enact a replacement system.[88] Three months elapsed without any congressional action, and so the Court granted another three-month extension.[89] Congress again failed to act, and finally the judiciary itself—acting through the Judicial Conference of the United States—imposed an "emergency rule" reconstituting bankruptcy courts as essentially adjuncts to federal district courts.[90] Congress did not implement its own statutory solution until 1984, nearly two full years after *Northern Pipeline* was decided.[91] Thus the Court failed rather dramatically in its attempt to set a time bomb that would provoke Congress to revise the law. It is also important to note the remedial option that the Court never seemed to consider in *Northern Pipeline*: rewriting the statute to give bankruptcy judges life tenure and other Article III protections. Only three years earlier the Court rewrote a section of the Social Security Act in *Califano*,[92] yet for some reason the Court did not contemplate rewriting the Bankruptcy Act to fix its violation of Article III. That would at least have been a less dramatic solution than invalidating the entire bankruptcy system and putting Congress on the clock to fix it.

Finally, in *Shelby County v. Holder*, the Supreme Court considered a constitutional challenge to section 5 of the Voting Rights Act ("VRA").[93] This section required a number of states and localities to obtain permission from the Department of Justice or a federal court before making changes to their election procedures.[94] The Supreme Court in *Shelby County* struck down the statutory formula that Congress used to determine which states and localities fell under this preclearance regime.[95] The Court did so partly based upon its determination that this formula was irrational, as it had not been updated after the initial passage of the VRA in 1965.[96] The majority opinion concluded "[i]f Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula" because "to-

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88 *Id.* at 88.

89 Order Extending Stay of Judgment, 459 U.S. 813, 813 (1982) (extending stay until December 24, 1982).

90 *See* Lawrence P. King, *The Unmaking of a Bankruptcy Court: Aftermath of* Northern Pipeline v. Marathon, 40 WASH. & LEE L. REV. 99, 115–16 (1983).

91 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

92 *See supra* notes 65–73 and accompanying text.

93 Shelby Cty. v. Holder, 133 S. Ct. 2612, 2621–22 (2013).

94 42 U.S.C. §§ 1973c(a)–(b) (2012); *Shelby Cty.*, 133 S. Ct. at 2620.

95 *Shelby Cty.*, 133 S. Ct. at 2631.

96 *See id.* at 2627–28.

day's statistics tell an entirely different story."[97] In dissent, Justice Ginsburg argued that the majority improperly struck down the entire coverage formula as a facial remedy, when it should instead have only applied its holding to the specific plaintiff bringing suit (i.e., Shelby County, Alabama).[98] Justice Ginsburg accused the majority of overreaching, noting that "[l]eaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional . . . can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite."[99] The logic of this critique is that the Court should determine the constitutionality of the VRA's coverage formula on a case-by-case basis, letting each state or locality plead its own claim for relief, rather than eliminating the entire formula in one fell swoop.

The debates in these four cases help to illustrate a number of the different considerations that courts take into account when deciding what kind of judicial amendment to impose. One such consideration is the legislature's goals in enacting the statute, and whether the court can determine the remedial option that will best further those goals. For example, the debates in both *Califano* and *Booker* concerned which remedy would best serve the legislative purpose.[100] Another consideration is whether the court can prompt Congress itself to act, so that the court does not have to take responsibility for imposing its own version of the statute. For example, the dissenters in *Califano* and the majority in *Northern Pipeline* both sought to cause such legislative overrides.[101] And a third consideration is which remedy will involve the smallest intervention by the court into the statutory scheme. For example, Justice Stevens's dissent in *Booker* and Justice Ginsburg's dissent in *Shelby County* both critiqued the majority for making major changes when a much narrower intervention was available.[102]

II. Strategies for Maintaining Judicial Legitimacy

The judicial amendment model is a creature out of Alex Bickel's fevered nightmares.[103] It recognizes that judges have a broad range of remedial options after they find a statute unconstitutional—they can add statutory text, remove statutory text, create atextual exceptions,

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97 *Id.* at 2630–31.

98 *Id.* at 2648 (Ginsburg, J., dissenting).

99 *Id.*

100 *See supra* notes 65–81.

101 *See supra* notes 71–73, 86–88.

102 *See supra* notes 78–81, 98–99.

103 *See generally* Bickel, *supra* note 8.

and mandate implausible interpretations. In short, the judicial amendment model flatly acknowledges that when a court engages in judicial review, it temporarily becomes a surrogate legislature.[104] This creates obvious legitimacy problems. Courts are not supposed to make the law; they are only supposed to "say what the law is."[105] Courts thus have strong incentives to exercise their broad remedial powers in a way that does not involve acting like legislatures. There are a variety of different strategies for doing this, or at least for appearing to do it. One strategy is to get another actor to choose the remedy, whether it be Congress or an executive enforcement agency. Another strategy is to develop doctrinal principles that will tame judges' remedial discretion and make their decisions appear more lawlike. And a third strategy is to practice deception, that is, to exercise remedial discretion while pretending to operate from constraint.

A. *Interbranch Dialogue*

Judicial amendments exist in the shadow of legislative action.[106] They depend on an implicit delegation of legislative power[107]—courts can only choose which remedy to impose if the legislature has not specified what should happen after the statute is held unconstitutional.[108] Thus, if a court wants to avoid choosing how to fix an unconstitutional statute, one course of action is to return that choice to the legislature. Such reverse delegation avoids the legitimacy problem of having the court stand in for the legislature and decide how a law should be rewritten. The crucial question, however, is how the court can actually get the legislature to act. One method is simply to state

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104 *Cf.* Ginsburg, *supra* note 71, at 317 (describing how the Court's role in remedying unconstitutional statutes resembles legislative action).

105 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

106 In this respect, they are analogous to agency interpretive rules (although obviously more powerful than agency interpretive rules, as judicial amendments can actually change the meaning of statutes). *See, e.g.*, Sec. Indus. & Fin. Mkts. Ass'n v. CFTC, 67 F. Supp. 3d 373, 412, 415–23 (D.D.C. 2014) (discussing types of agency action). *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (articulating standard for when an agency statutory interpretation is permissible).

107 *Cf.* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 (arguing that ambiguities in criminal statutes are delegations of criminal lawmaking power to the judiciary).

108 *See* Heckler v. Mathews, 465 U.S. 728, 734 (1984) (considering a constitutional challenge to a statute that contained the following clause: "If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid . . . the application of this subsection to any other persons or circumstances shall also be considered invalid."). *But see* Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303 (2007) (arguing for limits on the legislature's ability to define fallback law).

that a statute is unconstitutional and then hope that the legislature will fix it.[109] While this approach sounds naïve to American ears, it actually works quite effectively in the United Kingdom. Under the Human Rights Act of 1998, judges in the U.K. are empowered to declare that a domestic statute violates the European Convention on Human Rights.[110] However, such a "declaration of incompatibility" cannot be enforced through judicial invalidation. Rather, the court must rely on Parliament to actually change the offending statute. And in most cases, Parliament does in fact respond to these declarations by amending the relevant statute to make it consistent with the Convention.[111] However, this method depends crucially on how much political pressure there is to actually implement the court's judgment. And given the politicization of the U.S. Supreme Court, it seems rather unlikely that this method would function nearly as well in the United States as it does in the United Kingdom.[112]

A second method for getting the legislature to act is to impose a remedy that will force the legislature to revise the statute. This strategy effectively coerces the legislature into revealing its preferences, because if the legislature fails to pass an override then it will be stuck with an undesirable statute.[113] The dissenters in *Califano v. Westcott* and the majority in *Northern Pipeline Co. v. Marathon Pipe Line Co.* both advocated this strategy.[114] Each sought to strike down the relevant statute in its entirety in the hopes that the Legislature would respond by passing a new version. And the Federal Constitutional

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109 In the federal system, an unenforced declaration of unconstitutionality would run into Article III problems. But courts can get around this problem by warning the legislature through dicta that a law is unconstitutional and will soon be struck down. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–06 (2009)*; see also* Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173–74 (2014) (noting that constitutional avoidance allows the Supreme Court to "signal its readiness to impose major disruptions before actually doing so").

110 The Human Rights Act 1998 c. 42, § 4 (UK).

111 MINISTRY OF JUSTICE, RESPONDING TO HUMAN RIGHTS JUDGMENTS, 2011, Cm. 8162, at 29–46 (U.K.) (listing declarations of incompatibility since the Human Rights Act and describing how they have been remedied).

112 Indeed, the Parliament that enacted the Human Rights Act noted that a declaration of incompatibility "will almost certainly prompt the Government and Parliament to change the law." HOME DEPARTMENT, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782, ¶ 2.10 (U.K.). Compare this with the U.S. Congress's inability to enact a *Northern Pipeline* fix. *See supra* notes 82–91 and accompanying text.

113 *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91–92 (1989); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2164–66 (2002).

114 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982); Califano v. Westcott, 443 U.S. 76, 95–96 (1979) (Powell, J., concurring in part and dissenting in part).

Court of Germany sometimes adopts a version of this strategy by giving the legislature a specific deadline to revise an unconstitutional statute before it is invalidated[115]—much as the U.S. Supreme Court tried to do in *Northern Pipeline*.[116] There are major pitfalls to this approach. One is made clear by the *Northern Pipeline* saga—the legislature may simply not respond.[117] If that happens, then the Court will have created a statutory scheme that nobody wanted, especially not the legislature. And it will have done so deliberately, precisely because of the legislature's presumed opposition. Recent empirical work by William Eskridge and Matthew Christiansen underscores the likelihood of this scenario. They show that legislative overrides of the Supreme Court's statutory decisions have declined precipitously since 1998, to the point that they are now quite rare.[118] Another problem with attempting to force legislative overrides is that doing so robs the current legislature of its power to set its own agenda. Rather than expending its time and resources on its own priorities, the legislature is forced to revisit the statute that the Court has found unconstitutional. And indeed, this approach also robs the past legislature that originally enacted the statute of its agenda-setting resources—rather than trying to revise the unconstitutional statute according to that past legislature's preferences, the court solicits a remedy from the current legislature, which might have quite different policy views.[119] In short, although soliciting a remedy from the legislature seems like an appealing way to limit judges' remedial discretion, in practice this strategy is fraught with difficulties.

A court that finds a statute unconstitutional could also, in some cases, solicit a remedy from the agency tasked with enforcing the statute. This method will only work in certain kinds of cases, most notably cases where the constitutional violation stems from the statute's vagueness and the agency's consequent enforcement discretion. The New Jersey Supreme Court's 1992 decision in *State v. Lagares*[120] is a

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115 *See* Donald P. Kommers & Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 36–37 (3d ed. 2012). The Federal Constitutional Court even sometimes directs the legislature that it must adopt a specific legislative amendment. *See id.*

116 *See supra* notes 87–91 and accompanying text.

117 *See supra* notes 87–91 and accompanying text.

118 *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317, 1340–41 (2014); *see also* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. Cal. L. Rev. 205, 217–19 (2013).

119 I plan to develop this critique further in a future article.

120 State v. Lagares, 601 A.2d 698 (N.J. 1992).

fascinating example of this approach. *Lagares* involved a New Jersey statute that gave prosecutors total discretion over whether to impose a sentencing enhancement on career offenders.[121] The defendant in *Lagares* argued that this provision violated constitutional separation of powers principles by giving prosecutors absolute power over sentencing decisions.[122] The Supreme Court of New Jersey agreed with this argument, declaring that "[a]s currently written . . . Section 6f, with its lack of any guidelines and absence of any avenue for effective judicial review, would be unconstitutional."[123] However, rather than striking the provision down, the court adopted an avoidance interpretation—it interpreted the statute "to require that guidelines be adopted to assist prosecutorial decision-making with respect to applications for enhanced sentences . . . ."[124] The court then requested that the Attorney General of New Jersey promulgate such guidelines in order to regularize state prosecutors' use of the enhancement provision.[125] The Attorney General did so, and these guidelines resulted in more uniform use of the provision.[126] *Lagares* is certainly a unique case, but it shows that courts and legislatures are not the only bodies that can remedy constitutional violations. Sometimes executive branch officials can do so as well. Indeed, the New Jersey Supreme Court's approach in *Lagares* could potentially be extended to other situations where a statute is found unconstitutional due to its vagueness or arbitrary enforcement.[127]

B. Constraint Through Doctrine

Another way for judges to limit their remedial discretion is to use the familiar common-law method of articulating standards that will govern future cases. This approach allows courts to make their imposition of judicial amendments seem more lawlike. There are a number of different doctrinal principles that courts can apply when selecting remedies.[128] First, judges can establish a hierarchy of remedial interventions, such that a certain type of remedy will only be imposed if

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121 N.J. Stat. Ann. § 2c:43-6f (West 1992); *see also Lagares*, 601 A.2d at 700.

122 *Lagares*, 601 A.2d at 701.

123 *Id.* at 704.

124 *Id.*

125 *Id.*

126 *See* Ronald F. Wright, *Sentencing Commissions As Provocateurs of Prosecutorial Self-Regulation*, 105 Colum. L. Rev. 1010, 1031–33 (2005).

127 For an example of an ordinance found unconstitutional for vagueness and arbitrary enforcement, see Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

128 *See* Fish, *supra* note 38, at 333–47.

another type is unavailable.[129] Second, judges can seek to impose the remedy that best fits with the legislative purpose of the statute.[130] Third, judges can seek to impose the remedy that best advances the constitutional norm that is being enforced.[131] These principles can be used, independently or in conjunction with one another, to develop a comprehensive framework for determining how statutes should be changed after they have been found unconstitutional.

One doctrinal approach is to establish that a certain kind of remedy will always be preferred over another kind.[132] For example, in his *Booker* dissent Justice Stevens invoked the principle that a court should always prefer to adopt an avoidance interpretation rather than striking down part of a statute.[133] Similarly, in her *Shelby County* dissent Justice Ginsburg argued that the Court should prefer as-applied invalidations to facial invalidations.[134] Such a strict, rule-based ordering of remedial options has the benefit of taking away judges' discretion in particular cases. If the doctrine instructs that an avoidance reading should always be the preferred remedy, then the court's hands are tied.

However, there are problems with this approach. For starters, it does not help judges choose between remedies that fit within the same category. For example, if a constitutional violation can be fixed by striking down either Provision *A* or Provision *B*, this approach can tell you nothing about which of these provisions to strike. A second problem is that there is no theoretically sound basis for believing that one method of changing a statute is a larger usurpation of legislative power than any other method. As discussed above, all of the different remedial interventions judges might use—striking down text, striking down applications, adding text, or adopting avoidance interpretations—amount to the same thing in practice.[135] They are all just different ways of communicating how the legal effect of a statute will differ from its linguistic content. Thus any hierarchical ordering of constitutional remedies will ultimately be arbitrary at a certain level.

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129 *See id.* at 334–39 ("[The Editorial Restraint approach] posits a hierarchy of judicial interventions in a statutory text, and instructs judges to make the intervention that requires assuming the least editorial power over the statute.").

130 *See id.* at 339–42 ("[The Purpose Preservation approach] is directed at ensuring that the court's remedy interferes with the law's purpose as little as possible.").

131 *See id.* at 342–47 (describing the Irony Avoidance and Norm Recognition approaches in which constitutional norms "determine the selection of constitutional remedies").

132 *See supra* note 129.

133 United States v. Booker, 543 U.S. 220, 286 (2005) (Stevens, J., dissenting in part).

134 Shelby Cty. v. Holder, 133 S. Ct. 2612, 2648 (2013) (Ginsburg, J., dissenting).

135 *See supra* Part I.B.

And third, the difficulty with such a formalistic approach is that judges will inevitably bend it to avoid sufficiently bad consequences. The New York Court of Appeals's decision in *People v. Liberta*[136]—the equal protection challenge to New York's rape statute—is a good illustration of this problem. Even if the court had adopted a strict doctrinal rule that it would always invalidate statutory text rather than adding statutory text, it is impossible to imagine that the court would have actually struck down New York's law against rape. And if courts are willing to ignore such a rule in certain cases, it is difficult to see how it can be preserved in others.

Another doctrinal approach is to instruct judges to select the remedy that will best further the goals of the legislature that enacted the statute.[137] Justices Breyer and Stevens both adopted this approach in *Booker* when they debated over which of their respective remedies better fit the purposes of the Sentencing Reform Act.[138] Similarly, the majority in *Califano* endorsed this approach when it expanded a social security statute to cover more families rather than striking it down and leaving all families without benefits.[139] This approach carries a number of advantages.[140] It advances the democratic principle that the content of a statute should be determined by the goals of the enacting legislature. It also helps courts avoid situations where they are forced to adopt a remedy with disastrous consequences, as presumably no legislative body would prefer such a remedy to its alternatives. The main disadvantage to this approach is that it still leaves judges a large amount of discretion in cases where the legislature's preferred solution is unclear. For example, in *Booker* Justices Breyer and Stevens each mustered extensive arguments for why the Congress that enacted the Sentencing Reform Act would have preferred either advisory guidelines or a jury-based sentencing system.[141] And their arguments focused largely on the substantive merits of each remedy. *Booker* thus illustrates the danger of looking to Congress's hypothetical preferences. Judges can fall prey to motivated reasoning, and turn the

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136 People v. Liberta, 474 N.E.2d 567 (N.Y. 1984); *see supra* notes 47–49 and accompanying text.

137 *See supra* note 130.

138 *Booker*, 543 U.S. at 247–49 (Breyer, J., delivering the opinion of the Court in part); *id.* at 292 (Stevens, J., dissenting in part).

139 Califano v. Westcott, 443 U.S. 76, 91 (1979).

140 I have argued for it at length in a previous article. *See* Fish, *supra* note 38, at 363–73.

141 *Booker*, 543 U.S. at 247–49 (Breyer, J., delivering the opinion of the Court in part); *id.* at 292 (Stevens, J., dissenting in part).

discussion of what Congress would have wanted into a discussion of which remedy is better as a matter of public policy.[142]

A third doctrinal approach is for judges to adopt the remedy that best advances the norm underlying the constitutional provision being enforced.[143] Take for example the First Amendment overbreadth doctrine. This doctrine instructs judges to facially invalidate statutes that restrict speech, even if those statutes have some constitutionally valid applications.[144] The overbreadth doctrine thereby advances the free speech norm underlying the First Amendment, because it avoids piecemeal litigation that could chill the speech of those left uncertain how far the First Amendment extends.[145] If someone does not know whether or not certain speech carries legal repercussions, they may be deterred from uttering it. This type of constitutional-norm-based approach to remedy selection has been endorsed by a number of scholars, and it certainly has strong intuitive appeal.[146] If a court is enforcing the Constitution, after all, it should do so in the most effective way possible. But this approach also has important limitations. First, it can only help judges decide cases where the relevant constitutional norm points to one remedy over another. It provides no guidance in cases where the constitutional norm is indifferent to the choice of remedy. Second, the definition of the relevant constitutional norm is itself often a contested question, and different interpreters will commonly define a norm very differently. For example, the current occupants of the Supreme Court define the equal protection norm in starkly different ways—some see it as prohibiting discriminatory classifications, while others see it as endorsing substantive equality between groups.[147] And this problem is compounded by the fact that judicial review cases will often involve conflicting constitutional norms. For example, in *Shelby County* the Fifteenth Amendment norm that the federal government should police discrimination in voting rights was put in direct conflict with what the majority defined as a

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142 *See generally* Dan M. Kahan, Foreword, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011) (identifying the tendency of judges to fit "perceptions of policy-relevant facts to their group commitments").

143 *See supra* note 131.

144 *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 118–19 (2003).

145 *Id.*

146 *See generally* Nitya Duclos & Kent Roach, *Constitutional Remedies as "Constitutional Hints": A Comment on* R. v. Schachter, 36 MCGILL L.J. 1, 24–26, 35–37 (1991); Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185 (1986).

147 *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1534–40 (2004).

federalism norm of "equal sovereignty" between the states.[148] Such conflicts create even more indeterminacy. The constitutional norms approach to remedy selection thus does a relatively poor job of controlling judicial discretion in cases where judges disagree over how the norm should be defined, or over which of several norms should trump. In such cases, judges' use of discretion merely shifts from selecting the remedy to selecting the constitutional norm that will control the choice of remedy.

C. *The Noble Lie Strategy*

A final strategy for legitimizing the judicial amendment model is to pretend that remedial discretion does not exist. That is to say, judges can articulate principles of constraint—for example, the idea that they are only empowered to "strike down" unconstitutional statutes, and cannot rewrite them—while still in reality exercising full remedial discretion. This kind of strategy has a long philosophical heritage. In Plato's *Republic*, Socrates proposes that one might legitimize a socially stratified society through a "noble lie," telling the society's citizens that their souls contain certain metals—brass, iron, or silver—and that the metal in one's soul determines one's proper role in the social hierarchy.[149] More recently, in the comic book *Watchmen*, the character Ozymandias adopts a similar strategy to bring about world peace.[150] He fabricates an apocalyptic event—the appearance and explosion of a giant squidlike alien in downtown Manhattan—to fool humanity into uniting against a perceived common foe. In legal scholarship, the canonical statement of this "noble lie" strategy is Meir Dan-Cohen's article *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*.[151] Dan-Cohen distinguishes between "decision rules" and "conduct rules," that is, between rules that should govern actual judicial decisionmaking and rules that should be broadcast to the wider public in order to regulate its conduct. These two types of rules sometimes conflict with one another.[152] Take, for example, the well-known principle that ignorance of the law is no defense. This principle does not actually hold in all cases—for instance, good-faith ignorance of the relevant tax rules is in fact fre-

148 Shelby Cty. v. Holder, 133 S. Ct. 2612, 2618, 2621–25 (2013).

149 PLATO, REPUBLIC 99–101 (380 B.C.) (C.D.C. Reeve trans., 2004).

150 ALAN MOORE ET AL., WATCHMEN 24–25 (2005).

151 Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); *see also* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 1018–29 (2009).

152 Dan-Cohen, *supra* note 151, at 632.

quently a legal defense to the crime of tax evasion.[153] And this makes sense as a "decision rule," as it would be unfair to hold people criminally liable for not knowing all the details of something as complex as the tax code. But this fact should not be widely broadcast as a "conduct rule" because we generally want people to be as diligent as possible while doing their taxes, and that diligence could be undermined if people knew that ignorance of the law was a defense to the crime of tax evasion. In short, there are cases where the legal system is better served when judges decide cases according to one rule, but broadcast a different rule to the outside world.

Courts can employ this "noble lie" strategy to legitimize cases where they act as surrogate legislatures while fixing unconstitutional statutes. They can do so, for example, by broadcasting the invalidation model to the outside world but in fact operating according to the judicial amendment model. Indeed, this is arguably what the Supreme Court currently does. In describing the remedy in *Obergefell v. Hodges*, Justice Kennedy stated that the challenged state marriage statutes were "held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[154] Curious phrasing, that. How could the Court have changed these statutes to include same-sex marriage by *invalidating* them? In fact the actual effect of the remedy in *Obergefell* was to *expand* state marriage statutes to include gay marriage, not to hold the statutes "invalid." Yet the Court never acknowledged that it was effectively adding text to the challenged statutes.

The Court adopts a similar noble lie strategy in its approach to facial challenges. It formally adopts a rigid rule that prefers as-applied remedies in the great majority of cases (unless it can be shown that a statute has no constitutional applications whatsoever).[155] But, as Richard Fallon has demonstrated, in practice the Court actually imposes facial remedies with regularity, indeed even more frequently than it does as-applied remedies.[156] However, the Court often does not announce when it is applying a facial remedy, or explain why it is rejecting a more limited as-applied remedy.[157] Thus the Court is able to vocally declare one rule while silently operating by another.[158]

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153 *See, e.g.*, Cheek v. United States, 498 U.S. 192, 198–202 (1991).

154 Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

155 *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

156 *See* Fallon, *Fact and Fiction*, *supra* note 37, at 918.

157 *Id.* at 968 ("[T]he Court frequently gives no explicit indication whether it understands itself as rendering a ruling on the validity of the statute on its face or only as applied.").

158 Indeed, Justice Stevens has pointed out the incompatibility of the Supreme Court's

And, in the constitutional avoidance context, judges have powerful incentives to pretend that they are engaged in statutory interpretation when they are actually rewriting statutes to conform them to constitutional principles. For example, Philip Frickey has shown that during the McCarthy Era the Warren Court made aggressive use of the avoidance canon to protect the rights of people accused of being radicals and subversives.[159] These decisions were controversial, and might have sparked an even greater political backlash if the Court had declared that it was not actually engaging in interpretation, but was rewriting the relevant laws. In sum, the noble lie strategy allows courts to pretend that they are not exercising the discretion that the judicial amendment model grants them. They can claim, for example, that they do not make a choice when they invalidate a statute, but simply declare what the Constitution requires.[160] This strategy does seem a bit dishonest. But it is also perhaps understandable that courts would not want to announce that they must act as surrogate legislatures, even if that is the truth of the matter.

III. The Practical Implications of Judicial Amendment

So far, this Article has sought to theoretically reframe judicial review by attending to how it is actually practiced in the United States. But this reframing gives us more than just a more precise vocabulary to describe what judges are already doing. This next Part examines a number of concrete, practical implications of the judicial amendment model for the law of constitutional remedies.

A. *Revising a Judicial Amendment*

One vexing question about judicial review is what, exactly, happens to an invalidated statute if subsequent events make it constitutional again? Does the statute automatically spring back into

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practice with its official doctrine. *See* Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of certiorari) ("While a facial challenge may be more difficult to mount than an as-applied challenge, the dicta in *Salerno* 'does not accurately characterize the standard for deciding facial challenges,' and 'neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles.' ").

159 *See generally* 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 (2005) (describing the Warren Court's extensive use of avoidance doctrine to adjust public law while defusing political opposition).

160 *Cf.* Walsh, *supra* note 25, at 742 (arguing that the Constitution automatically "displaces" unconstitutional statutes, and that judges have no discretion in deciding how such statutes will be changed).

existence? Or must the judiciary or the legislature do something to bring it back? Imagine, for instance, that the United States enacted a constitutional amendment granting Congress the power to ban flag burning. Would 18 U.S.C. § 700, which provides criminal penalties for desecrating the "flag of the United States,"[161] and which is still in the U.S. Code despite being struck down in *United States v. Eichman*,[162] automatically become valid once more?[163]

Or consider a more complicated version of this problem. In a 2006 case entitled *Gory v. Kolver*, the South African Constitutional Court considered the constitutionality of an intestacy statute that provided inheritance rights to the "spouse" of the deceased.[164] The Court held that this statute discriminated against homosexuals because at the time of the case only heterosexuals could be married in South Africa.[165] The Court issued a remedial order providing that the statute should be read as though it applied to both "spouses" and "permanent same-sex life partners."[166] However, shortly after this decision, South Africa enacted a same-sex marriage law.[167] As a result, both heterosexual and homosexual spouses can now inherit under the text of the intestacy statute. Nonetheless, the remedial order in *Gory* still remains in effect, so that now South Africa's inheritance law contains a strange inequality.[168] Heterosexuals can only inherit from their deceased spouse, but homosexuals can inherit from either their deceased spouse *or* their deceased permanent life partner. Thus the law now discriminates against straight couples. Is there a way for the Court to fix this unusual result?

The conventional understanding of judicial review—that it involves "striking down" unconstitutional statutes—provides little guidance for dealing with cases such as these. On the one hand, striking

161 18 U.S.C. § 700 (2012).

162 United States v. Eichman, 496 U.S. 310 (1990).

163 *Id.* at 319. Something very similar to this hypothetical happened with the Twenty-Sixth Amendment. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court partially invalidated a federal statute that lowered state voting ages. *Id.* at 117–18. The Twenty-Sixth Amendment was then enacted, which empowered Congress to enact such statutes. *See* Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1171, 1190–95 (2012).

164 Gory v. Kolver NO, 2006 (4) SA 97 (CC) at para. 1 (S. Afr.).

165 *Id.* at para. 19.

166 *Id.* at para. 66.

167 Civil Union Act 17 of 2006 (S. Afr.).

168 *See* Bradley Smith, Surviving Heterosexual Life Partners and the Intestate Succession Act 81 of 1987: A "Test Case" for the Fashioning of an Appropriate Constitutional Remedy in Cases of "Judicially-Generated Residual Discrimination" (Aug. 22, 2015) (unpublished manuscript) (on file with author).

a statute down is generally understood as getting rid of it—declaring it no longer a law.[169] As one prominent scholar has put it, "[o]nce properly adjudicated to be unconstitutional, a statute is no longer the positive law of the United States and *citizens* need not obey it."[170] But on the other hand, striking a statute down does not actually remove it from the legislative code. And it would seem quite odd to require that Congress reenact a statute that is already on the books if intervening events (such as the passage of a constitutional amendment) render it constitutionally valid. Given that we do not have a settled account of what "striking down" a statute really means, it is unclear whether or not a judge can strike a statute back up.

Fortunately, the judicial amendment model provides more clarity. Judicial amendments are court orders—injunctions requiring that a statute must be read contrary to its textual meaning. And a judicial injunction can sometimes be lifted if a party petitions the court and shows that the injunction no longer serves a purpose.[171] If the American judiciary explicitly adopted the "judicial amendment" model, it could establish internal rules of procedure whereby orders amending an unconstitutional statute can be rescinded if the constitutional defect has been fixed through other means. Thus in the case of the hypothetical flag-burning amendment, the government could petition the judiciary to rescind its prior order that the anti-flag-burning statute must be ignored. And in the case of the South African intestacy statute, the court could rescind its order that the statute be read as though it extended to unmarried same-sex life partners.

B. *Severability*

The judicial amendment model also highlights the problematic broadness of existing severability doctrine.[172] Under the Supreme

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169 *See, e.g.*, Oliver P. Field, *Effect of an Unconstitutional Statute*, 1 IND. L.J. 1, 2 (1926) (explaining the view that "an unconstitutional statute is to be considered as though it had never been enacted by the legislature").

170 Randy Barnett, *What is the Positive Law of the Land after a Supreme Court Holding of Unconstitutionality?*, WASH. POST: THE VOLOKH CONSPIRACY (June 9, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/09/what-is-the-positive-law-of-the-land-after-a-supreme-court-holding-of-unconstitutionality/.

171 *Cf.* FED. R. CIV. P. 60 (authorizing federal courts to grant relief from a final order if "applying it prospectively is no longer equitable . . . or [for] any other reason that justifies relief").

172 *Cf.* Lisa Marshall Manheim, *Beyond Severability*, 101 IOWA L. REV. (forthcoming 2016) (arguing that the current severability framework should be rejected in its entirety, and should be replaced by an approach that instructs judges to look at the various interpretations that would fix a constitutional defect and then select the interpretation that the legislature would prefer).

Court's current approach, a judge who has struck down one provision of a statute must then consider whether the legislature would hypothetically have wanted other provisions to still remain in force.[173] If it would not have, those other provisions must be struck down as well.[174] But this approach fails to account for the fact that judges are not limited to "striking down" legislation. They can also *extend* legislation, as the Supreme Court has done in cases like *Obergefell v. Hodges*, *Califano v. Westcott*, and others.[175] How does one make sense of severability doctrine in the context of adding language to a statute? The basic rationale behind current severability doctrine is that it effectuates the legislature's intentions. The legislature never meant to enact the law without the provision that has been struck down, and so the court will try to approximate what the legislature would have wanted by striking down additional, perfectly valid provisions.[176] By the same logic, within the judicial amendment model a court that fixes a violation by adding text should be able to add additional provisions to further the legislature's goals. After all, the legislature never intended to enact the text that the court *added* either. Or, more precisely, a court that adds or takes away text to fix a constitutional violation should then add or take away more text to effectuate the legislature's intent.

That is to say, if we apply the logic of current severability doctrine to the judicial amendment model, then judicial review happens in two phases. In phase one, the court imposes a judicial amendment that fixes the constitutional violation by adding statutory language or taking away statutory language. In phase two, the court imposes additional judicial amendments that reshape the statute to approximate what the legislature would hypothetically have wanted had it known the court was going to impose the phase one amendment. Thus the court becomes a surrogate legislature not only while fixing the constitutional violation, but also while rewriting the statute to approximate the legislature's policy preferences. For example, if the Supreme Court had struck down the Affordable Care Act in *National Federation of Independent Business v. Sebelius*, it might have replaced the law with a single payer system, an expansion of Medicare, or whatever

173 Fish, *supra* note 26, at 1300–09

174 *See id.*; *see also* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) ("The final test, for legislative vetos [sic] as well as for other provisions, is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.").

175 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2605–08 (2015); Califano v. Westcott, 443 U.S. 76, 90 (1979).

176 *See* Fish, *supra* note 26, at 1322–27.

other solution the Court imagined Congress would hypothetically have wanted. Severability doctrine becomes, in essence, a judicial power to redraft the entire statute.

This starkly illustrates how overbroad the Supreme Court's current severability doctrine is. It empowers—indeed requires—judges to rewrite statutes in order to further certain policy goals held by the legislature. In prior work, I have advocated a much more limited approach to severability doctrine that would curtail this problem.[177] A number of other scholars have made similar proposals to limit severability.[178] Essentially, I argue that a court can only find a provision inseverable if the legislature has made that provision conditional on the provision that is struck down.[179] The legislature can do this in a number of ways. Most directly, it can explicitly provide through an inseverability clause that if one provision is struck down, another provision must also be invalidated.[180] But the legislature can also create inseverability implicitly, by writing the statute so that one provision cannot be enforced or makes no logical sense if another provision is removed from the statute.[181] For example if a court strikes down a criminal law as unconstitutional, a separate sentencing provision for that crime is logically inseverable.[182] A court cannot sentence someone for something that is not a crime, after all. However a court *cannot* find a provision inseverable merely because it believes the legislature would not hypothetically have wanted that provision to remain in force. The conditionality approach to severability is thus much more limited than current doctrine.

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177 *See id.* at 1332–43.

178 *See, e.g.*, Tobias A. Dorsey, Remarks, *Sense and Severability*, 46 U. RICH. L. REV. 877, 891–92 (2012) (arguing that courts should always find unconstitutional provisions severable, without exception); Movsesian, *supra* note 30, at 79–80 (arguing for a default presumption of severability); Nagle, *supra* note 30, at 206 (same); Shumsky, *supra* note 30, at 272–75 (same); Tribe, *supra* note 25, at 21–27 (arguing that every unconstitutional provision should be held severable unless Congress has provided an explicit inseverability clause); Walsh, *supra* note 25, at 777–89 (same); Ezzell, *supra* note 30, at 1500–05 (arguing for a "qualified clear statement rule," where statutes would be severable unless (1) there is an inseverability clause or (2) the severed law could not logically be enforced).

179 *See* Fish, *supra* note 26, at 1332–43.

180 *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 65 (1982) (reviewing an Alaska statute that provided, "[i]f any provision enacted in sec. 2 of this Act . . . is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that provision is nonseverable, and all provisions enacted in sec. 2 of this Act are invalid and of no force or effect" (quoting 1980 Alaska Sess. Laws ch. 21, § 4, at 9)).

181 *See* Fish, *supra* note 26, at 1336–43.

182 *Id.* at 1339.

The conditionality approach can also be incorporated into the judicial amendment model. A legislature can create "fallback law," that is, it can enact statutory provisions that spring into effect only after a law is declared unconstitutional.[183] And it can do so either explicitly or implicitly. Explicit fallback law is the mirror image of an inseverability clause—while an inseverability clause specifies what must disappear after a finding of unconstitutionality, explicit fallback law specifies what must be added.[184] And implicit fallback law is the mirror image of the idea that any provisions that are logically dependent on an invalidated provision must also fall.[185] By parallel reasoning, the legislature can write a statute in such a way that if a court finds it unconstitutional and then adds language, the court must logically add additional language in order for the statute to make sense. Consider, for example, the New York rape statute that only permitted males to be found guilty of rape.[186] If this statute had a separate sentencing provision stating that "any male found guilty of rape will be sentenced to between ten years and life in prison," this provision would also have to be expanded so that it provided sentences to both men and women. However, the conditionality approach would not permit the court to essentially add language to the statute based on what it thinks the legislature might hypothetically have wanted. Thus the conditionality approach to severability, unlike the current doctrine, can be translated into the judicial amendment model without the judiciary being able to redraft entire statutes.[187]

Dean Tom Campbell has advocated an alternative solution to this problem.[188] Campbell argues that every time a statutory provision is found unconstitutional, the entire statute in which that provision is contained must be struck down.[189] Every statute is like a house of

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183 *See generally* Dorf, *supra* note 108 (articulating the theory of fallback law).

184 *See* Fish, *supra* note 26, at 1332–33.

185 *See id.* at 1332–34.

186 *See* People v. Liberta, 474 N.E.2d 567, 570 (N.Y. 1984); *supra* notes 47–49 and accompanying text.

187 It is worth noting, though, that the Supreme Court actually finds statutes inseverable in very few cases, despite the broadness of current doctrine. *Supra* note 28 and accompanying text. Thus the conditionality approach would not conflict with very many of the Court's actual holdings. *See* Fish, *supra* note 26, at 1355–58.

188 *See* Campbell, *supra* note 30, at 1495–97; *see also* Tom Campbell, *Conditionality as Opposed to Inseverability*, 64 EMORY L.J. ONLINE 2099, 2099 (2015).

189 More precisely, Campbell argues that everything in a single bill enacted by a legislature should fall if one part of that bill is unconstitutional. Campbell, *supra* note 30, at 1496–97. Thus his argument actually extends to omnibus bills that have many different statutory provisions. *See* Fish, *supra* note 26, at 1314–15.

cards—when one piece is removed, the entire thing falls. This principle extends even to cases like *Obergefell* where a court could resolve a constitutional violation by adding text to a statute. Courts cannot do that either, according to Campbell's model—they must strike down the entire law in every case.[190] This approach to judicial review is appealingly elegant. It obviates the need for judges to wring their hands over what kind of remedy to impose when a statute is found unconstitutional, and over what else to do to that statute so that it is not changed too much from what the legislature wanted. Indeed, if Campbell's solution were adopted, it would render this Article's entire thesis moot. The answer to every constitutional violation would simply be to strike down the entire statute. The downside to Campbell's approach, however, is that it would be extremely disruptive.[191] Even a small constitutional review decision would have catastrophic consequences if it concerned a provision that happened to be part of a major law like the Social Security Act, Civil Rights Act, Administrative Procedure Act, etc. Indeed, Campbell's approach would have required the Supreme Court in *Marbury v. Madison* to strike down the entire Judiciary Act of 1789.[192] In *Obergefell v. Hodges*, the Court would have had to invalidate the marriage statute of every state that failed to allow gay marriage. In *INS v. Chadha*, the Court would have had to strike down 196 different federal laws that contain legislative veto provisions.[193] If Campbell's model were really put into practice, it also seems likely that the various branches of government would find workarounds to avoid striking down laws. Legislatures might establish that every sentence of a law is a separate "statute," turning the formalism of Campbell's approach against itself.[194] And judges might engage in less judicial review, and more frequently use "avoidance" readings or other constitutional enforcement methods that do not re-

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190 *See* Campbell, *supra* note 188, at 2106 (noting that Campbell's model avoids situations where a court has more than one method to fix an unconstitutional statute, because the only method it permits is striking down the entire statute).

191 For further critique of Campbell's approach, and responses to such critique, compare Fish, *supra* note 26, at 1313–19, with Campbell, *supra* note 188, at 2099–108.

192 *See* Fish, *supra* note 26, at 1314.

193 *See* Fish, *supra* note 26, at 1314; *see also* INS v. Chadha, 462 U.S. 919, 944 (1983) (noting the existence of 196 different statutes with congressional veto provisions).

194 *See* Campbell, *supra* note 30, at 1507. One interesting question is whether the President would have to separately sign all of these statutes into law. This is not an idle problem, as some statutes are quite long. If so, one solution might be to let the President "pocket pass" them by failing to sign them for ten days while Congress is in session. *See* U.S. CONST. art. I, § 7, cl. 2.

quire formally changing a statute.[195] On the other hand, if judges did want to fundamentally reshape the American legal landscape they could do so quite easily, eliminating a foundational statute through a minor constitutional holding. In short, while Campbell's model of judicial review is quite elegant, it would transform judicial review into a wrecking ball.

C. *Facial Challenges*

Much as the judicial amendment model makes severability work in both directions—letting courts both add and delete statutory language—it does the same for facial challenges. In a number of different kinds of cases, a court can declare a statute void in its entirety rather than limiting the remedy to only certain applications.[196] For example, in *Northern Pipeline Co. v. Marathon Pipe Line Co.* the Supreme Court eliminated *all* of federal bankruptcy judges' jurisdiction, even though the Court had only concluded that their jurisdiction over state contract claims was unconstitutional.[197] The Court voided the entire jurisdictional grant because it seemed unlikely that Congress would have wanted bankruptcy judges' jurisdiction stripped away through piecemeal litigation rather than all at once.[198] Similarly, in the First Amendment context the Supreme Court will entertain facial challenges to statutes that have both constitutional and unconstitutional applications. This is because piecemeal litigation in the First Amendment context can have the effect of chilling constitutionally protected speech.[199] And, in *Shelby County v. Holder*, the Court invalidated the VRA's entire coverage formula rather than just restricting its remedy to the specific county bringing suit.[200] In cases like

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195 *See supra* Part II.C. (pointing out that judges can, and sometimes do, rewrite statutes while pretending to be adopting avoidance interpretations).

196 There is no single doctrinal theory that fully explains when the Court prefers as-applied challenges and when it prefers facial challenges. *See supra* notes 31–37 and accompanying text; *see also* Fallon, *Fact and Fiction*, *supra* note 37, at 917.

197 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 n.40 (1982) ("In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. . . . We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose.").

198 *Id.*

199 *See* Virginia v. Hicks, 539 U.S. 113, 119 (2003); *supra* notes 144–45 and accompanying text.

200 *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

these, judges invalidate statutes through overinclusive rulings that eliminate both constitutional and unconstitutional applications, and that are not limited to the specific party claiming relief.

Analogously, when a court expands a statute it can also do so "facially." That is, it can expand the statute further than just the applications that are constitutionally required, or further than just the applications that are before the court. Consider, for example, a hypothetical oath of office law. This law requires that anybody who takes a job in the government must "swear an oath of allegiance to the Constitution of the United States." This law would violate the religious convictions of Quakers, who believe that the Bible forbids them from taking oaths.[201] Thus this oath of office provision would effectively function as an unconstitutional religious test for public office.[202] Indeed, concern for the religious convictions of Quakers is the reason that the Constitution's Oath of Office Clause requires federal and state officials to be "bound by Oath *or Affirmation*, to support this Constitution."[203] A court that found this hypothetical oath statute unconstitutional could impose a similar remedy, changing the statute so that it required officials to "swear an oath (or make an affirmation) of allegiance to the Constitution of the United States." If the court were imposing this remedy only "as applied," then it would restrict the "or make an affirmation" language to only people with religious objections to oaths. But permitting everyone, not just Quakers, to "affirm" their allegiance is a much more appealing solution. It does not force Quakers to self-identify as objecting to oaths, and it establishes the same rule for everyone rather than having one rule for some religions and another rule for others. A court should thus impose what might be called a "facial" expansion of the statute. It should add to the statute in a way that goes beyond solving the immediate constitutional violation. Such facial expansions could be used in other contexts as well. For example, if a statute provides benefits to one racial group and a member of another racial group sues on antidiscrimination

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201 *See* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1630 (1989) ("One of the clearest illustrations of the Founders' affirmative accommodation of religious belief came in the loyalty requirement of article VI. Certain minority religious groups, most notably the Quakers, refused on Biblical grounds to take oaths, but were willing to make affirmations. In recognition of this, the Framers drafted article VI to require federal and state officials to be 'bound by Oath *or Affirmation*, to support this Constitution.'" (footnote omitted)).

202 *See* U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

203 *Id.*; *see* Adams & Emmerich, *supra* note 201, at 1630.

grounds, a court could impose a remedy that extends the benefits to every racial group. Or imagine a reverse of *Shelby County v. Holder*. The Supreme Court might have vindicated the principle of "equal sovereignty" in that case by *expanding* section 5 of the VRA to cover all states. This would have been a facial expansion of the statute, rather than the facial invalidation that the Court actually imposed. In sum, just as the judicial amendment model transforms "severability" into a tool for both adding and deleting statutory language, it does the same for "facial challenges."[204]

IV. Rewriting Statutes and Judicial Federalism

This Article has shown that the power of judicial review is in fact a quasi-legislative power. It involves the judiciary stepping into the shoes of the legislature and rewriting a statute in order to fix a constitutional defect. Courts can add language, delete language, eliminate applications, or adopt implausible interpretations in order to make a statute constitutionally valid. Much of this Article has focused on the question of how judges can legitimately exercise such power. But that question also has an important variant: how can *federal* judges exercise such power with respect to *state* statutes? The power to enact legislation is a fundamental feature of state sovereignty, and it infringes on such sovereignty to have federal courts rewrite state laws. Indeed, the Supreme Court has interpreted the Constitution as containing a structural "anti-commandeering" principle, whereby the federal government cannot force state governments to enact legislation or perform enforcement functions.[205] Having a federal court rewrite state legislation creates analogous federalism problems. State courts (or legislatures) should be the ones to change state statutes that have been found unconstitutional.[206] For example, if a state has a welfare statute of the kind at issue in *Califano v. Westcott*, and this statute unconstitutionally provides benefits to unemployed fathers but not

204 The further question of when a court should entertain a facial expansion is quite complex, especially given the unsettled nature of current facial challenge doctrine, and is therefore beyond the scope of this Article. I hope to address this question in a future article, as well as the question of how courts have the power to entertain facial challenges in the first place.

205 *See* Printz v. United States, 521 U.S. 898, 925–27, 933 (1997).

206 The Supreme Court has recognized this principle. *See* Levin v. Commerce Energy, Inc., 560 U.S. 413, 427–28 (2010) ("With the State's legislative prerogative firmly in mind, this Court, upon finding impermissible discrimination in a State's allocation of benefits or burdens, generally remands the case, leaving the remedial choice in the hands of state authorities."); *cf.* Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1988) (quoting West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237–38 (1940)) (noting that the rulings of state supreme courts on state law issues (and even to some extent those of intermediate state courts) are binding on federal courts).

unemployed mothers, it should be up to the state courts to decide whether such discrimination is remedied by leveling the benefits up to include mothers or down to include no one.[207] If a federal court selects the remedy, it will essentially be rewriting the state law.[208]

When a constitutional challenge is brought in federal court, however, it can become a bit tricky to implement this principle of judicial federalism. The federal court has to find some way of resolving the constitutional challenge without rewriting the statute, or of giving the remedial question back to the relevant state's judiciary. One way to do this is to remand the case to a state supreme court. However, this can only be done if the case is being heard by the United States Supreme Court on direct appeal from a state supreme court.[209] Thus remands only work in a relatively limited set of cases.[210] But the Supreme Court has indeed used remands to defer to state courts on remedial questions. It has done so, for example, in severability cases involving state statutes.[211] In *Zobel v. Williams*[212] the Court found an Alaska statute unconstitutional under the Privileges and Immunities Clause, but remanded the case to let the Alaska Supreme Court determine whether the unconstitutional provision was severable from the rest of the statute.[213] And the Supreme Court did so despite the fact that the Alaska statute contained a very clear inseverability clause, making the issue fairly straightforward.[214] By remanding this remedial question, the Supreme Court preserved the Alaska court's power to

207 *See* Califano v. Westcott, 443 U.S. 76, 93 (1979).

208 *Cf.* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011) (arguing that federal courts should adopt state methods of interpretation when construing state statutes).

209 *See generally* John A. Lynch, Jr. & G. Robert Wileman, Note, *Remand to State Courts and Its Effect on the Dual-Sovereign System*, 50 GEO. L.J. 819 (1962).

210 *See Stat Pack Archive*, SCOTUSBLOG, http://www.scotusblog.com/reference/stat-pack/ (last visited Mar. 23, 2016) (showing that during October Term 2014 only about seven percent of Supreme Court cases came from state supreme courts).

211 *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 331 (2006); Leavitt v. Jane L., 518 U.S. 137, 139–40, 146 (1996) (per curiam); Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 624 (1985); Zobel v. Williams, 457 U.S. 55, 65 (1982); Harrison v. NAACP, 360 U.S. 167, 178–79 (1959); Watson v. Buck, 313 U.S. 387, 396 (1941). For a more complete list of such cases, see Ryan Scoville, *The New General Common Law of Severability*, 91 TEX. L. REV. 543, 564 n.139 (2013).

212 Zobel v. Williams, 457 U.S. 55 (1982).

213 *Id.* at 65 ("[I]t is of course for the Alaska courts to pass on the severability clause of the statute.").

214 *See id.* ("If any provision enacted in sec. 2 of this Act . . . is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that provision is nonseverable, and all provisions enacted in sec. 2 of this Act are invalid and of no force or effect." (quoting 1980 Alaska Sess. Laws ch. 21, § 4, at 9)).

determine how Alaska's statutes ought to be changed in light of constitutional rulings.

A second method for preserving state courts' power to rewrite state laws is to limit federal courts' remedies to only the actual litigants in a case. That is, a federal court can grant relief only to the parties before the court, and can thereby refrain from making any pronouncements that change the meaning of a state statute. This method can be illustrated by contrasting the Supreme Court's decisions in two cases involving the constitutionality of sentencing guidelines: *Blakely v. Washington*[215] and *United States v. Booker*.

First, in *Blakely*, the Supreme Court determined that the state of Washington's system of mandatory sentencing guidelines violated the Sixth Amendment right to a jury trial.[216] However the Court restricted its remedy to only the defendant before it, declaring simply that "[t]he judgment of the Washington Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."[217] This left the state of Washington free to impose its own solution, which ultimately resembled Justice Stevens's preferred remedy in *United States v. Booker*.[218] Washington's legislature reformed the Guidelines so that any fact leading to a mandatory enhancement would have to be proven to a jury beyond a reasonable doubt.[219] And although the legislature ultimately ended up implementing the solution in *Blakely*, this fix could also have been imposed by the Washington Supreme Court.[220] Now contrast *Blakely* with *Booker*. In *Booker* the Supreme Court ruled on the same constitutional challenge vis-à-vis the Federal Sentencing Guidelines, and did not restrict its remedy to only the case at bar. Rather, the Court debated whether (1) to make the Federal Sentencing Guidelines nonbinding, or (2) to impose jury sentencing.[221] And the Court ultimately opted for the former. The contrast between these two cases illustrates how federal courts can use limited remedial holdings to avoid rewrit-

215 Blakely v. Washington, 542 U.S. 296 (2004).

216 *Id.* at 298, 313–14.

217 *Id.* at 314.

218 *See* United States v. Booker, 543 U.S. 220, 286 (2005) (Stevens, J., dissenting in part); *supra* note 78 and accompanying text.

219 *See* Kate Stith, *Principles, Pragmatism, and Politics: The Evolution of Washington State's Sentencing Guidelines*, 76 L. & CONTEMP. PROBS. 105, 106 (2013) ("In the wake of *Blakely*, Washington state decided to treat *all* exacerbating sentencing factors, including those allowing imposition of an 'exceptional' sentence, as elements of the underlying crime.").

220 *Cf., e.g.*, People v. Lockridge, 870 N.W.2d 502, 506–07 (Mich. 2015) (making the state sentencing guideline system advisory).

221 *See supra* notes 74–81 and accompanying text.

ing state statutes. For Washington's guidelines, the U.S. Supreme Court held back and simply flagged the issue for the state itself to fix. For the federal guidelines, by contrast, the Court basically rewrote the statute itself.

A third method for federal courts to send remedial issues to state courts is through the "certification" process. Forty-five states have adopted a procedure by which federal courts can certify state law questions to the state supreme court.[222] A federal court could use this procedure to request that a state supreme court decide how to fix an unconstitutional statute, for example by expanding it, striking it down, or adopting an avoidance reading. This procedure can even be used by the U.S. Supreme Court. In the 1999 case *Fiore v. White*,[223] the Court certified a question to the Pennsylvania Supreme Court in order to resolve a state law issue on which the federal claim in that case depended.[224] More extensive use of the certification procedure would allow the Supreme Court to send remedial questions to state courts in all cases, not just those that are appealed from a state supreme court. Indeed, without certification the Supreme Court is put in the odd situation that state law issues arising in state litigation can be remanded to state court, but state law issues arising in federal litigation must be resolved in federal court.[225]

To illustrate how certification might work in the judicial amendment context, consider *Obergefell v. Hodges*. In that case the Supreme Court imposed one remedy on every state marriage statute—it expanded them to include same-sex marriage.[226] But some state courts may have preferred to impose other remedies, such as eliminating marriage altogether. For example, the Alabama Supreme Court stated in a *per curiam* opinion that the prohibition on gay marriage was "so important to the general plan and operation of" the state's marriage law that Alabama's entire marriage statute would have to be

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222 *See* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 373 & n.1 (2000).

223 Fiore v. White, 528 U.S. 23 (1999).

224 *Id.* at 25; *see also* Bush v. Gore, 531 U.S. 98, 139 (2000) (Ginsburg, J., dissenting) ("Just last Term, in *Fiore v. White* . . ., we took advantage of Pennsylvania's certification procedure. . . . Instead of resolving the state-law question on which the federal claim depended, we certified the question to the Pennsylvania Supreme Court for that court to 'help determine the proper state-law predicate for our determination of the federal constitutional questions raised.'").

225 *See* Ginsburg, *supra* note 71, at 313 (noting that the Supreme Court imposed its own choice of remedy in a number of cases because "litigation was initiated in a federal forum, thus disposition on remand would not be in the hands of state court judges" (footnote omitted)).

226 Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

struck down if same-sex marriage were constitutionally required.[227] If the Alabama Supreme Court really believed that, then a federal court hearing a constitutional challenge to Alabama's marriage law could certify the remedial question to the Alabama Supreme Court in order to let it impose its chosen remedy.[228] Of course, if a state supreme court selects a remedy that the federal courts find constitutionally insufficient (whether on remand, through certification, or otherwise), the federal courts can step in later to impose an adequate remedy. But state courts should have the first shot at rewriting state statutes to conform them to the Constitution's requirements.

Conclusion

The conventional understanding of judicial review in the United States is that when a statute is held unconstitutional, a court will strike it down. This understanding is incomplete. The truth is that courts remedy constitutional violations by adding language as well. The Supreme Court did so just last term in *Obergefell v. Hodges*, rewriting the marriage statute of every state that had not yet expanded marriage rights to same-sex couples. Yet our theoretical understanding of judicial review has not kept up with the reality of its practice. Courts do not merely "invalidate" statutes; rather, they "amend" statutes through judicial orders. And facing up to this fact forces us to address some uncomfortable truths about the judicial role. Courts have far more discretion over what happens to an unconstitutional statute than is commonly supposed. Once we recognize how much power courts truly exercise when enforcing the Constitution, we can develop doctrinal tools that will limit, rationalize, and legitimize their remedial discretion. But the first step is to acknowledge that this discretion exists.

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227 *Ex Parte* State *ex rel.* Ala. Policy Inst., No. 1140460, 2015 WL 892752, at *28 n.19 (Ala. Mar. 3, 2015) (per curiam).

228 Of course, this assumes that the violation noted in *Obergefell* can be remedied by getting rid of marriage. Some language from the majority opinion seems to suggest that states are constitutionally required to have marriage. *See Obergefell*, 135 S. Ct. at 2598 ("[T]he right to marry is protected by the Constitution.").