Undone: The New Constitutional Challenge to Obamacare

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Introduction

The saga of the Affordable Care Act's individual mandate can be told in three acts.

Act I: *Unprecedented*.[1] In 2010, a sharply-divided Congress required most Americans to purchase insurance. Two years later, in *NFIB v. Sebelius*, a sharply-divided Supreme Court found that Congress lacked the power to enact this *unprecedented* individual mandate pursuant to the Commerce and Necessary and Proper Clauses.[2] However, through a "saving construction," the individual mandate was upheld as an exercise of Congress's taxing power.

Act 2: *Unraveled*.[3] Between 2012 and 2016, congressional Republicans attempted, over and over again, to "repeal and replace Obamacare." So long as President Obama wielded the veto pen, these efforts were doomed to fail. Yet, the attempts to *unravel* the ACA were not limited to Congress. After the first round of litigation failed, conservative groups brought new legal challenges to block the ACA's payment of subsidies. If successful, millions of Americans would no longer be penalized for going uninsured. However, the Supreme Court once again turned away that challenge in *King v. Burwell*.[4]

Act 3: *Undone*. Following the 2016 election, Republicans now controlled the White House, and both Houses of Congress. It soon became apparent that they would be unable to "repeal and replace Obamacare," as promised. However, through the Tax Cuts and Jobs Act of 2017, the GOP was able to accomplish what *NFIB* and *King* did not: eliminate the penalty for going uninsured. Obamacare's core was *undone*. Soon enough, Texas and a host of other states brought a new constitutional challenge to the ACA. Now that the individual mandate no longer raised any revenue, they argued, it could no longer be saved as a tax. Therefore, all of Obamacare must be set aside. The Department of Justice agreed in part, and declined to defend the mandate and other portions of the law. New Jersey and a host of other states intervened to defend the ACA in its entirety. And that litigation proceeds apace.

We are now in the midst of Act 3. No one knows how it will end. This article will explain how it begun.

Part I explains the interaction between the Affordable Care Act's individual mandate and shared responsibility payment. The former imposes a requirement to maintain insurance.[5] The latter penalizes those who do not maintain insurance.[6] Some people are exempt from the mandate, and other people are exempt from the penalty. They are distinct legal requirements. Indeed, Congress found the mandate was "essential" to the operation of the ACA, including its guaranteed issue and community rating provisions.[7] (These two regulations prohibited insurers from denying

[1] *See* JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).
[2] 567 U.S. 519 (2012).
[3] *See* JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER (2016).
[4] 135 S.Ct. 2480 (2016).
[5] 26 U.S.C. § 5000A(a).
[6] 26 U.S.C. § 5000A(b).
[7] 42 U.S.C. § 18091(2)(I)).

coverage, or charging extra, to customers with pre-existing conditions.) Congress did not find the penalty was "essential" in any way.

Part II recounts the "saving construction" in *NFIB v. Sebelius*.[8] Chief Justice Roberts was willing to uphold the individual mandate under Congress's taxing power because the shared responsibility payment complied with three requirements. First, the penalty "is paid into the Treasury by 'taxpayer[s]' when they file their tax returns."[9] Second, "[f]or taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status."[10] Third, "[t]his process" of making the payments, "yields the essential feature of any tax: It produces at least some revenue for the Government."[11] These three *guardrails* are essential to the saving construction.

Part III analyzes the Tax Cuts and Jobs Act of 2017 (TCJA). Starting in 2019, the ACA's shared responsibility payment—that is, the penalty—will be reduced to $0. However, the TCJA did not repeal the individual mandate. Nor did the TJCA rescind Congress's findings that the individual mandate was "essential" to the operation of the ACA. Even without a penalty, the mandate will not be toothless. The Congressional Budget Office (CBO) recognized in 2008 that "[p]ersonal [v]alues and [s]ocial [n]orms," apart from a monetary penalty, also enforce compliance with a requirement to purchase insurance.[12] Indeed, a November 8, 2017 report from CBO and the Joint Committee on Taxation observed that "with no penalty at all, only a small number of people who enroll in insurance because of the mandate under current law would continue to do so solely because of a willingness to comply with the law."[13] The number is no doubt "small," but it is not zero. At bottom, some people who are subject to the mandate, will still comply with the mandate, even though there is no penalty for failing to comply with the mandate.

Part IV explains that following the TCJA, the individual mandate can no longer be saved as a constitutional tax on the uninsured. Specifically, the requirement to purchase insurance will now fall outside the three *guardrails* established by *NFIB*'s saving construction. (1) Starting in 2019, 0% of Americans have to pay a penalty; (2) therefore, taxpayers will not owe *any* penalty when they file their tax returns in 2019; and (3) as a result, the penalty will no longer produce any revenue for the government. Texas's challenge to the constitutionality of the individual mandate is likely to succeed on the merits. Moreover, the Attorney General's decision not to defend the constitutionality of the mandate was reasonable.

Part V turns to the question of severability: if the individual mandate is no longer constitutional, what other provisions of the ACA—if any—must also be set aside? This Part will consider four options. First, the mandate—and only the mandate—should be enjoined. Second, the *entire* ACA should be halted. Third, the mandate, along with the ACA's guaranteed issue and community rating provisions, should be blocked. Fourth, the provision of the Tax Cuts and Jobs Act that reduced the penalty to $0 should be rescinded.

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[8] *NFIB*, 567 U.S. at 563-574.
[9] *Id.* at 563 (citing 26 U.S.C. § 5000A(b)).
[10] *Id.* at 563 (citing §§ 5000A(b)(3), (c)(2), (c)(4)).
[11] *Id.* at 563 (citations omitted).
[12] https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-18-keyissues.pdf at 53 (emphasis added).
[13] https://www.cbo.gov/publication/53300

I. The Affordable Care Act's Individual Mandate and Shared Responsibility Payment

Perhaps the two most popular features of the Patient Protection and Affordable Care Act are provisions known as *guaranteed issue* and *community rating*. Under these health care regulations, insurers (1) are required to issue polices to customers regardless of how sick they were, and (2) cannot charge higher rates because of any pre-existing conditions. These two provisions created perverse incentives: the uninsured could simply wait to buy insurance until it was needed. To counteract such a moral hazard—known as *adverse selection*—the ACA included a "Requirement to maintain minimum essential coverage," codified at 26 U.S.C. § 5000A. This statute has seven subsections—(a) through (g)—which we will consider out of order.

First, § 5000A(a) creates the requirement that has become known as the *individual mandate*: "An applicable individual *shall* for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."[14] As a general matter, starting in 2014, all Americans were required to maintain "minimum essential coverage."[15] Second, § 5000A(f) defines what constitutes "minimum essential coverage"—that is, the minimum level of insurance needed to avoid triggering a violation of the individual mandate.

Congress made express statutory findings about the importance of the mandate as part of its "constitutional" findings.[16] Specifically, Congress concluded that the "individual responsibility requirement," that is the individual mandate, was "*essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."[17] Congress also found that the individual mandate was "*essential* to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs."[18] Chief Justice Roberts cited these findings in his controlling opinion.[19]

However, certain people were not required to maintain "minimum essential coverage." Third, § 5000A(d) *exempts* three classes of people from the individual mandate: (a) those with religious-based conscious objections or members of health care sharing ministries; (b) aliens who

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[14] 26 U.S.C. § 5000A(a) (emphasis added).
[15] *Id.*
[16] 42 U.S.C. § 18091(1) (Congress determined that "the individual responsibility requirement provided for in this section (in this section referred to as the 'requirement')"—that is, the individual mandate in 5000A(a)—is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)."). The findings section was added in order to bolster the government's defense of the individual mandate against any potential constitutional challenge. *See* Josh Blackman, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 49-50 (2013). ("Ultimately, the 2,700-page Affordable Care Act contained three pages of constitutional findings to show that the 'requirement to maintain minimum essential coverage' was constitutional. First, 'the individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce.' Second, the findings listed a number of 'effects on the national and interstate commerce' that resulted from uninsured people shifting costs. Third, the 'findings' stated that 'the requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased [emphasis added].' The word 'activity' would prove decisive. Fourth, 'in United States v. South-Eastern Underwriters Association, the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.'"). Ironically enough, the taxing power was not mentioned anywhere in the findings.
[17] 42 U.S.C. § 18091(2)(I) (emphasis added)
[18] 42 U.S.C. § 18091(2)(F) (emphasis added)
[19] *See NFIB*, 567 U.S. at 547 (citing 42 U.S.C. § 18091(2)(F)); *id.* at 556 (citing 42 U.S.C. § 18091(2)(I)).

were not lawfully present; and (c) those who were incarcerated.[20] These three categories of people were not "applicable individual[s]" for purposes of § 5000A(a), and thus were not subject to the laws' requirement to maintain "minimum essential coverage." Yet, Congress still found the mandate "*essential* to creating effective health insurance markets" even though these individuals would be exempted from the requirement to maintain qualified insurance.

Fourth, Congress codified at 26 U.S.C. § 5000A(b) the shared responsibility payment: "if a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) for 1 or more months"—that is, maintain minimum essential coverage—"then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty." That is, an individual who is not exempt from the penalty (under subsection (e)) and who fails to obtain qualified insurance would have to pay the penalty. Fifth, § 5000A(c) provided the formula to calculate the "amount of [the] penalty" based on a taxpayer's income. Sixth, § 5000A(g) spells out the "administration and procedure" of how the penalty is to be collected.

However, certain classes of people are exempted from the penalty. Seventh, in 26 U.S.C. § 5000A(e) Congress excused five categories of people from having to pay the shared responsibility payment. That is, "no penalty shall be imposed" for (1) individuals who cannot afford coverage, (2) taxpayers with income below the filing threshold, (3) members of Indian tribes, (4) people with short gaps in coverage, and (5) those who have "suffered a hardship" as defined by the Secretary. The penalty-exemptions in § 5000A(e) are *different* from the mandate-exemptions in § 5000A(d). Individuals covered by § 5000A(e) are *still* subject to mandate, but are exempt from the penalty. In *NFIB v. Sebelius*, Chief Justice Roberts observed that that the "shared responsibility payment . . . does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code."[21] That is, taxpayers who qualify for the exemption in § 5000A(e)(2), but who are *still* subject to the mandate.

As a general matter, most people are subject to the mandate *and* the penalty. Some people are subject to the mandate, *but* are exempted from the penalty (§ 5000A(e)). And some people are subject to *neither* the mandate, nor the penalty (§ 5000A(d)).Though, it is impossible to be subject to the penalty, but not be subject to the mandate. Congress made explicit findings about why the mandate was "essential" to the operation of the health care markets. However, Congress made no findings that the shared responsibility payment was "essential," to the ACA.[22] Indeed, the statutory findings make no express reference to the penalty at all.

The only conceivable reference to the shared responsibility in the congressional findings is the following sentence: "By significantly increasing health insurance coverage, the [individual mandate] requirement, *together with the other provisions of this Act*, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums."[23] The mandate, working "together" with the penalty, would no doubt reduce adverse selection and broaden risk pools. However, in the very next sentence, Congress focused on the mandate, and the mandate alone, as being "*essential* to creating effective health insurance markets."[24] The mandate is a necessary condition for the operation of the ACA; the penalty would make the ACA operate more effectively. The mandate, in conjunction with the

[20] 26 U.S.C. § 5000A(d).
[21] *NFIB*, 567 U.S. at 563.
[22] In addition, "none of these official findings alluded to the tax power of Congress." Unprecedented, *supra* note __ at 50.
[23] 42 U.S.C. § 18091(2)(I) (emphasis added).
[24] *Id.* (emphasis added)

penalty, is no doubt *more* effective. But the mandate, minus the penalty, still has *some* effectiveness.

II. The Constitutionality of the Individual Mandate in *NFIB v. Sebelius*

NFIB v. Sebelius considered the constitutionality of the Affordable Care Act's individual mandate, codified at 26 U.S.C. § 5000A.[25] The Court divided sharply. Justices Scalia, Kennedy, Thomas, and Alito concluded that Congress lacked the power to enact the Affordable Care Act's individual mandate under the Commerce and Necessary and Proper Clauses.[26] Nor would the conservative quartet uphold the individual mandate as an exercise of Congress's taxing power.[27] However, Justices Ginsburg, Breyer, Sotomayor, and Kagan determined that Congress had the power to enact the individual mandate under the Commerce and Necessary and Proper Clauses.[28] The progressive quartet also found that "minimum coverage provision is a proper exercise of Congress' taxing power."[29]

Chief Justice Roberts agreed with both groups—sort of. Part III of his controlling opinion split the difference. In Part III.A.1 the Chief Justice found that the individual mandate "cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'"[30] In Part III.A.2, the Chief Justice concluded that the mandate cannot be "upheld as a 'necessary and proper' component of the insurance reforms."[31] That is, Congress could not mandate that people purchase insurance in order to implement guaranteed issue and community rating provisions—the guards against adverse selection. However, "[t]hat [was] not the end of the matter."[32]

In Part III.B, the Chief Justice considered if "the mandate may be upheld as within Congress's enumerated power to 'lay and collect Taxes.'"[33] He posited that "if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax."[34] Yet, he rejected that conclusion:"[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance."[35] Therefore the shared responsibility payment was not a tax. Still, that observation was not the end of the matter.

In Part III.C., the Chief Justice developed the so-called "saving construction."[36] He explained that "[t]he exaction the Affordable Care Act imposes on those without health insurance"—that is, the penalty that was not actually a tax—"looks like a tax in many respects."[37] The Chief Justice then listed three *guardrails* in which the "exaction"—that is, the shared responsibility payment—can be construed as a tax. First, "[t]he '[s]hared responsibility payment,'

[25] 567 U.S. 519 (2012).
[26] *Id.* at 650-660 (Joint Concurrence).
[27] *Id.* at 661-669 (Joint Dissent).
[28] *Id.* at 599-605, 618-619 (Ginsburg, J., dissenting).
[29] *Id.* at 589 (Ginsburg, J., concurring).
[30] *Id.* at 548-558.
[31] *Id.* at 558-561.
[32] *Id.* at 561.
[33] *Id.* at 561-563.
[34] *Id.* at 563.
[35] *Id.* at 562.
[36] *Id.* at 563-574.
[37] *Id.* at 563.

as the statute entitles it, is paid into the Treasury by 'taxpayer[s]' when they file their tax returns."[38] Second, "[f]or taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status."[39] Third, "[t]his process" of making the payments, "yields the essential feature of any tax: It produces at least some revenue for the Government. . . . Indeed, the payment is expected to raise about $4 billion per year by 2017."[40] These three guardrails are essential to the saving construction.

Finally, the controlling opinion acknowledged that the shared responsibility payment can be still be saved as a tax, despite the fact that is was primarily designed to "affect individual conduct," not to raise revenue.[41] However, that design cannot be achieved unless, in the first instance, the payment can be saved as a tax. Why? All of the exactions cited by the Chief Justice raised revenue *as the means* to "affect individual conduct."[42] In other words, people modified their conduct to *avoid* having to pay extra money to the government. For example, "federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking."[43] Some people will quit smoking to avoid having to pay the taxes, but even those who continue smoking will pay the tax. But Congress must have the power to enact the exaction in the first place.

Critically, Justice Ginsburg, as well as Justices Breyer, Sotomayor, and Kagan joined Part "III–C of THE CHIEF JUSTICE's opinion."[44] As a result, there were five votes for the proposition that the individual mandate could be upheld as an exercise of Congress's taxing power.

III. The Affordable Care Act of 2010 after the Tax Cuts and Jobs Act of 2017

Almost immediately after the Supreme Court upheld the individual mandate, Republicans promised to "Repeal and Replace Obamacare."[45] Over the next four years, congressional Republicans would vote more than fifty times to repeal the Affordable Care Act.[46] However, those votes were destined to fail: President Obama would veto any effort to dismantle his signature health care legislation. Following the 2016 presidential election, that threat would vanish. Throughout 2017, House Republicans passed several bills to reform the Affordable Care Act, but none of those measures could pass the Senate. Finally, in December 2017, both Houses of Congress approved the Tax Cuts and Jobs Act of 2017 (TCJA). Critically, Section 11081 of TCJA reduced the ACA's shared responsibility payment to $0, starting in 2019. This section will consider how the TCJA affected the ACA, and why the individual mandate still plays an important role in reducing adverse section.

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[38] *Id.* at 563 (citing 26 U.S.C. § 5000A(b)).
[39] *Id.* at 563 (citing §§ 5000A(b)(3), (c)(2), (c)(4)).
[40] *Id.* at 563 (citations omitted).
[41] *Id.* at 567.
[42] *See id.*
[43] *Id.*
[44] *Id.*at 589 (Ginsburg, J., concurring).
[45] *See* Josh Blackman, Unraveled: Obamacare, Religious Liberty, and Executive Power 78-81 (2016).
[46] Sahil Kapur, *GOP House Votes to Delay Obamacare Mandate, Which Wouldn't Do Much Now*, Talking Points Memo (Mar. 5, 2014), http://perma.cc/66R9-SB3S.

A. Reducing the Shared Responsibility Payment To $0

In December 2017, Congress enacted, and the President signed into law, the Tax Cuts and Jobs Act of 2017 (TJCA). Section 11081 of TCJA was titled "elimination of shared responsibility payment for individuals failing to maintain minimum essential coverage." It provides, in its entirety:

> (a) In General.—Section 5000A(c) is amended—
> (1) in paragraph (2)(B)(iii), by striking "2.5 percent" and inserting "Zero percent", and
> (2) in paragraph (3)—
> (A) by striking "$695" in subparagraph (A) and inserting "$0", and
> (B) by striking subparagraph (D).
> (b) Effective Date.—The amendments made by this section shall apply to months beginning after December 31, 2018.

Section 11081(a) of the TCJA modified § 5000A(c) of the Affordable Care Act, which established the shared responsibility payment. Recall that § 5000A(c) calculated the penalty in two different ways. First, starting in 2015, the ACA set the penalty at "2.5 percent" of a taxpayer's income (subject to a complicated formula that is not relevant here).[47] Second, the ACA set the penalty at a flat rate, generally $695 per year. The TCJA modified both of these approaches: "2.5 percentage" was changed to "Zero percent," and the flat-rate "$695" penalty was set to $0. These changes would go into effect in January 2019.

What exactly did §11081 of TCJA accomplish? To be precise, Congress did not repeal the shared responsibility payment. The statutory framework to calculate and collect that penalty still exists. At the present moment, no one will face a liability greater than $0; therefore, the existence of the shared responsibility payment is something of a non-sequitur. Congress, of course, retains the power to increase the penalty in the future.

Did § 11081 of TCJA repeal the individual mandate? No. And it couldn't have. Throughout 2017, congressional Republicans continued to promise—as they had for the past 7 years—to "repeal and replace Obamacare." This promise was illusory. Certain budgetary portions of the ACA were enacted in 2010 through the Budget Reconciliation process. That is, those provisions were not subject to the filibuster in the Senate; they did not need to clear the sixty-vote threshold. The shared responsibility payment—which established the amount of the penalty—was one such provision. However, the individual mandate—not a budgetary provision—was not subject to the Budget Reconciliation process. As a result, the individual mandate could *only* be repealed with a filibuster-proof majority.

Likewise, Congress did not repeal its finding that the mandate was "essential" to ACA's guaranteed issue and community rating provisions.[48] It couldn't have done so under the "rules of proceeding," for such a vote would have had to be held outside the budget reconciliation process. These findings, therefore, remain intact. In contrast, the shared responsibility payment *could* be modified pursuant to the budget reconciliation process. And that is *all* that §11081 of TCJA accomplished.

[47] § 5000A(c)(2)(B)(iii).
[48] 42 U.S.C. § 18091(2)(I)

B. The Individual Mandate Still Plays a Social Function to Reduce Adverse Selection

Starting in 2019, the shared responsibility payment will be reduced to $0. Yet, the individual mandate will still play a role in the Affordable Care Act's regulation of health care markets. Though weakened, the individual mandate standing by itself is not toothless. This fact was understood at the time the ACA was enacted. In 2008, the Congressional Budget Office (CBO) compiled a detailed, 196-page report that assessed various health insurance reform proposals.[49] Chapter two, in particular, considered the efficacy of state-level health insurance mandates. CBO demonstrated that monetary penalties were an effective means to enforce compliance with a requirement to purchase insurance.[50] CBO also considered how "[p]ersonal [v]alues and [s]ocial [n]orms," apart from a monetary penalty, also enforce compliance with a requirement to purchase insurance.[51] CBO recognized that "compliance" with the mandate "is generally observed, even when there is little or *no enforcement of mandates*."[52]

Why would a person comply with a legal mandate that is not enforced? CBO observed that "[c]ompliance, then, is probably affected by an individual's personal values and by social norms."[53] For example, "[m]any individuals and employers would comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws."[54] Others may comply based on "perceptions of fairness," if they believe the "mandate is fair and is consistently enforced."[55] Still others may comply based on their "perceptions of how others will act."[56] That is, "many people want to take the popular—as well as the moral—course of action."[57]

At bottom, some people who are subject to the mandate, will still comply with the mandate, even though there is no penalty for failing to comply with the mandate. According to a November 8, 2017 report from CBO and the Joint Committee on Taxation, observed that "with no penalty at all, only a small number of people who enroll in insurance because of the mandate under current law would continue to do so solely because of a willingness to comply with the law."[58] The number is no doubt "small," but it is not zero. No matter how small this class is, such virtuous individuals do exist. Therefore, a certain number of individuals are *still* affected by a penalty-less mandate. The mandate still has force, even if no penalty accompanies it.

CBO attempted to quantify this number in a November 16, 2017 report.[59] Professor Timothy Jost observed that "the repeal of the mandate would reduce federal expenditures over ten years by $338 billion," however, the "repeal of the penalty in the tax bill would reduce expenditures by *only* $318 billion."[60] What makes up for that $20 billion differential? The fact that some people would *still* adhere to the mandate, even if the penalty was $0. In other words, Professor Jost wrote, "as long as the requirement [that is, the mandate] remained in the law, some

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[49] https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-18-keyissues.pdf
[50] *Id.* at 50-53.
[51] *Id.* at 53 (emphasis added).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 53-54.
[56] *Id.* at 54.
[57] *Id.*
[58] https://www.cbo.gov/publication/53300
[59] https://www.cbo.gov/publication/53348
[60] https://www.healthaffairs.org/do/10.1377/hblog20171220.323429/full/ (emphasis).

individuals would continue to purchase individual coverage because it was legally required, even if the penalty was repealed." Professor Jonathan Adler described the CBO report in this fashion: "the practical consequence of eliminating the tax penalty is *substantially* the same as erasing the mandate altogether."[61] The key word is "substantially." It's not exactly the same. And CBO measured that distinction to the tune of $20 billion. This is a weak mandate, for sure, but not a *rump* mandate.

Beyond the requirement of social norms, the ACA still imposes obligations on those who fail to maintain minimum essential coverage. Line 61 of 2017 IRS Form 1040 asks an individual if he had minimum essential coverage for all twelve months of the year.[62] If the taxpayer checks "yes," there is no need to calculate the penalty. If the box is not checked, the taxpayer must complete Form 8965.[63] This Form asks whether the taxpayer is subject to an exemption. As explained by the instructions, Form 8965 does not appear to distinguish between exemptions from the mandate under § 5000A(d) and exemptions from the penalty under § 5000A(e).[64] Starting in 2019, at least some people may *still* apply for exemptions from the mandate and from the penalty.

It is possible that Line 61 can be abolished altogether. There is no indication yet whether these forms will be amended in 2018. Though, there is reason to suspect that the IRS may still request information about individual coverage, even if there is no penalty associated with it: individual tax returns can be used to verify whether information provided by employers is accurate (through forms 1095-A and 1095-B).[65] That is, if an employer reports that it provided insurance to an employee, pursuant to 26 U.S.C. § 6055, but the employee reports that he is uninsured, there is a conflict. If in fact the employer submitted false information, the individual return will make it easier for the government to impose the employer mandate penalty.

Finally, under Congress's original plan, certain classes of people were subject to the mandate, but were not subject to the penalty: (1) individuals who could not afford coverage, (2) taxpayers with income below the filing threshold, (3) members of Indian tribes, (4) people with short gaps in coverage, and (5) those who have "suffered a hardship" as defined by the Secretary.[66] Such individuals were *never* subject to the penalty, but were *always* subject to the mandate. For this category, the TCJA had no impact on their decision whether to comply with the mandate, or not. To the extent that some of these individuals complied with the mandate before the TCJA, that group would still be confronted with the same choice.

Even though the penalty is set to $0, the individual mandate still plays an important social function to reduce adverse selection, and plays a role in the operation of employer-based coverage. Far from toothless, the mandate still has some bite.

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[61] http://reason.com/volokh/2018/06/11/the-clever-red-state-lawsuit-against-the (emphasis added).
[62] https://www.irs.gov/pub/irs-pdf/f1040.pdf
[63] https://www.irs.gov/pub/irs-pdf/f8965.pdf
[64] https://www.irs.gov/pub/irs-pdf/i8965.pdf
[65] https://www.irs.gov/pub/irs-pdf/f1095a.pdf https://www.irs.gov/pub/irs-pdf/f1095b.pdf
[66] 26 U.S.C. § 5000A(e)

IV. After the TJCA, the Individual Mandate Can No Longer Be Saved as a Constitutional Tax

From June 2012 through December 2017, the contours of *NFIB*'s "saving construction" remained largely an academic curiosity.[67] No longer. In February 2018—two months after the tax reform was signed into law—Texas and eighteen other states challenged the constitutionality of the Affordable Care Act's individual mandate.[68] The states alleged that because the TCJA zeroed out the ACA's penalty, Chief Justice Roberts's saving construction no longer holds. As a result, the individual mandate—which was *not* repealed—must be declared unconstitutional. And, because the mandate cannot be severed from the remainder of the statute, the entire ACA must fall. Alternatively, the states argued, the individual mandate should be set aside along with the guaranteed-issue and community-rating provisions.

With respect to the individual mandate, Texas is correct. After the TCJA, the individual mandate can no longer be *saved*. Specifically, the requirement to purchase insurance will fall outside the three *guardrails* established by *NFIB*'s saving construction. Texas is likely to succeed on the merits. Moreover, the Attorney General's decision not to defend the constitutionality of the mandate was reasonable. Part V will consider the question of whether other provisions of the ACA can be severed from the unconstitutional individual mandate.

A. The Individual Mandate Will Fall Outside *NFIB's* Three Guardrails

Under his saving construction, Chief Justice Roberts's was willing to construe § 5000A as imposing a tax on the uninsured, in light of three *guardrails*. In 2019, following the implementation of TCJA, the constitutionality of the individual mandate will have to be reassessed in light of this troika. First, will "[t]he '[s]hared responsibility payment,' as the statute entitles it, [*still* be] paid into the Treasury by 'taxpayer[s]' when they file their tax returns"?[69] Second, "[f]or taxpayers who do owe the payment," is the amount of the penalty *still* "determined by such familiar factors as taxable income, number of dependents, and joint filing status"?[70] Third, does the "process" of making the payments *still* "produce[] at least some revenue for the Government"?[71]

It is simple enough to answer each question *no*. (1) Starting in 2019, 0% of Americans have to pay a penalty; (2) therefore, taxpayers will not owe *any* penalty when they file their tax returns in 2019; and (3) as a result, the penalty will no longer produce any revenue for the government. This simple analysis, however, is complicated by an inconvenient truth: many Americans do not pay their tax bills on time, if ever. It is possible, indeed probable, that some taxpayers will defer the payment of shared responsibility payments assessed in 2018 until 2019, 2020, or even later. Moreover, the IRS can collect unpaid penalties on those late payments for years to come. And this theory is not limited to penalties assessed in 2018. Any penalty assessed from 2014 through 2018 could remain outstanding *in perpetuity*. Under this theory, every repealed tax—not just the ACA—could produce at least some revenue for the Government *indefinitely*.

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[67] *See* Josh Blackman, *The Saving Construction at Five Years*, 11 U. St. Thomas J.L. & Pub. Pol'y 72 (2017).

[68] https://www.texasattorneygeneral.gov/files/epress/Texas_Wisconsin_et_al_v._U.S._et_al_-_ACA_Complaint_(02-26-18).pdf

[69] *Id.* at 563 (citing 26 U.S.C. § 5000A(b)).

[70] *Id.* at 563 (citing §§ 5000A(b)(3), (c)(2), (c)(4)).

[71] *Id.* at 563 (citations omitted).

As a bookkeeping matter, this approach makes intuitive sense. For example, if the CBO attempts to forecast revenue that may be generated from a soon-to-be-repealed tax, it could consider how payments would be deferred years into the future.[72] However, Chief Justice Roberts's saving construction was not a mere accounting exercise. Rather, he established guidelines in which an unconstitutional penalty can be *saved* as a constitutional tax. The opinion should be understood for what it was: a constitutional framework based on certain reasonable assumptions, and not an intricate balance sheet.

Consider a pragmatic illustration of this dynamic: the saving construction was mathematically flawed from the outset. The third guardrail requires that the payments will "produce[] at least some revenue for the Government."[73] After all, the Chief Justice noted that "the payment is expected to raise about $4 billion per year by 2017."[74] However, it could have raised $0. How? If all Americans who were subject to the mandate and the penalty obtained qualifying insurance, 0% of Americans would have to pay the penalty. This hypothetical is fanciful, as no such health care utopia could ever exist. The saving construction is best understood to be premised on a simple presumption: some people who are subject to the mandate and penalty will pay that penalty when they file their tax returns. If we disregard this presumption—that is, *no one* would be have to pay the Shared Responsibility Payment due to 100% compliance—then the saving construction would have prematurely toppled.

Another far more important presumption undergirds *NFIB*'s controlling opinion: the relevant timeframe is the year in which the penalty is assessed, and more likely than not, paid. Each of the three guardrails supports this presumption.

The first guardrail considered whether the "shared responsibility" is "paid into the Treasury by 'taxpayer[s]' *when they file their tax returns*."[75] The opinion presumed that the payment is made *at the same time* as the filing of the tax return. It is a fair reading of Chief Justice Roberts's opinion that he did not have in mind a situation where the payments are made at a *different time* than the filing of the tax return—perhaps even years later.

This presumption is bolstered by the federal government's representation to the Court. The Solicitor General explained that "'[i]f [those subject to the Act] pay the tax penalty, they're in compliance with the law.'"[76] The failure of a person to timely pay her taxes means she is not "in compliance with the law." Furthermore, the Affordable Care Act is somewhat unique in that the government cannot use traditional collection devices, like a notice of lien or a levy.[77] As a general matter, penalties that are due can only be deducted from a tax refund. If taxpayers who owe the penalty from 2018 are *never* due a refund, the government will *never* collect the penalty.

Chief Justice Roberts's decision hinged on this important representation. He explained that that "the only consequence" if "an individual does not maintain health insurance" is "that he must

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[72] https://www.cbo.gov/publication/21993 at 71 (noting that some "individuals will try to avoid making payments.").
[73] *Id.* at 563 (citations omitted).
[74] *Id.* at 564.
[75] *NFIB*, 567 U.S. at 563 (emphasis added). *See also id.* at 665 (Joint Dissent) ("In the face of all these indications of a regulatory requirement accompanied by a penalty, the Solicitor General assures us that 'neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation,' and that '[i]f [those subject to the Act] *pay the tax penalty, they're in compliance with the law*.") (emphasis added).
[76] *Id.* at 665 (Joint Dissent) (quoting Tr. of Oral Arg. 50 (Mar. 26, 2012)).
[77] 26 U.S.C. § 5000A(g). *See* https://www.irs.gov/pub/irs-pdf/p594.pdf at 5 ("However by law, there will be no filing of the Notice of Federal Tax Lien and no levies issued to collect an individual shared responsibility payment associated with the Affordable Care Act.").

make an additional payment to the IRS is when he pays his taxes."[78] The crux of this analysis is that the shared responsibility payment was "in effect just a tax hike on certain taxpayers who do not have health insurance."[79] The focus, in all regards, is the year in which the tax is assessed, and presumably payed.

The second guardrail referenced the fairly complicated formula used to calculate the penalty in § 5000A(b)(3). That provision turns on whether a taxpayer lacks qualified insurance "for any month" in a "taxable year."[80] Once again, the controlling opinion focuses on the timeframe when the tax is assessed. In 2019, and beyond, this inquiry becomes irrelevant.

The third guardrail likewise supports *NFIB*'s rule against perpetual payments. Chief Justice Roberts wrote that the collection "process yields the essential feature of any tax: It produces at least some revenue for the Government." And that "process" is premised on *how* the payment is "assess[ed] and collect[ed]," not *when* (if ever) it is ultimately paid. No tax has perfect enforcement rates. In his opinion, Roberts cited a CBO report which forecasted that "the payment is expected to raise about $4 billion per year by 2017."[81] He did not consider revenue that would trickle into perpetuity based on late-filing taxpayers. Simply stated, the Court's opinion was not premised on the deferral of payments. The fact that some people may *never* pay the penalty is not enough to save the mandate.

Starting in 2019, none of the guardrails identified by the Chief Justice will be satisfied. Therefore, the predicate of Part III.C of the controlling opinion in *NFIB* is no longer relevant. Or, to put it differently, Part III.C. has now been *severed* from the opinion. At the conclusion of Part III.D, the Chief Justice succinctly explains why the saving construction can no longer hold:

> The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.[82]

Starting in 2019, Section 5000A can no longer "reasonably be read as a tax." Therefore, Section 5000A will be "unconstitutional" because it "read[s] as a command." At that point, we are left with "[t]he most straightforward reading of the mandate . . . [which] commands individuals to purchase insurance."

Finally, the mandate—even without a penalty—still imposes a legal requirement to purchase insurance. Section 5000A(a) provides that "[a]n applicable individual *shall* for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."[83] The most important word in that provision is *shall*: "[t]he plaintiffs contend that Congress's choice of language—stating that individuals '*shall*' obtain insurance or pay a 'penalty'—requires reading § 5000A as punishing unlawful conduct, even if that interpretation would render the law unconstitutional."[84] Chief Justice Roberts rejected this argument for purposes of his saving

[78] *Id.* at 562-653.
[79] *Id.* at 563.
[80] 26 U.S.C. § 5000A(b)(3).
[81] *Id.* at 564 (citing Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act (rev. Apr. 30, 2010), in Selected CBO Publications Related to Health Care Legislation, 2009–2010, p. 71 (2010)).
[82] *Id.* at 575.
[83] 26 U.S.C. § 5000A(a) (emphasis added).
[84] *NFIB*, 567 U.S. at 568.

construction. Like in *New York v. United States*, the Court could "sustain[] the charge paid to the Federal Government as an exercise of the taxing power."[85]

However, that position only worked for purposes of the saving construction. Chief Justice Roberts reached the *exact opposite* result in Part III.B of the opinion, which focused on the Commerce and Necessary and Proper Clauses. He stated:

> The *most straightforward reading* of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals "*shall*" maintain health insurance. 26 U.S.C. § 5000A(a). Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power.[86]

Now that the penalty has been zeroed out, and the saving construction cannot hold, we are left with "[t]he *most straightforward reading* of the mandate."[87] What is that reading? Section 5000A "commands individuals to purchase insurance."[88] And Congress lacks the power to issue such a command pursuant to its powers under the Commerce and Necessary and Proper Clauses. Even if the penalty is $0. Under the most straightforward reading of *NFIB*, the individual mandate can no longer survive constitutional review.

B. The Attorney General's Decision Not to Defend the Constitutionality of the Individual Mandate

In response to Texas's challenge to the Affordable Care Act, the Attorney General announced that he would not defend the constitutionality of the individual mandate. Specifically, he informed Congress that the Department of Justice would "not defend the constitutionality of 26 U.S.C. 5000A(a)."[89] (Part V.C.3, *infra*, will discuss the Attorney General's decision concerning severability.)

This was not the first time that Attorney General Sessions has publicly made a decision regarding the constitutionality of a government policy.[90] First, in September 2017, he determined that President Obama's Deferred Action for Childhood Arrivals policy, known as DACA, was unconstitutional.[91] Attorney General Sessions explained that DACA was implemented "without proper statutory authority" and that this "open-ended circumvention of immigration laws" was "an unconstitutional exercise of authority by the Executive Branch."[92] He reaffirmed his "duty to defend the Constitution and to faithfully execute the laws passed by Congress."[93] Critically, he made this decision without the benefit of a decision from the Supreme Court, or any court from that matter, that DACA was unlawful. His analysis only reasoned by analogy from the 5th Circuit's decision in *U.S. v. Texas*, which found unlawful (but not unconstitutional) the related Deferred

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[85] *Id.* at 568-69 (citing New York, 505 U.S. at 152-53)).
[86] *Id.* at 562 (emphasis added).
[87] *Id.*
[88] *Id.*
[89] https://www.justice.gov/file/1069806/download
[90] https://www.nationalreview.com/2017/10/obamacare-immigration-trump-attorney-general-jeff-sessions-lawmaking-power-from-executive-to-congress/
[91] https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca
[92] *Id.*
[93] *Id.*

Action for Parental of Americans and Lawful Permanent Residents (DAPA policy).[94] Attorney General Sessions also disregarded—but did not withdraw—a 2014 opinion from the Office of Legal Counsel (OLC), which concluded that DACA was consistent with Article II's duty to faithfully execute the laws.[95]

Second, in October 2017, Attorney General Sessions determined that the Affordable Care Act "does not appropriate funds" for certain subsidies.[96] He acknowledged that his predecessor had defended the payments, but "concluded that the best interpretation of the law is that the permanent appropriation" cannot be used to fund the subsidies.[97] This decision that the payments were unconstitutional was supported by the District Court's decision in *House of Representatives v. Burwell*, though at the time, the D.C. Circuit had not yet opined.[98]

Third, in January 2018, Attorney General Sessions rescinded the so-called Cole Memorandum. That policy concerned marijuana enforcement in states that decriminalized the controlled substance.[99] The memorandum itself makes no mention of the Constitution. Though, my colleague Randy Barnett observed in the *Wall Street Journal*, "by establishing what amounted to sanctuary status for legal-marijuana states, the Cole memorandum seemed to flout the president's constitutional obligation to 'take care that the laws be faithfully executed.'"[100] He's right.

Each of these three decisions were internal, and in no way affected laws enacted by Congress. Moreover, these decisions reflect a dynamic known as "departmentalism," in which each department of government, can interpret the Constitution within its own spheres.[101] Here, the executive branch determined that an executive action, taken by its predecessor, was unconstitutional. Critically, the Attorney General did so without the benefit of a definitive court decision, let alone one from the Supreme Court.

The Attorney General's decision not to defend the individual mandate, however, is different, because it directly implicated the failure to defend a law enacted by Congress. He did not simply reverse an executive action taken by his predecessor.[102] Rather, he failed to defend the supreme law of the land.

As a result, the Attorney General notified Congress that he would not defend the mandate's constitutionality. Section 530D requires such a report when the Department of Justice has "determine[d] to refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law."[103]

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[94] Texas v. United States, 809 F.3d 134 (5th Cir. 2015). For an argument that DAPA was unconstitutional, *see* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 Texas Review of Law & Politics 215 (2015).

[95] https://www.justice.gov/file/179206/download. For a critique of this opinion, *see* Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 Georgetown Law Journal Online 96 (2015).

[96] https://kslawemail.com/128/3779/uploads/cost-sharing-pdf-5-(ag-letter).pdf

[97] *Id.*

[98] *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016).

[99] https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement

[100] https://www.wsj.com/articles/on-legal-weed-let-states-tend-their-own-gardens-1528652158

[101] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2884832

[102] *See* Josh Blackman, *Presidential Maladministration*, 2018 Illinois Law Review 397 (2018) (discussing presidential reversals).

[103] 28 U.S.C. § 530D(a)(B)(ii).

Without question, the Department of Justice could have made non-frivolous arguments to defend the individual mandate. But it did not. Attorney General Sessions explained in his report to Congress that "not every professionally responsible argument is necessarily reasonable in this context, as 'different cases can raise very different issues with respect to statutes of doubtful constitutional validity,' and thus there are 'a variety of factors that bear on whether the Department will defend the constitutionality of a statute.'" To reach this conclusion, he relied on a letter Assistant Attorney General Andrew Fois wrote to Senator Orrin Hatch in 1996.[104]

Attorney General Sessions identified three factors why he concluded that "Section 5000A(a) will be unconstitutional when the Jobs Act's amendment becomes effective in 2019." First, he wrote that because "Section 5000A(a) will produce no revenue for the Government," then "the *NFIB* Court's saving construction will no longer be available." This position tracks the analysis in Part IV.A, *supra*.

Second, he stated that his decision "adheres to the Department's longstanding respect for comity between the three branches of government." Why? He wrote that Congress repealed the penalty with full awareness of the saving construction's limits. In other words, Congress knew that zeroing out the penalty would render the mandate unconstitutional; and it did so anyway. I doubt that many Republicans cast their vote for the tax bill with Chief Justice Roberts's opinion in mind, but this is a reasonable presumption.

Third, the Attorney General wrote that "the Department's decision not to defend Section 5000A(a)'s constitutionality will not prevent the court in *Texas v. United States* from resolving the question, given the posture of the case." After Texas filed its complaint, the New Jersey Attorney General to provide a vigorous defense of the individual mandate.

These reasons are all valid, but they do not directly address why a defense of the mandate would be "professionally responsible," but not "necessarily reasonable in this context." I find the Attorney General's explication of his own constitutional authority lacking, much like I did with his letter concerning the rescission of DACA.[105] Allow me to bridge the gap. On June 28, 2012, then-Senator Sessions issued a press release criticizing the Court's just-released decision in *NFIB v. Sebelius*:

> For the Court to affirm the mandate portion of the law, it was forced to reject the President's and the then-majority Democratic Congress' contention that the mandate was not a tax. Under this ruling, the big spenders have once again succeeded in surreptitiously imposing a tax on the American people while pretending they are not. The problem is that the mandate remains a mandate. It remains a demand that Americans purchase a product they do not wish to purchase. I do not believe the central government possesses such a broad power. . . . The majority redefines a provision of the law that declares a mandate to be a tax. I am very troubled by this. Scholars will give great thought to what the Court has done and I am afraid it will be concluded that this is a *legal sleight of hand rather than a principled decision*. The question has to be asked to what extent all government mandates and demands can just be referred to as a tax, thus unleashing the power of the central government to dictate individual Americans' private, everyday decisions.[106]

This release expressed what quickly became an article of faith for right-of-center attorneys: the Chief Justices' saving construction was "a legal sleight of hand rather than a principled decision."[107] I suspect when Senator Sessions became Attorney General Sessions, he did not

[104] http://journaloflaw.us/1 Pub. L. Misc./1-1/JoL1-1, PLM1-1, Fois to Hatch 1996.pdf
[105] https://www.lawfareblog.com/understanding-sessionss-justification-rescind-daca
[106] http://bit.ly/2vGgwM9 (emphasis added).
[107] https://votesmart.org/public-statement/712059/sessions-comments-on-supreme-court-health-care-ruling-calls-for-laws-repeal#.W3D9SJM3nwd

abandon this position. Straining to construe the facts such that the mandate *still* falls within the saving construction is no doubt "professionally responsible," but is not "necessarily reasonable in this context" because of the Attorney General's opinion about the mandate's underlying constitutionality. The Attorney General's independent judgment about the Constitution, absent a definitive answer from the courts, undergirded his position on the mandate, much like it did his positions on DACA, the ACA subsidies, and the Cole Memorandum. I don't doubt that Sessions's policy views on immigration, Obamacare, and marijuana informed these decisions. But as Attorney General, he has the authority to issue such constitutional judgments. And that judgment was reasonable.

V. Severing the Unconstitutional Individual Mandate from the Affordable Care Act

Following the enactment of the Tax Cuts and Jobs Act of 2017, the individual mandate can no longer be saved by *NFIB v. Sebelius*. That much is fairly straightforward. There is a far more pressing question: what is the remedy for this constitutional violation? This Part will consider four options. First, the mandate—and only the mandate—should be enjoined. Second, the *entire* ACA should be halted. Third, the mandate, along with the ACA's guaranteed issue and community rating provisions, should be blocked. Fourth, the provision of the Tax Cuts and Jobs Act that reduced the penalty to $0 should be rescinded.

A. Option 1: Enjoin the Individual Mandate

Without question, if the individual mandate is no longer constitutional, courts should halt its enforcement. However, such a judicial declaration would have minimal effect. Starting in 2019, no penalty will be imposed for violating the mandate. Therefore, for most Americans, such a declaration would be meaningless. However, such a judicial declaration would have an impact on the group of people who are motivated to follow the mandate based on "personal values and by social norms."[108]

Additionally, such a declaration would have a salutary effect on the rule of law. The saving construction has been widely ridiculed as a means to an end: a way to avoid striking down the ACA in an election year without setting any longstanding precedents. The proverbial ticket-for-one ride. Maybe this ridicule is not deserved. Maybe the saving construction—with its three guardrails—is in fact a neutral principle of law. If the Court declares that the mandate is now unconstitutional, because that neutral principle was violated, *NFIB* will be understood in an entirely new, and far more positive light.

Moreover, a declaration that the individual mandate could no longer be saved would, by necessity, cast the decisive fifth vote for *NFIB's* analysis concerning the Commerce and Necessary and Proper Clauses. (Arguably, now, this section is dicta.) This decision would not only be symbolic: it would reaffirm the system of enumerated powers that undergirds our separation of powers.

I close this section with a constitutional riddle. In 2018, the individual mandate was constitutional because the shared responsibility payment was greater than $0. In 2019, the

[108] *See supra* Part III.B.

individual mandate will be unconstitutional because the shared responsibility payment will drop to $0. But what if Congress, in 2020 or later, increases the shared responsibility payment above $0. At that time—unless the Supreme Court says otherwise—the individual mandate becomes constitutional again. We would have something akin to Schrödinger's cat, where the mandate fluctuates between constitutional and unconstitutional, depending on the price of the penalty. The answer to this dilemma lies in a simple, but widely misunderstood aspect of federal jurisprudence: all courts, including the Supreme Court, cannot, and does not actually strike down laws. Statutes remain on the books until they are repealed. The judiciary lacks what Jonathan Mitchell referred to as *the writ of erasure*.[109]

Indeed, the Court has already considered the constitutionality of Schrödinger's mandate. When *NFIB v. Sebelius* was decided in 2012, no one had yet paid the penalty. Only through a strained application of the Tax Anti-Injunction Act was the Court able to adjudicate the case in 2012. Yet, Chief Justice Roberts's analysis was premised on the fact that under the law, "[b]eginning in 2014, those who do not comply with the mandate must make a '[s]hared responsibility payment' to the Federal Government."

Unless and until Congress actually repeals Section 5000A, the framework to collect the penalty, and indeed the constitutionality of the mandate itself, remains in flux. For now, the judiciary can only halt the enforcement of the mandate—courts cannot actually *strike* the mandate.

B. Option 2: Halt the Entire ACA

In *NFIB v. Sebelius*, the challengers proposed a stark remedy: if the Court found the individual mandate and the Medicaid Expansion were unconstitutional, then the entire Affordable Care Act should be halted. Chief Justice Roberts upheld the individual mandate and the Medicaid expansion. Therefore, he had no occasion to address the challenger's proposed remedy. Ditto for Justices Ginsburg, Breyer, Sotomayor, and Kagan.

However, Justices Scalia, Kennedy, Thomas, and Alito found that the individual mandate, along with the ACA's Medicaid expansion, were unconstitutional. And, they agreed with the challengers' proposed remedy: the entire ACA must be halted. Their analysis was twofold: after invalidating part of a statute, the Court must address "[1] whether the remaining provisions will operate as Congress designed them, and [2] whether Congress would have enacted the remaining provisions standing alone."[110] As a general matter, the dissenters found, "if the remaining provisions cannot operate according to the congressional design (the first inquiry), it almost necessarily follows that Congress would not have enacted them (the second inquiry)."[111] The joint dissenters found that the individual mandate and Medicaid expansion could not be severed from the ACA's "major provisions," as well from its "minor provisions."[112]

The Tax Cuts and Jobs Act rendered the individual mandate unconstitutional. However, it left undisturbed the Court's analysis concerning the constitutionality of the Medicaid expansion. Therefore, if *only* the mandate is declared unconstitutional, the severability analysis in the joint

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[109] Jonathan Mitchell, *The Writ of Erasure Fallacy*, 104 Va. L.Rev. __ (2018), at https://www.ssrn.com/abstract=3158038. *See also* Josh Blackman, *The Irrepressible Myths of Cooper v. Aaron*, 107 Georgetown Law Journal __ (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3142846.
[110] *NFIB*, 567 U.S. at 693 (Joint Dissent).
[111] *Id.*
[112] *Id.* at 697.

dissent cannot be adopted wholesale. Instead, each of the four "major provisions" can be considered separately.

First, the joint dissenters found that the ACA's "insurance regulations and taxes" would rely on both "the Act's Individual Mandate and Medicaid Expansion [because] each increase revenues to the insurance industry by about $350 billion over 10 years."[113] Allowing these "insurance regulations and taxes" to exist in the absence of the individual mandate and the Medicaid expansion "necessarily would impose significant risks and real uncertainties on insurance companies, their customers, all other major actors in the system, and the government treasury."[114] It is unclear if the "regulations and taxes" could exist without the ACA.

Second, the joint dissenters observed that the ACA "Affordable Care Act reduces payments by the Federal Government to hospitals by more than $200 billion over 10 years."[115] Why? "Near-universal coverage will reduce uncompensated care, which will increase hospitals' revenues, which will offset the government's reductions in Medicare and Medicaid reimbursements to hospitals."[116] Here, the joint dissenters focused nearly exclusively on the Medicaid expansion, with nary a mention of the individual mandate. In theory, at least, the mandate could be set aside without also severing the reduction in payments to hospitals.

Third, the joint dissenters concluded that the ACA's "exchanges cannot operate in the manner Congress intended if the Individual Mandate, Medicaid Expansion, and insurance regulations cannot remain in force."[117] Here, the individual mandate and the Medicaid Expansion play a prominent role in channeling customers to the exchanges.

Fourth, the joint dissenters determined that "the ACA makes a direct link between the employer-responsibility assessment and the exchanges." Though the Medicaid Expansion is not directly related to the employer-responsibility provision, the Expansion does affect the exchanges. Therefore, both the Individual Mandate and the Medicaid Expansion play a role in this major provision.

Under the analysis advanced by the joint dissenters, if the individual mandate is set aside, then at least three—and perhaps four—of the ACA's major provisions would also have to be halted.

C. Option 3: Block the Individual Mandate, along with Guaranteed Issue and Community Rating

There is a third option: if the individual mandate is declared unconstitutional, then the courts should also set aside the ACA's community rating and guaranteed issue provisions. In *NFIB v. Sebelius*, the Solicitor General urged the Court to adopt this severability analysis. Why? Because Congress found that the individual mandate was "essential" to the ACA's requirement that all insurers stop discriminating against the sick. In 2018, Attorney General Sessions adopted this same severability analysis.

1. The Solicitor General Advanced Option 3 in *NFIB v. Sebelius*

[113] *Id.* at 698.
[114] *Id.* at 699.
[115] *Id.* at 699.
[116] *Id.* at 699.
[117] *Id.* at 701.

In *NFIB v. Sebelius*, the United States took the middle-of-the-road position on severability. The Solicitor General based his position on "Congress's findings," which "establish that the guaranteed-issue and community-rating provisions are *inseverable* from the minimum coverage provision."[118] He explained that "Congress specifically found that in a market with guaranteed issue and community rating, but without a minimum coverage provision"—that is, without the individual mandate—"'many individuals would wait to purchase health insurance until they needed care.'"[119]

To avoid this risk of adverse selection, the brief explained, "Congress . . . expressly found that the minimum coverage provision is '*essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."[120] Likewise, Congress found that the individual mandate "'is *essential* to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.'"[121]

The Solicitor General stressed that Congress "twice described" the individual mandate "as 'essential'" to the "success" of the guaranteed issue and community rating provisions.[122] Therefore, he concluded, "Congress would not have intended" these two market reforms "to stand if the minimum coverage provision . . . were held unconstitutional." *Id.* In short, guaranteed issue and community rating "are inseverable" from the individual mandate. If the latter goes, so must the former. The Solicitor General made no reference to the shared responsibility payment. He couldn't have, at least in this argument: Congress made no reference to shared responsibility payment in its findings.

The Solicitor General was not troubled that Congress made these findings in the context of the ACA's constitutionality, rather than in a severability clause.[123] In its reply brief, the Government admitted that the findings were "directed at the antecedent constitutional question"—that is, the constitutionality of the mandate—yet the findings "can also be read to answer the severability question."[124] The Solicitor General explained that "the finding rested on evidence showing that, unless paired with a minimum coverage provision, the guaranteed-issue and community-rating provisions would actually undercut Congress's goals because they would cause premiums to rise and coverage to decline."[125] Therefore, the brief continued, "[a]s both a logical and practical matter, therefore, Congress's finding on the 'essential' role of the minimum coverage provision in effectuating the guaranteed-issue and community-rating provisions effectively serves as an inseverability clause—albeit one limited to only those two provisions, given that Congress did not find the minimum coverage provision to be 'essential' to any other part of the Act."[126] The Solicitor General was correct. The findings in § 18091, though directed at the constitutional question, also serve as reliable indicia of Congress's intent in 2010 concerning the relationship between the individual mandate, and the guaranteed issue and community rating provisions.

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[118] Severability Brief at 45, http://maestro.abanet.org/trk/click?ref=zpqri74vj_3-14e8dx315cf6x1820&
[119] *Id.* at 45 (citing 42 U.S.C. § 18091(a)(2)(I)).
[120] *Id.* at 46 (citing 42 U.S.C. § 18091(a)(2)(I)) (emphasis added).
[121] *Id.* at 46 (citing 42 U.S.C. § 18091(a)(2)(J)) (emphasis added).
[122] *Id.* at 46-47 (citing 42 U.S.C. 18091(a)(2)(I) and (citing 42 U.S.C. 18091(a)(2)(J)).
[123] *Id.* at 45-47.
[124] Reply Brief at 10 quoting Court-Appointed Amicus Br. 33, http://maestro.abanet.org/trk/click?ref=zpqri74vj_3-15858x3166cex1816&.
[125] *Id.* at 10.
[126] *Id.*

2. The Joint Dissenters in *NFIB* stressed the Centrality of Guaranteed Issue and Community Rating

The Joint Dissenters likewise addressed the close connection between the individual mandate and the guaranteed issue and community provisions. They observed that "Congress did not intend to establish the goal of near-universal coverage without regard to fiscal consequences."[127] In particular, "Insurance companies are required to sell . . . insurance [policies] regardless of patients' pre-existing conditions."[128] This requirement for insurers exists alongside the requirement for "individuals . . . to obtain health insurance."[129] Stated differently, "[i]nsurance companies bear new costs imposed by a collection of insurance regulations and taxes, including 'guaranteed issue' and 'community rating' requirements to give coverage regardless of the insured's pre-existing conditions; but the insurers benefit from the new, healthy purchasers who are forced by the Individual Mandate to buy the insurers' product."[130]

"Without the Individual Mandate and Medicaid Expansion," the dissenters concluded, "the Affordable Care Act's insurance regulations and insurance taxes impose risks on insurance companies and their customers that this Court cannot measure."[131] Because, "[t]hose risks would undermine Congress' scheme of "shared responsibility," the guaranteed issue and community rating provisions could not be severed from the unconstitutional individual mandate.[132]

3. The Attorney General's Decision Not to Defend Guaranteed Issue and Community Rating

After Texas and other states challenged the constitutionality of the Affordable Care Act, Attorney General Sessions announced that he would adhere to the same position as did his predecessor with respect to severability: if the individual mandate is set aside, the Court should also halt the guaranteed issue and community rating provisions.[133] First he observed that "[i]n *NFIB*, the Department previously argued that if Section 5000A(a) is unconstitutional, it is severable from the ACA's other provisions, except those 'guarantee[ing] issuance of coverage in the individual and group market' ('guaranteed issue'), and 'prohibiting discriminatory premium rates' ('community rating")." [134] Second, Attorney General Sessions "concur[red] in the Department's prior determination."

Third, he observed that following the Tax Cuts and Jobs Act of 2017, "Congress's express findings in the ACA continue to describe Section 5000A(a) as 'essential' to the operation of the guaranteed-issue and community-rating provisions." Why? "[B]ecause otherwise individuals could wait until they become sick to purchase insurance, thus driving up premiums for everyone else."[135] The Department of Justice's brief makes this point more explicitly: Congress's finding

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[127] *Id.* at 694.
[128] *Id.* (citing 42 U.S.C. §§ 300gg(a)(1), 300gg–4(b) (community rating); §§ 300gg–1, 300gg–3, 300gg–4(a) (guaranteed issue)).
[129] *Id.* (citing 26 U.S.C. § 5000A(a)).
[130] *Id.* at 695-96.
[131] *Id.*
[132] *Id.*
[133] https://www.justice.gov/file/1069806/download
[134] *Id.* (citing 42 U.S.C. 300gg-1, 300gg-3, 300gg-4(a), 300gg(a)(I), 300gg-4(b)).
[135] *Id.* (citing 42 U.S.C. 18091(2)(I).).

codified at § 18091(2)(I) "cannot be deemed to have been impliedly repealed by Congress's mere elimination of the financial penalty."[136]

Congress, of course, "remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified."[137] Indeed, Congress can do so "either expressly or by implication as it chooses."[138] However, there is a strong presumption in law against implied repeals.[139] The Supreme Court has explained that a statute can be repealed through implication in two circumstances:

> "(1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."[140]

There is no "conflict," let alone an "irreconcilable conflict" between the ACA and the TCJA. The individual mandate can continue to operate in the absence of a penalty. Furthermore, the TCJA is in no sense a "substitute" for § 5000A. The former only modifies one discrete of the latter: the penalty is reduced to $0. These congressional findings remain in force. Indeed, because Congress enacted the tax legislation through the budget reconciliation process, under its "rules of proceeding"—to which courts ought to defer—the other provisions of the ACA, including the findings, could not be amended. At bottom, Congress could not repeal the statutory findings—either through an implied, or express action.

Fourth, Attorney General Sessions distinguished his decision concerning severability and his decision not to defend the individual mandate: the former question, one of "statutory interpretation does not involve the ACA's constitutionality and therefore does not implicate the Department's general practice of defending the constitutionality of federal law." Therefore, the congressional notification requirement in Section 530D was simply inapplicable.[141] For example, during the first constitutional challenge to the ACA in 2011, the Department of Justice did not need to notify Congress about its severability position.[142] Accordingly, the Supreme Court appointed an amicus curiae to argue that position. Bartow Farr explained that the Justice Department asked the "Court to invalidate perfectly lawful provisions of a federal statute."[143] That is, the guaranteed issue and community rating provisions.

Finally, Sessions concluded, "[o]utside of these two provisions of the ACA"—that is guaranteed issue and community rating—"the Department will continue to argue that Section 5000A(a) is severable from the remaining provisions of the ACA."

While the Attorney General's decision with respect to the mandate was reasonable, the same cannot be said for his decision concerning severability. There are more than enough

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[136] https://www.justsecurity.org/wp-content/uploads/2018/06/ACA.Azar_.filing.pdf, at 15-16.
[137] Dorsey v. United States, 567 U.S. 260, 274 (2012).
[138] *Id.*
[139]
[140] Posadas v. National City Bank of N.Y., 296 U.S. 497, 503 (1936).

[141] 28 U.S.C. § 530D(a)(B)(ii).
[142] *See* Fla. ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1299 (N.D. Fla. 2011) ("I note that the defendants have acknowledged that the individual mandate and the Act's health insurance reforms, including the guaranteed issue and community rating, will rise or fall together as these reforms "cannot be severed from the [individual mandate].").
[143] http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-393_caac_amcu_severability.pdf Brief at 2

arguments, grounded in text, history, and precedent, to save the guaranteed issue and community rating provisions. Precisely because this decision does not implicate the Attorney General's independent constitutional judgment, he has a much, much stronger obligation to defend Congress's handiwork.

D. Option 4: Rescind Section 11081 of the Tax Cut and Jobs Act of 2017

There is a fourth option that is counterintuitive, yet compelling. Prior to December, 2017, § 5000A(a) of the Affordable Care Act—that is, the individual mandate—was constitutional by virtue of *NFIB*'s saving construction. However, when President Trump signed the Tax Cuts and Jobs Act of 2017 into law, thereby reducing the penalty to $0, a conflict arose. Neither the mandate, nor the tax cut, by itself, poses any problems. But both cannot exist in harmony. James Durling and E. Garrett West describe this conflict as a "convergent constitutional violation."[144] If the TCJA of 2017 rendered the individual mandate of 2010 unconstitutional, they propose an alternate remedy: the "court should strike the repeal of the tax penalty in the" TCJA.[145] At first blush, this argument appears jarring. How can the judiciary rescind a tax cut?! However, the authors' case is grounded in longstanding Supreme Court precedent. Under the rule in *Frost v. Corporation Commission of Oklahoma*, when a new statute renders an old statute unconstitutional, the remedy is to set aside the new statute.[146]

Though persuasive, this remedy is not available in *Texas v. United States* because no one challenged the constitutionality of the TCJA. Yet, *Frost*'s logic still informs the severability analysis in *Texas v. United States*. The intent of the Congress in 2017—which enacted the amendment—is legally irrelevant. Rather, the relevant intent remains that of Congress in 2010, which enacted the individual mandate.

1. *Frost v. Corporation Commission of Oklahoma*

Frost v. Corporation Commission of Oklahoma provides the starting point for the severability analysis in *Texas v. United States*.[147] The facts are as follows. The Oklahoma Corporation Commission authorized W.A. Frost to operate a cotton gin.[148] Frost was given this permit after he made "satisfactory showing of public necessity."[149] Subsequent to the issuance of Frost's permit, Oklahoma modified the pre-existing statutory regime. The new "proviso" required the Commission to issue a permit for a "gin to be run cooperatively" if a petition was "signed by one hundred (100) citizens and tax payers of the community where the gin is to be located."[150] Critically, the "proviso made it *mandatory* to grant the permit applied for *without regard* to [public] necessity."[151] Frost charged that the new regime ran afoul of the Fourteenth Amendment, because

[144] *See* James Durling and E. Garrett West, *Severing Unconstitutional Amendments*, 86 U. Chi. L. Rev. Online 1, 8 (2018).
[145] *Id.* at 9-10.
[146] 278 U.S. 515 (1929).
[147] 278 U.S. 515 (1929).
[148] *Frost*, 278 U.S. at 517.
[149] *Frost*, 278 U.S. at 517.
[150] *Id.*
[151] *Id.* at 518 (emphasis added).

his cotton gin was subject to a more stringent regime than were the new cooperative. That is, similarly-situated businesses were treated differently.

The Supreme Court, in an opinion by Justice Sutherland, found the proviso violated the Fourteenth Amendment: "its effect is to relieve all corporations organized under the [pre-existing legislation] from an onerous restriction upon the right to engage in a public business which is imposed by the statute."[152] In other words, the original statutory regime was sound; the proviso, however, rendered that initial regime unconstitutional. (The similarities to the facts in *Texas v. U.S.* quickly become apparent).

Next, Justice Sutherland turned to the question of severability: would the Court set aside only the proviso, or would it void the underlying statute as well. He considered two different scenarios. First, what would happen if the *same* legislation included *both* the unconstitutional amendment and the otherwise-constitutional substantive provision? That is, a single statute adopted a generally-applicable licensing scheme, but included an unconstitutional carveout for cooperatives. In such a case, Justice Sutherland wrote, "the effect would be to render the *entire section invalid*," for it would not be sufficient to simply invalidate the proviso.[153] The Court would not "extend the scope of the law in that regard so as to embrace corporations which the Legislature passing the statute had, by its very terms, expressly excluded."[154] (Justice Scalia's dissenting opinion in *Legal Services Corp. v. Velazquez*, discussed *infra*, would consider this first scenario.)

In the second scenario, the unconstitutional amendment was subsequently added to the otherwise-constitutional substantive provision. Such were the facts in *Frost*, in which, "the proviso here in question was not in the original section."[155] Rather, the proviso "was added by way of amendment many years after the original section was enacted."[156] In other words, the proviso "repeal[ed] by implication the requirement of the existing statute in respect of public necessity," rendering that old statute unconstitutional.

The Court "conceded that the statute, before the amendment, was entirely valid."[157] When that original statute was "passed, it expressed the will of the Legislature which enacted it."[158] Yet, the subsequent legislature did not enact "an express repeal" of the original statute.[159] Rather, the "different Legislature undertook to create an exception" to the initial statute.[160] That is, the amendment. However, that subsequent "body sought to express its will by an amendment which [was] unconstitutional."[161] Therefore, the amendment, had no legal effect: the later-in-time legislative "will" was "a nullity."[162] And, the amendment was "powerless to work any change in the existing statute."[163] What is the "only valid expression of the legislative intent?"[164] The original, "existing statute."[165]

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[152] *Id.* at 521-22.
[153] *Id.* at 525 (emphasis added).
[154] *Id.*
[155] *Id.* at 526.
[156] *Id.*
[157] *Id.* at 526.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 526-27.
[164] *Id.* at 527.
[165] *Id.*

Critically, in *Frost,* it was not simply the case that the later proviso was unconstitutional. Rather, the latter proviso *rendered* the original statute unconstitutional. That is, the latter proviso, *when combined* with the former statute, was unconstitutional. Specifically, by exempting a certain class of businesses, the proviso created an unconstitutional distinction for purposes of the Equal Protection in the underlying regime. *Frost* stands for the proposition that permissible laws can become unconstitutional in light of later-enacted laws. And the remedy is somewhat counterintuitive. Furthermore, *Frost* teaches that the actions of the later-in-time Congress that *rendered* the earlier-in-time statute unconstitutional, are a "nullity."

Because the later-in-time proviso rendered the original statute unconstitutional, it was a "nullity" and could not "work any change in the existing statute." What is the "only valid expression of the legislative intent"? The original statute, enacted by the earlier-in-time legislature. Therefore, the *Frost* Court declared the cooperative proviso unconstitutional, but left the underlying "public necessity" regime in place.

2. *Frost* and *Velazquez*

Though old, and somewhat obscure, *Frost* is still cited, and remains a relevant, and binding precedent. Indeed, *Frost*'s rule was not a new rule. Justice Sutherland's majority opinion favorably cited an 1866 opinion from the Michigan Supreme Court by Chief Justice Thomas M. Cooley involving a "similar situation."[166] In that case, the renowned jurist wrote, "nothing can come in conflict with a nullity, and nothing is therefore repealed by this act on the ground solely of its being inconsistent with a section of this law which is entirely unconstitutional and void."[167] In other words, the earlier-in-time provision was not repealed because the later-in-time amendment was a "nullity." The Supreme Court expressed a similar sentiment in *United States v. Jackson*: a recently-added "clause authorizing capital punishment [was] severable from the remainder of the kidnaping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole."[168] No case has cast *Frost* in doubt. Several federal and state court decisions have favorably cited and applied it.[169]

The most detailed discussion of *Frost* by the Supreme Court appeared in Justice Scalia's dissent in *Legal Services Corp. v. Velazquez*.[170] This 2001 opinion warrants a careful study. Through § 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Congress prohibited the Legal Services Corporation from funding any organization

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[166] *Id.* at 527 (citing Campau v. Detroit, 14 Mich. 276, 286 (Cooley, C.J.)).
[167] *Id.*
[168] 390 U.S. 570, 586 (1968).
[169] *See e.g.,* White Motor Corp. v. Citibank, N.A., 704 F.2d 254, 261 (6th Cir. 1983) ("It has long been held that a statute which is unconstitutional does not repeal a prior statute on the subject when a contrary construction would create a void in the law which the legislative body did not intend. The prior statute is 'revived' to avoid a chaotic hiatus in the law."); In re Benny, 812 F.2d 1133, 1148 (9th Cir. 1987) (Norris, J., concurring) ("My second reason for disagreeing with the Department's position that Congress in 1984 impliedly or explicitly repealed the prior holdover provision is that any attempt by Congress to terminate the holdover tenure of incumbent judges would itself have constituted an independent constitutional violation."); Matter of Certification of Questions of Law from U.S. Court of Appeals for Eighth Circuit, Pursuant to Provisions of SDCL 15-24A-1, 1996 S.D. 10, ¶ 88, 544 N.W.2d 183, 204 ("An act or amendment to an act which violates the Constitution has no power, and can neither build up nor tear down. It can neither create new rights nor destroy existing rights.").
[170] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 561 (2001) (Scalia, J., dissenting) (quoting (*Frost*, 278 U.S. at 525)).

> "that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation."[171]

This provision was challenged in court as a violation of the First Amendment. On appeal, the Second Circuit declared unconstitutional "the qualification that representation could 'not involve an effort to amend or otherwise challenge existing law,' because it 'clearly seeks to discourage challenges to the status quo.'"[172] This restraint, the Court of Appeals found, constituted an "impermissible viewpoint discrimination."[173] Because "congressional intent regarding severability was unclear," the Second Circuit "decided to 'invalidate the smallest possible portion of the statute, excising only the viewpoint-based proviso rather than the entire exception of which it is a part.'"[174]

On the merits, the Supreme Court agreed. Justice Kennedy's majority opinion found that the "funding condition" in § 504(a)(16) violated the First Amendment, and is "invalid."[175] With respect to severability, the Court noted that the Second Circuit "reached the reasoned conclusion to invalidate the fragment of § 504(a)(16) found contrary to the First Amendment, leaving the balance of the statute operative and in place."[176] However, Justice Kennedy "decline[d] to address" anew the question of severability because "[t]hat determination was not discussed in the briefs of either party or otherwise contested here."[177] Instead, the majority simply affirmed the judgment of the Second Circuit, and left the remainder of § 504(a)(16) in place. In other words, the Legal Services Corporation could now fund organizations that represent an individual eligible client who is seeking specific relief from a welfare agency *even if* such relief involves an effort to "amend or otherwise challenge existing law in effect on the date of the initiation of the representation."

Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas, dissented from the majority's severability analysis. He posed the relevant question succinctly: "whether, without the restriction that the Court today invalidates, [would] the permission for conducting welfare litigation . . . have been accorded."[178] That is, would Congress have allowed *any* funding for individualized welfare benefits litigation if such organizations could challenge existing welfare laws? "One determines what Congress would have done," Justice Scalia explained, "by examining what it did."[179]

And what did Congress do in 1996? The dissent found that the amendment linked together the "funding of welfare benefits suits and its prohibition on suits challenging or defending the validity of existing law."[180] These provisions, Justice Scalia concluded, are "conditions, considerations [and] compensations for each other" that cannot be severed."[181] The dissent imagined a legislative bargain: Congress would fund individuals who seek to challenge the

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[171] *Id.* at 537.
[172] *Id.* at 539 (quoting Velazquez v. Legal Services Corp., 164 F.3d 757, 769-770 (2nd Cir. 1999)).
[173] *Id.* at 539
[174] *Id.* at 539-540 (quoting *Velazquez*, 164 F.3d. at 773)).
[175] *Id.* at 549.
[176] *Id.* at 549.
[177] *Id.*
[178] *Id.* at 561 (Scalia, J., dissenting).
[179] *Id.* at 560.
[180] *Id.* at 560.
[181] *Id.* at 558-59 (quoting Warren v. Mayor and Aldermen of Charlestown, 68 Mass. 84, 99 (1854) (Shaw, C.J.)).

application of welfare laws, so long as welfare laws themselves were not challenged. "The statute concocted by the Court of Appeals," he wrote, "bears little resemblance to what Congress enacted, funding without restriction welfare-benefits litigation that Congress funded only under the limitations of § 504(a)(16)."[182] And so, the majority opinion erred. Under Justice Scalia's analysis, "[t]o strike the restriction on welfare benefits suits is to void § 504(a)(16) altogether."[183] Why? "To remove that limit [on litigation] is to repeal subsection (a)(16) altogether, and thus to eliminate a significant quid pro quo of the legislative compromise."[184]

Next, Justice Scalia discussed *Frost v. Corporation Commission of Oklahoma*.[185] He noted that the Court has "in some cases stated that when an 'excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand,' for 'to hold otherwise would be to extend the scope of the law . . . so as to embrace [situations] which the legislature passing the statute had, by its very terms, expressly excluded.'"[186] Again, this discussion from *Frost* considered the first scenario where the *same* legislature enacted *both* the "excepting proviso" and the "substantive provision which [the proviso] qualifies." These were the facts in *Velazquez*, because the same Congress in 1996 enacted the objectionable, and unobjectionable portions of the statute. Such were not the facts of *Frost* itself, where legislatures at different points in time enacted the "excepting proviso" and the "substantive provision which [the proviso] qualifies." For the latter scenario, the *Frost* Court set aside the proviso itself, and not the original substantive provision.

Under Justice Scalia's analysis, if a single Congress enacted a statute—part of which is unconstitutional and part of which is constitutional—than that entire statute should be set aside if Congress would not have intended the constitutional part to operate independently. In other words, he would throw out the baby, the bathwater, the bathtub, the bathroom, and even the kitchen sink. In hindsight, we knew he adopted the *statute delenda est* approach in *NFIB v. Sebelius*: he would have set aside the *entire* Affordable Care Act. Justice Scalia's approach, however, does not speak to the second *Frost* scenario where a later-in-time Congress took an action that rendered an earlier-in-time statute unconstitutional. That is, the 1996 amendments did not render the original 1974 Legal Services Corporation Act unconstitutional.

3. *Frost's* Bite

Simply stated, *Frost* applies when two different statutes create a "convergent constitutional violation."[187] In such cases, *Frost*'s bite is straightforward: the later-in-time statute is set aside, so the earlier-in-time statute can be restored. That is, the later-in-time statute is not a valid expression of the legislative will, because that legislature acted unconstitutionally. The only valid expression of the legislative will remains the original statute, which was constitutional. In both *Frost* and *Texas*, there are two provisions that, by themselves would be constitutional. But in both cases, when the provisions are combined, they clash.

Specifically, under this rubric, James Durling and E. Garrett West identified such a "convergent constitutional violation" between the TCJA of 2017 and the individual mandate of

[182] *Id.* at 559.
[183] *Id.* at 561.
[184] *Id.* at 561.
[185] *Id.* at 561 (2001) (quoting (*Frost*, 278 U.S. at 525)).
[186] *Id.* at 560 (quoting 278 U.S. at 525).
[187] *See* James Durling and E. Garrett West, *Severing Unconstitutional Amendments*, 86 U. Chi. L. Rev. Online 1, 8 (2018).

2010.[188] The 2010 individual mandate remained constitutional until the 2017 TCJA eliminated the revenue-generating tax that saved its constitutionality. The two provisions cannot coexist. Durling and West write "[w]hen Congress enacts an amendment that renders a broader statutory scheme unconstitutional, the default rule should be to strike down the amendment and restore the law to the pre-amendment status quo."[189] The key word here is "renders." Neither the mandate nor the tax cut is independently unconstitutional. Under *NFIB*'s saving construction, Congress can impose an insurance mandate by taxing the uninsured. And, Congress can rescind a tax. But it can't do both. Why? The tax cut *renders* the mandate unconstitutional.

Durling and West explain that Congress could have resolved this problem by adding an "inseverability clause."[190] That provision is exactly what it sounds like: Congress indicates that "if the amendment is unconstitutional, then the rest of the statutory scheme should also be held unconstitutional."[191] Why would Congress draft such a provision? With respect to the ACA at least, Congress may not have wanted a simple tax cut to render a major piece of social welfare legislation inoperable. However, Congress did not take this path. When zeroing out the penalty in 2017, Congress did not include an "inseverability" clause. Indeed, it expressed no concern, whatsoever, that it was about to render another statute unconstitutional, even though "Congress is presumed to act with full awareness of existing judicial interpretations."[192] There is also no indication that Congress, acting in a Departmentalist fashion, simply rejected Chief Justice Roberts's saving construction. Instead, Congress passed a statute that flouted the terms of *NFIB v. Sebelius*. Indeed, many members were quite vocal about their intent to repeal the individual mandate, even though they could not do so under the reconciliation process they adopted. Therefore, under *Frost*'s bite, the correct remedy would be to "strike the repeal of the tax penalty in the Tax Cuts Act."[193]

4. *Frost* and *Texas*

Though persuasive, *Frost*'s bite is not available in *Texas v. United States* for a simple reason. Because of how Texas structured its challenge, the district court is presented with a narrower menu of options with respect to severability.[194] No one—not the Plaintiffs, not the Intervenors—have challenged the constitutionality of the TCJA. Federal courts lack a roving license to flip through the U.S. Code with a red pencil to void one statute, in order to save another. Invalidating the 2017 tax cut is simply not an option in the *Texas* litigation, because it has not been challenged.

Durling and West observe that often, "the Court does not confine itself to the plaintiff's requested relief."[195] They're correct. For example, in *Session v. Morales-Santana*, the Court considered a provision of the Immigration and Nationality Act that imposed a gender-based

[188] *Id.*
[189] *Id.*at 10.
[190] *Id.*
[191] *Id.*
[192] United States v. Fausto, 484 U.S. 439, 460 n.6 (1987) (citing Rodriguez v. United States, 480 U.S. 522, 525 (1987) (per curiam)).
[193] *Id.* at 9-10.
[194] In its Amended Compliant, Texas prayed for the court to "Declare the ACA, as amended by the Tax Cuts and Jobs Act of 2017, to be unconstitutional either in part or in whole." Texas did not in any way challenge Section 11081 of the TCJA. *See* https://www.scribd.com/document/382123557/Texas-v-United-States-Amended-Complaint.
[195] Durling, *supra* note __.

classification.[196] The respondent in this case could only derive citizenship if his unwed father had been physically present in the United States for five years. However, citizenship could be derived from an unwed mother who was "continuously present in the United States for one year at any point in her life prior to the child's birth."[197] This "gender-based differential," Justice Ginsburg found for the Court, violated the "equal protection principle implicit in the Fifth Amendment."[198] The Respondent urged the Justices to *level-down*, and apply the one-year limit to unwed fathers. While "the preferred rule in the typical case is to extend favorable treatment," Justice Ginsburg observed, "this is hardly the typical case."[199] As a result, the Court left in place the five-year requirement for unwed fathers, and *increased* the requirement for unwed mothers from one year to five years. This *level-up* remedy was proposed by the Solicitor General: "The proper way to cure any equal protection violation would be to apply, on a prospective basis, the longer physical-presence requirements in Section 1401 to children born out of wedlock to U.S.-citizen mothers."[200] Congress was left with one option: "settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender."[201]

Without question Durling and West are correct that in cases involving severability, "the Court does not confine itself to the plaintiff's requested relief."[202] Indeed, Morales-Santana's victory was pyrrhic: he could not benefit from the one-year requirement, and, prospectively, neither would other children of unwed mothers. *Morales-Santana*, however, does not stretch far enough to resolve the question presented in *Texas v. United States*: if an earlier-in-time statute is rendered unconstitutional by a later-in-time amendment, the court cannot set aside the latter provision that was never challenged.

The individual mandate and the tax cut can exist independently, but cannot exist simultaneously. If the tax cut is invalidated, the individual mandate remains constitutional. Conversely, if the individual mandate is invalidated, the tax cut remains constitutional. Call it *Schrödinger's Mandate*. *Morales-Santana* presented a very different scenario. The one-year requirement for unwed mothers and the five-year requirement for unwed fathers cannot exist independently. The presence of one provision, by itself, amounts to an unconstitutional gender based classification. Justice Ginsburg's majority opinion determined that the only viable remedy was to put everyone on the same page. *Morales-Santana* does not address the question presented in *Texas*.

There is, however, another option that could give rise to the fourth option: if the right party challenged the constitutionality of the tax cut because it rendered the individual mandate unconstitutional. In that collateral attack—assuming there is standing to challenge the *elimination* of a tax burden—a federal court could in fact set aside the TCJA under the rule in *Frost*, leaving the mandate in place.

[196] 137 S.Ct. 1678 (2017).
[197] *Id.* at 1698.
[198] *Id.* at 1686.
[199] *Id.* at 1701.
[200] http://www.scotusblog.com/wp-content/uploads/2016/08/15-1191-petitioner-merits-brief.pdf at 12
[201] 137 S.Ct. at 1701.
[202] Durling, *supra* note __.

5. Congress's Intent in 2010, not 2017, Controls the Severability Analysis

Though *Frost* does not provide the rule of decision for *Texas v. United States*, it still informs the severability analysis about a pivotal question. Which legislative intent controls: that of Congress in 2010, or that of Congress in 2017?

Modern severability doctrine employs a purposivist analysis.[203] If one provision of a statute is found unconstitutional, the Court will only invalidate the entire statute if it is "evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not."[204] The courts pose an important question: "'[w]ould Congress still have passed' the valid sections 'had it known' about the constitutional invalidity of the other portions of the statute?"[205]

As a general matter, the Court only needs to consider situations where a single Congress enacts a statute with constitutional, and unconstitutional portions. In *Velazquez*, for example, Justice Scalia observed "[o]ne determines what Congress would have done by examining what it did."[206] The traditional doctrine, however, does not fit a case like *Texas v. United States*. Why? Two Congresses, seven years apart, expressed different legislative wills. Congress in 2010 declared that the individual mandate was "essential" to the operation of the Affordable Care Act, and in particular its guaranteed issue and community rating provisions.[207] And Congress in 2017 rendered that individual mandate largely ineffective—and unconstitutional—by reducing the penalty to $0.

Were the courts to consider the legislative will in 2017, the severability analysis would be straightforward: Congress no longer believed that the individual mandate was "essential" to the operation of the ACA.[208] Therefore, a court could easily declare the mandate unconstitutional, and sever the rest of the ACA—including the guaranteed issue and community rating provisions. Were the courts to consider the legislative will in 2010, the severability analysis is also straightforward: Congress would not have wanted the ACA to operate *without* an individual mandate. Therefore, many, if not all of the ACA would have to be set aside with the mandate. The critical question in *Texas v. U.S.*, therefore, is *which* Congress's intent controls. Here, *Frost* provides the correct framework.

The 2017 TCJA did not attempt "an express repeal" of the individual mandate.[209] Rather, in 2017, Congress "sought to express its will by an amendment"—the tax cut—which was unconstitutional.[210] And that amendment was "a nullity" that was "powerless to work any change in the" ACA of 2010.[211] Therefore, the ACA of 2010 "must stand as the only valid expression of the legislative intent."[212] In other words, the "only valid expression of the legislative intent" is the "will of the Legislature" which enacted "the statute, before the amendment." That is, the Congress

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[203] Justice Thomas has asserted these severability precedents are "in tension with traditional limits on judicial authority." *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1485-1487 (2018) (Thomas, J., concurring).
[204] *Id.* at 1482 (2018) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)).
[205] United States v. Booker, 543 U.S. 220, 258, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (quoting Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996)).
[206] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting).
[207] 42 U.S.C. 18091(2)(I).
[208] *See supra* Part I.A.
[209] 278 U.S. at 526.
[210] 278 U.S. at 526.
[211] 278 U.S. at 526.
[212] 278 U.S. at 527.

that enacted the ACA in 2010. What about the "will" of the "different Legislature" that enacted the amendment in 2017? That "will" was "a nullity and, [is] therefore, powerless to work any change in the existing statute." Because of *Frost's* bite, the legislative intent of the Congress that enacted the TCJA is not legally irrelevant for purposes of severability.

Does it matter that the individual mandate has proven to not be "essential" to the operation of the Affordable Care Act? No. The Supreme Court's severability doctrine does not permit such time-shifting. Hindsight is always 20/20. Of course, if Congress knew in 2010 what it knows today about health care markets, it would have acted in a very different fashion. Congress may not even have bothered to enact the individual mandate, which proved to not be nearly as essential as was thought. But it did not know then what it knows now. Indeed, as late as 2015—five years after the ACA was enacted—the Supreme Court observed that "Congress found that the guaranteed issue and community rating requirements would not work without the" individual mandate.[213] The relevant question is, what would Congress in 2010 have intended to happen if the individual mandate was invalidated. The findings in Section 18091(a)(2)(I) provide a strong indication of that intent. Indeed, these findings may be the *best evidence* we have of that intent, as they are in the actual text of the statute, and not in the legislative history. And, pursuant to that intent, Congress would not have wanted guaranteed issue and community rating to exist, in the absence of the individual mandate.

[213] King v. Burwell, 135 S. Ct. 2480, 2487 (2015) (citing 42 U.S.C. 18091(2)(I)).