Unreviewable: The Final Installment of the "Epic" Obamacare Trilogy

*Josh Blackman**

Introduction

By fate or design, my young career has tracked the trajectory of Obamacare. In September 2009, shortly after I graduated from law school, I launched a blog to focus on constitutional and other legal issues. On my fourth day of blogging, I covered this new bill called the Patient Protection and Affordable Care Act (ACA, also known as "Obamcare"). The cornerstone of the law was an individual mandate that commanded people to purchase health insurance. In November 2009, I was by chance present at a meeting where the legal strategy to challenge the individual mandate was hatched.

Over the next decade, I followed and wrote about the ACA. During that period, Obamacare faced three existential legal challenges. And in each "installment [of the] epic Affordable Care Act trilogy,"[1] the Supreme Court rebuffed those attacks. First, *National Federation of Independent Business v. Sebelius* (*NFIB*) saved the ACA's individual mandate as an exercise of Congress's taxing power.[2] Second, *King v. Burwell* held that the ACA, which subsidizes only health care exchanges "established by the State," also subsidizes the federal exchange.[3] And this past term, *California v. Texas* held that the latest challenge to Obamacare was unreviewable.[4] After three rounds, Obamacare remains undefeated before the Supreme Court.[5]

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[1] California v. Texas, 141 S. Ct. 2104, 2123 (2021) (Alito, J., dissenting).

[2] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); see Josh Blackman, Unprecedented: The Constitutional Challenge to Obamacare (2013).

[3] King v. Burwell, 576 U.S. 473 (2015); see Josh Blackman, Unraveled: Obamacare, Religious Liberty, and Executive Power (2016).

[4] Texas, 141 S. Ct. at 2120.

[5] Josh Blackman, Undefeated: Trump, Obamacare, and the Roberts Court (forthcoming 2022).

California v. Texas began when President Donald Trump signed the Tax Cuts and Jobs Act of 2017 (TCJA).[6] This law did not repeal the individual mandate. Rather, it reduced the ACA's penalty to $0.[7] Arguably, this revision toppled *NFIB*'s saving construction. Soon, a cohort of conservative attorneys general, as well as two private plaintiffs, filed suit.[8] The plaintiffs contended that the penalty-less law could no longer be saved as a tax. And, they argued, the unconstitutional mandate could not be severed from the remainder of the law. Therefore, the entire law was unconstitutional.

The arguments were familiar. But *Texas* felt different. *NFIB v. Sebelius* had united the conservative legal movement and the Republican political apparatus.[9] This confluence moved novel arguments about the unconstitutionality of the mandate from *off-the-wall* to *on-the-wall*.[10] In *NFIB*, 26 states joined the challenge against the federal government. These combined forces came within one vote of killing the most important social-welfare legislation in decades. Four years later, the support for *King v. Burwell* was still strong. The conservative legal movement largely backed the challenge, which was grounded in a conventional reading of the ACA.[11]

Yet, by 2017 the politics were different. The ACA had finally surpassed the 50 percent mark for popularity.[12] Indeed, this surge in popularity was triggered by failed efforts in Congress to repeal the law. Millions of Americans now rely on the ACA. The threat of unraveling Obamacare rallied people to support the law. As a result, many red states that joined *NFIB* did not support Texas's case. Only 18 states joined the challenge. Moreover, the *Wall Street Journal* and

[6] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 131 Stat. 2054 (2017).

[7] *Id.* at § 11081.

[8] Jenny Deam, "The Journey from Wisconsin to Texas and the Ruling that Struck Down the ACA," Hous. Chron., Jan. 11, 2019, https://perma.cc/D8AD-B5JN.

[9] Josh Blackman, Popular Constitutionalism and the Affordable Care Act, 27 Pub. Aff. Q. 3 (2013).

[10] Jack M. Balkin, "From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream," Atlantic, June 4, 2012, https://perma.cc/2FWB-TQ9M.

[11] Robert Pear, "Flood of Briefs on the Health Care Law's Subsidies Hits the Supreme Court," N.Y. Times, Feb. 21, 2015, https://perma.cc/RQ85-MFMX.

[12] Dan Mangan, "Obamacare Tops 50 percent Popularity among Americans for First Time in New Poll, after Senate Unveils Bill to Gut Health-care Law," CNBC, June 23, 2017, https://perma.cc/EGD6-KVMX.

other bellwethers of right-of-center thought opposed the challenge.[13] And the conservative legal movement ridiculed the challenge. Indeed, the architects of *King v. Burwell* lampooned *Texas*.[14] For some time, I was the "only prominent dissenting voice,"[15] though Professor Randy Barnett joined the fray.[16]

Still, the new Obamacare challenge was consistent with my longstanding views about *NFIB*.[17] First, I long ago concluded that the private plaintiffs had standing to challenge the ACA, even with a $0 penalty. For nearly a decade, I argued that the injury-in-fact from *NFIB* was premised solely on the individual mandate and did not rely on the penalty. Second, for that same period, I vigorously contended that the individual mandate imposed an unconstitutional command to purchase insurance, without regard to the penalty. And only through Chief Justice John Roberts's saving construction could the ACA be read to compel a *choice* between buying insurance and paying a tax. Once the penalty was reduced to $0, the saving construction failed, and that choice vanished. I advanced these views in the Cato Institute's *California v. Texas* amicus brief.[18]

Alas, the Supreme Court disagreed. The vote wasn't even close. Seven members of the Court found that plaintiffs lacked standing. Justice Stephen Breyer wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Clarence Thomas, Sonia Sotomayor, Elena Kagan, Brett Kavanaugh, and Amy Coney Barrett. Justice Samuel Alito dissented with Justice Neil Gorsuch. They found that the state plaintiffs had standing, the mandate was

[13] "Texas ObamaCare Blunder," Wall St. J., Dec. 16, 2018, https://perma.cc/SU3X-QDTD.

[14] Jonathan H. Adler & Abbe R. Gluck, "What the Lawless Obamacare Ruling Means," N.Y. Times, Dec. 15, 2018, https://perma.cc/EQZ9-ENTP; Michael F. Cannon, "ObamaCare's Enemy No. 1 Says This Is the Wrong Way to Kill It," N.Y. Post, March 28, 2019, https://perma.cc/RNB4-T4KL.

[15] Michael C. Dorf, "Can an 'Off the Wall' Procedural Argument (Invalidating Obamacare) Climb the Wall?," Dorf on Law, Dec. 18, 2018, https://perma.cc/8SL7-PJB2.

[16] Randy E. Barnett, "Texas v. U.S.: Why the Individual Mandate Is Still Unconstitutional," Volokh Conspiracy, July 8, 2019, https://perma.cc/3N3X-BUPX.

[17] Josh Blackman, "How I Approach Unpopular and Unconventional Legal Views," Volokh Conspiracy, July 28, 2021, https://perma.cc/NT7K-5W2W.

[18] Brief for Cato Institute as Amicus Curiae Supporting Respondents, California v. Texas, 141 S. Ct. 2104 (2021) (No. 19-840) [hereinafter Cato Amicus], https://perma.cc/6RYA-SQDU.

unconstitutional, and certain portions of the ACA that injure the states should be enjoined. However, the majority and dissent did not address my preferred theory of standing-through-inseverability, which was also advanced by the solicitor general.

This article for the *Cato Supreme Court Review*—my fourth—considers the legal arguments that *California v. Texas* declined to reach.

Part I revisits *NFIB*. In that case, the private plaintiffs established standing based entirely on the mandate, without regard to the penalty. Moreover, *NFIB* held that the ACA imposes a command to purchase insurance. Outside the saving construction, the ACA does not provide people with a choice between buying insurance and paying a tax. In *Texas*, the Fifth Circuit accepted both of these premises.

Part II turns to severability. The Cato brief, as well as the solicitor general, advanced a theory of standing premised on inseverability: *standing-through-inseverability*. In short, the private plaintiffs could establish Article III jurisdiction based on the ACA's insurance reforms that were inseverable from the unconstitutional mandate. Taken together, these provisions established an injury-in-fact, traceability, and redressability.

Part III turns to *California v. Texas*. The majority found that the plaintiffs could not trace their injuries to the individual mandate because the mandate is not enforced. And the Court found that the plaintiffs waived the standing-through-inseverability argument. In dissent, Justices Alito and Gorsuch accepted standing-through-inseverability for the state plaintiffs but declined to consider it for the private plaintiffs. Justice Thomas concurred and cast some doubt on standing-through-inseverability. In the end, the ACA survived once again.

I. The Individual Mandate Injures the Private Plaintiffs and Does Not Offer a "Choice," without Regard to the Penalty

California v. Texas was *NFIB v. Sebelius* redux. Indeed, my position on *Texas* was informed by two of my long-held views about *NFIB*. First, standing in *NFIB* was premised entirely on the pocketbook injury inflicted by the mandate and did not turn on the enforcement of the penalty. Second, the ACA could only be read to grant people a "choice"—buy insurance or pay a tax—under the auspices of the saving construction. My writings on these two points affected the proceedings before the Fifth Circuit.

A. Standing in NFIB *Was Premised on the Mandate, Not the Penalty*

Many critics ridiculed the jurisdictional argument in *Texas*. They said that a mandate without a penalty could not impose an Article III injury. A "toothless" mandate, they claimed, was not a mandate at all.[19] California argued that "the TCJA rendered Section 5000A(a) *toothless*" because there are no longer any "'negative legal consequence[s]' of not buying health insurance."[20] To these critics, the jurisdictional arguments in *Texas* were unprecedented. But, from my vantage point, the arguments were familiar. Indeed, I wrote about them in *Unprecedented*.[21] Questions Chief Justice Roberts and Justice Kagan asked in 2012 augured, with a remarkable degree of clarity, two issues presented in *Texas*. First, is the mandate separate from the penalty? Second, would someone who is subject to the mandate, but not the penalty, have standing? We will revisit these questions, which were presented in *NFIB* and then resurfaced before the Fifth Circuit.

1. Oral arguments in *NFIB*, revisited

On Monday, March 26, 2012, the Supreme Court heard the first of four oral argument sessions in *NFIB v. Sebelius*. At the time, most people focused on the second day, which considered the constitutional basis of the mandate. However, the first day proved to be the most pivotal for the saving construction.[22] And, in hindsight, the first day was also a critical day for standing.

Gregory Katsas (now a judge on the D.C. Circuit) argued on behalf of the private plaintiffs. Justice Kagan asked Katsas whether "a person who is subject to the mandate but not subject to the penalty would have standing?" This question addresses the dispute in *Texas*: The private plaintiffs were subject to the mandate but did not have to pay a penalty for going uninsured. Justice Kagan's question demonstrates that the question presented in *Texas* was not new.

[19] Henry J. Aaron, "The Supreme Court Procrastinates: No Decision Now on a Baseless Challenge to the Affordable Care Act," Brookings Inst., Feb. 10, 2020, https://perma.cc/3FWQ-KQ74.

[20] Opening Brief for Petitioners at 15, 38, California v. Texas, 141 S. Ct. 2104 (2021) (No. 19-840), https://perma.cc/GHD8-E6N8 (emphasis added).

[21] Unprecedented, *supra* note 2, at 176–84.

[22] *Id.* at 181.

Indeed, even in 2012, there were some people who were subject to the mandate but were statutorily exempt from having to pay the penalty. The law exempted five categories of people from having to pay the shared responsibility payment: "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.[23] Individuals covered by § 5000A(e) are *still* subject to the mandate but are exempt from the penalty.

Katsas answered that for people exempted by § 5000A(e), the mandate still causes an injury-in-fact. "[T]hat person is injured by compliance with the mandate," he explained. Justice Kagan was incredulous. She asked what that injury would "look like." Katsas replied that the person subject to the mandate, but not the penalty, still suffers a "classic pocketbook injury" through the "forced acquisition of an unwanted good."

Consider the declarations of the private plaintiffs from *NFIB*. Mary Brown, for example, wrote that she would be harmed because she was "required to obtain and maintain such insurance, which [she] neither need[s] nor want[s], or to pay the prescribed penalties for non-compliance."[24] Starting in 2014, the payment of the penalty could have caused a separate Article III injury. But when the case was being litigated, the penalty had *not yet been assessed*. Rather, standing was premised entirely on the mandate. Brown wrote, "to comply with the individual insurance mandate, and well in advance of 2014, [she] must now investigate whether and how to rearrange [her] personal finance affairs." Indeed, the penalty could not provide the injury-in-fact because Brown *never* planned to pay the penalty. Why? The plaintiffs were "*law-abiding* citizens who intend[ed] to comply with the mandate unless it is invalidated." The plaintiffs challenged the mandate and not the penalty, because the penalty

[23] 28 U.S.C. § 5000A(e).

[24] Declaration of Plaintiff Mary Brown in support of Plaintiffs' Motion for Summary Judgment at 2, Florida v. United States HHS, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT) [hereinafter Declaration of Plaintiff], https://perma.cc/EJ6W-BUPG.

would never injure them. Indeed, enjoining the penalty would not redress their injuries.

Earlier in the argument, Gregory Katsas elaborated on this theme in a colloquy with the chief justice. Roberts asked, "why would you have a requirement that is completely toothless? You know, buy insurance or else. Or else what? Or else nothing." Katsas replied in much the same way that the *Texas* plaintiffs would respond: "Because Congress reasonably could think that at least some people will follow the law precisely because it is the law."

Katsas's brief cited a 2008 Congressional Budget Office (CBO) report, which found that "many individuals . . . would comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws."[25] The brief added that CBO's "finding readily confirms the common-sense proposition that the interest of law-abiding citizens in challenging burdensome legal requirements *exists independently of the sanction* that would be imposed for noncompliance."[26] This argument is precisely the same argument that the *Texas* private plaintiffs advanced.

Some critics, both then and now, may think that Katsas's argument was wrong—maybe even silly. During oral argument, Chief Justice Roberts seemed genuinely skeptical. But in his written opinion, Roberts put his skepticism aside. Though he did not directly address the standing question, he *had* to accept NFIB's position to reach the merits. Otherwise, the plaintiffs would have lacked standing to challenge the mandate in 2012. But he did not dismiss the case due to a lack of standing.

The *Texas* private plaintiffs suffered an injury-in-fact for the same reason that the *NFIB* private plaintiffs suffered an injury-in-fact: the mandate imposes a legal obligation to purchase insurance, without regard to any collateral legal consequences.[27] Indeed, the *Texas* plaintiffs had a far more imminent injury in fact: they needed to maintain insurance at present, whereas the *NFIB* plaintiffs had to make financial arrangements to purchase insurance in the future.

[25] U.S. Cong. Budget Off., Pub. No. 3102, Key Issues in Analyzing Major Health Insurance Proposals 53 (2008), https://perma.cc/BA6E-VEK7.

[26] Brief for Private Respondents (Anti-Injunction Act) at 15, HHS v. Florida, 565 U.S. 1088 (2011) (No. 11-398), https://perma.cc/E6UV-V6MX.

[27] Declaration of Plaintiff, *supra* note 24.

2. Obamacare stands down in the Fifth Circuit

On the eve of oral arguments before the Fifth Circuit, I blogged about Katsas's colloquies with the chief justice and Justice Kagan.[28] This writing, based on my 2013 book *Uprecedented*, had a discernible impact on oral arguments.

Robert Henneke of the Texas Public Policy Foundation represented the private plaintiffs. He explained that the "individual mandate carries the force of a command, because [certain] categories of persons are subject to it, without the penalty."[29] Judge Jennifer Walker Elrod asked if people who were "in one of those exempted categories" from 28 U.S.C. § 5000A(e) would still "have standing." She referenced the "original argument" from *NFIB* in 2012. Judge Elrod recalled that "Justice Kagan asked . . . [w]hether or not people who don't have to pay the penalty . . . have standing?" Henneke returned to the "case history of *NFIB*." He explained that the "sole basis for the *NFIB* individual plaintiffs' [standing,] as set forth in their declarations, was the individual mandate. Not the penalty." Henneke recounted that this argument "was addressed during the first day of oral argument, in questions from both the Chief Justice and Justice Kagan." Henneke then recited the colloquy between Justice Kagan and Katsas.

Ultimately, the Fifth Circuit found that the private plaintiffs had standing. Judge Elrod wrote the majority opinion, which was joined by Judge Kurt Engelhardt. The majority explained that "[t]he standing issues presented by the individual plaintiffs are not novel."[30] Rather, "the Supreme Court faced a similar situation when it decided *NFIB* in 2012."[31] The majority then quoted from Justice Kagan's colloquy with Katsas. Justice Kagan asked "whether [Katsas] thought 'a person who is subject to the [individual] mandate but not subject to the [shared responsibility payment] would

[28] Randy E. Barnett & Josh Blackman, "NFIB v. Sebelius Already Addressed the 'Injury in Fact' Question in Texas v. U.S.," Volokh Conspiracy, July 8, 2019, https://perma.cc/R75B-YJBE.

[29] Oral Argument at 1:25:14, Texas v. United States, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011), https://bit.ly/2VnSg1o.

[30] Texas v. United States, 945 F.3d 355, 378 (5th Cir. 2019).

[31] *Id.*

have standing.'"[32] Under Congress's design, some people were subject to the mandate but not the penalty. Katsas replied that such people would have standing because they would be "injured by compliance with the mandate."[33] He explained, "when that person is subject to the mandate, that person is required to purchase health insurance. That's a forced acquisition of an unwanted good. It's a classic pocketbook injury."[34] The majority further cited Mary Brown's declaration.[35] The court also relied on the 2008 CBO report.[36] Based on this report, the majority quoted once again from Katsas's argument: "Congress reasonably could think that at least some people will follow the law precisely because it is the law."[37]

Judge Carolyn Dineen King dissented. She found that the private plaintiffs lacked standing. And she dismissed the relevance of Justice Kagan's colloquy with Katsas: "counsel's answer to a Justice's hypothetical question does not bind this court."[38] Of course, the panel was not bound by hypothetical questions. But those questions highlighted a necessary aspect of *NFIB*. And the majority drew that essential inference: "To bring a claim against the individual mandate, therefore, the [*NFIB*] plaintiffs needed to show injury from the individual mandate—not from the shared responsibility payment."[39] The *NFIB* plaintiffs advanced only this single argument for standing. And *California v. Texas* teaches that waived theories of standing are forfeited—at least in ACA cases. Judge Elrod concluded, "[t]he evidentiary basis for this injury is even stronger than it was in *NFIB*."[40]

B. The ACA Imposes a Mandate, Not a Choice

Over the past decade, I have confronted a persistent argument about *NFIB*: the ACA does not impose a mandate, but instead affords

[32] *Id.* (citations omitted).

[33] *Id.*

[34] *Id.*

[35] *Id.* at 379.

[36] *Id.* at 385 n.27.

[37] *Id.* at 379.

[38] *Id.* at 410 n.5 (King, J., dissenting).

[39] *Id.* at 378.

[40] *Id.* at 380.

people a choice between buying insurance or paying a tax.[41] This premise is half-right. Chief Justice Roberts accepted the *choice* reading of the ACA. But only in the context of the saving construction does "the shared responsibility payment merely impose[] a tax citizens may lawfully *choose* to pay in lieu of buying health insurance."[42] Outside the saving construction, Chief Justice Roberts rejected the *choice* reading. And this rejection is evident from the structure of *NFIB*. In *Texas*, the Fifth Circuit recognized this structure.

1. The structure of *NFIB*

For years, I debated the *choice* argument in many fora. And consistently advocates and scholars quoted the chief's *choice* reading, without noting that his reading was only permissible for the saving construction. To address this frequent mischaracterization of *NFIB*, I turned to a simple structure: roman numerals. I broke down the structure of *NFIB* based on the subsections of Part III of the opinion.[43]

Part III of *NFIB* considered the constitutionality of the individual mandate. Part III-A held that the mandate could not be sustained under the Commerce or Necessary and Proper Clauses. Part III-B held that the mandate could be sustained under Congress's taxing power. Five justices agreed with Parts III-A and III-B. But the opinion did not stop there.

Part III-C developed and applied the "saving construction." Chief Justice Roberts explained that "[t]he exaction the Affordable Care Act imposes on those without health insurance"—that is, the shared responsibility payment—"looks like a tax in many respects."[44] And because the penalty raised revenue, the Court could save § 5000A as a single entity. The saving construction fused together the mandate and the penalty. When combined, this chimera presented an individual with "a lawful *choice* to do or not do a certain act, so long as he is

[41] See, e.g., Marty Lederman, "There Is No 'Mandate,'" Balkinization, Dec. 15, 2018, https://perma.cc/F2VB-4UU7 ("But the ACA doesn't contain any mandate, or legal requirement, for anyone to maintain health insurance. What § 5000A contains, instead, is a choice.").

[42] NFIB, 567 U.S. at 568.

[43] See Josh Blackman, Undone: The New Constitutional Challenge to Obamacare, 23 Tex. Rev. of Law & Politics 3, 9–11, 20–22 (2019).

[44] NFIB, 567 U.S. at 563.

willing to pay a tax levied on that choice."[45] The saving construction may be treated as a gloss on the ACA. Outside the saving construction, however, "[t]he most straightforward reading of the mandate is that [§ 5000A] commands individuals to purchase insurance."[46] The shared responsibility payment, as drafted by Congress, was not a tax. And § 5000A, as drafted by Congress, did not offer a "lawful choice." Instead, it imposed an unconstitutional mandate to purchase insurance.

The TCJA reduced the shared responsibility payment to $0. As a result, § 5000A can no longer be read as offering a "lawful choice" to purchase insurance or pay a tax. Congress thus peeled off the ACA's protective gloss, leaving only the unvarnished and unconstitutional individual mandate. Part III-C, and much of Part III-B, are no longer controlling. Rather, Part III-A controls: "the 'most straightforward' reading of that provision [is] a command to purchase insurance."[47]

My sequential framing of the structure of *NFIB* had a discernible impact on the proceedings before the Fifth Circuit.

2. The Fifth Circuit recognized a mandate, not a choice

Before the Fifth Circuit, Texas Solicitor General Kyle Hawkins concisely explained why Part III-A is now the only relevant portion of *NFIB*, and how Parts III-B and III-C became irrelevant.[48] He began, "it is crucial to understand the structure of Chief Justice Roberts's opinion." Hawkins continued, "in Part III-A," Chief Justice Roberts "says that the best way to read [§ 5000A(a)] is as a command to buy insurance." Critically, the chief "looks at the mandate" and "not the penalty." But in Parts "III-B and III-C" Roberts, "says that we can glue the individual mandate provision to the penalty provision, and once they are glued together, then they function as a tax." The chief could apply that saving construction only because "the penalty is raising revenue for the government." However, in 2017, "Congress took away everything that supported III-B and III-C." Because of the TCJA, the penalty "is no longer raising any revenue for the federal government"

[45] *Id.* at 574 (emphasis added).

[46] *Id.* at 562 (opinion of Roberts, C.J.).

[47] Texas v. United States, 945 F.3d at 391 (quoting NFIB, 567 U.S. at 562).

[48] Oral Argument, *supra* note 29, at 56:36.

and "no longer can be fairly characterized as a tax." Hawkins stated that "in light of the [TCJA], Part III-B and III-C . . . are irrelevant." "[T]he only thing we are left with then is Part III-A . . . where [Roberts] holds that [§ 5000A(a)] is a command to buy insurance." At that point, Judge Elrod asked if the court should "sever" Parts III-B and III-C from *NFIB*. Hawkins replied, "the entire basis for III-B and III-C is now off the table."

Ultimately, the Fifth Circuit's majority opinion followed the structure of *NFIB*. Judge Elrod explained that "Chief Justice Roberts's opinion functioned in the following way."[49] First, "[i]n Part III-A, Chief Justice Roberts said that the individual mandate was most naturally read as a command to buy insurance."[50] And that mandate "could not be sustained under either the Interstate Commerce Clause or the Necessary and Proper Clause."[51]

Second, "in Part III-B, the Chief Justice wrote that . . . the most natural reading of the individual mandate was unconstitutional."[52] Still, "the Court . . . needed to determine whether it was 'fairly possible' to read the provision in a way that saved it from being unconstitutional."[53] And as part of "an exercise in constitutional avoidance," the Court found "the mandate could be read not as a command but as an option to purchase insurance or pay a tax."[54] The "'option' interpretation of the statute could save the statute from being unconstitutional" as an exercise of "Congress' taxing power."[55] Critically, however, this "option," or *choice* reading was only feasible because the penalty raised revenue.

Third, in "Part III-C," the Court "concluded that [§ 5000A] could be construed as constitutional" under the saving construction.[56] The majority would "read[] the individual mandate, in conjunction with the shared responsibility payment, as a legitimate exercise of

[49] Texas v. United States, 945 F.3d at 387 n.12.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 388.

[55] *Id.*

[56] *Id.* at 387 n.12.

Congress' taxing power."[57] The provisions were, in Solicitor General Hawkins's words, "glued together." The choice argument works *only* within the context of the saving construction. Judge Elrod concluded "that the individual mandate was [*only*] constitutional as saved."[58]

The Supreme Court would echo this reading of the ACA—sort of.[59]

II. Sensing Severability

As a general matter, I felt confident about the standing and merits arguments in *Texas*. But I was conflicted about severability in this case, and in general. I have long struggled with the notion that courts can halt an entire law, even though only part of it is unconstitutional. In *Unprecedented*, I carefully avoided taking any firm position about what should happen if the mandate was unconstitutional. I tentatively agreed with the Obama administration's position: the ACA's central insurance reforms were inseverable from the "essential" mandate. But I didn't commit. Ultimately, the *NFIB* majority did not need to reach the severability question because it saved the mandate. The joint dissent, by contrast, would have halted the *entire* ACA. All of it. Still, in hindsight, at least one *NFIB* dissenter may have become uncertain about that sweeping holding. In *Murphy v. NCAA*, Justice Thomas advanced a different approach to severability. *Murphy* changed how I think about severability. And Justice Thomas's writings on severability affected how I approached standing.

This part will explain the relationship between standing and severability in *Texas*. First, I will reconsider the severability analysis in *NFIB*'s joint dissent in light of Justice Thomas's *Murphy* concurrence. Second, I will introduce the concept of standing-through-inseverability. In a rare sliver of cases, courts have Article III jurisdiction to redress injuries caused by inseverable provisions. Indeed, third, a careful analysis of *NFIB* shows that standing in that case could have been established only through inseverability. Fourth, under modern, purposivist doctrine, the severability analysis in *Texas* would be straightforward: the Congress that enacted the TCJA did not want to kill the entire law. But the unstated legislative intent from

[57] *Id.*

[58] *Id.*

[59] See *infra* Part III.C.

2017 was a nullity. Instead, fifth, the plaintiffs established standing to challenge the mandate by showing that their injuries were traceable to the enforcement of the ACA's insurance reforms. And those injuries could be redressed by enjoining the reforms. I thought that approach was consistent with Justice Thomas's *Murphy* concurrence. So did the solicitor general. We were wrong.

A. NFIB*'s Joint Dissent, Reconsidered after* Murphy

In *Murphy v. NCAA*, Justice Thomas wrote a significant concurring opinion, which Justice Gorsuch joined.[60] Justice Thomas recognized that the Court's severability precedents are "in tension with traditional limits on judicial authority."[61] Modern "severability doctrine," he wrote, "often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions."[62] When one provision of a statute is declared unconstitutional, "every other provision" of that statute is "at risk of being declared nonseverable and thus inoperative," regardless of "whether the plaintiff has standing to challenge those other provisions."[63] Justice Thomas cited a recent example of this dynamic: the *NFIB* joint dissent, which found that the *entire* ACA was inseverable from the unconstitutional mandate.[64] Yes, Justice Thomas cast some doubt on his own opinion from six years earlier. (If only we were all able to so easily admit our own fault.) Justice Thomas observed that "severability doctrine is thus an unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect."[65] Justice Thomas, as he often does, urged the Court to "reconsider these precedents, at some point."[66]

The *Murphy* concurrence had a large impact on how I view severability, as well as standing.

[60] Murphy v. NCAA, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring).

[61] *Id.*

[62] *Id.* at 1487.

[63] *Id.*

[64] *Id.* (citing NFIB, 567 U.S. at 696–97).

[65] *Id.* at 1487.

[66] *Id.*

B. Standing-through-Inseverability

To establish Article III standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[67] "[S]tanding and remedies are joined at the hip: Article III permits a court only to provide 'a remedy that redresses the plaintiffs' injury-in-fact.'"[68] For example, a plaintiff argues that he is injured by an unconstitutional provision and the court redresses that injury by enjoining the injurious unconstitutional provision.

Conversely, if a court can afford a remedy that redresses the plaintiffs' injury-in-fact, then a court has Article III jurisdiction. Or does it? Placing the remedial inquiry *before* the standing inquiry seems backwards. Crafting a remedy often involves statutory interpretation—an inherently *merits*-style question. How can a court resolve a remedial question before establishing Article III standing? Engaging in this task prior to establishing Article III jurisdiction could amount to something like an advisory opinion. I'll admit this argument is powerful and—in most cases—persuasive. But I think the adjudicatory order of operations can be flipped for a narrow sliver of cases that involve inseverability.

Often, legislatures include severability clauses in statutes: Courts should sever an unconstitutional provision of a statute from the remainder of a law to save as much of the statute as possible. By contrast, inseverability clauses are rare. With these provisions, legislatures group together central provisions of a statute. If *any* aspect of that grouping is declared unconstitutional, the entire grouping must fall.

Consider a hypothetical statute with three sections: Section A, Section B, and Section C. Congress adds an inseverability clause to this statute, finding that Section A is "essential" to the operation of Section B. If Section A is declared unconstitutional, then the court should also enjoin Section B. Congress would not want Section B to operate in the absence of Section A. However, Section A is not

[67] Transunion, L.L.C. v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

[68] Collins v. Yellen, 141 S. Ct. 1761, 1796 n.34 (2021) (Gorsuch, J., concurring) (quoting Collins v. Mnuchin, 938 F.3d 553, 609 (5th Cir. 2019) (Oldham, J., concurring in part and dissenting in part)).

"essential" to the operation of Section C. Thus, Section C can be severed from Sections A and B. But Section A cannot be severed from Section B.

In a hypothetical case, the enforcement of Section A injures the plaintiff. The plaintiff alleges that Section A is unconstitutional. Moreover, that injury can be traced to the enforcement of Section A. And that injury can be redressed by enjoining Section A. But Section B does not satisfy any of the three elements of Article III standing. Yet, in light of the inseverability clause, Section B would be enjoined, *regardless* of whether Section B is unconstitutional. Under modern doctrine, the court would not even ask if Section B injures the plaintiff, or whether enjoining Section B redresses any injury.

This analysis is not controversial. But it should be. Here, the court enjoined Section B, which was constitutional and never injured the plaintiff. For the reasons Justice Thomas identified in *Murphy*, this approach seems to conflict with the rigors of Article III standing. The courts should only have the power to enjoin laws that in fact injure the plaintiffs. Yet, under settled doctrine, this analysis is valid.

Now consider another statute with two sections: Section A and Section B. Congress adds an inseverability clause to this statute, finding that Section A is "essential" to the operation of Section B. Section A imposes an unconstitutional-but-unenforced mandate: a command to buy a commercial product. Section A inflicts on the plaintiff a classic pocketbook injury. And the plaintiff alleges that Section A is unconstitutional. However, that injury cannot be traced to the government's enforcement of Section A because the government does not enforce Section A. Accordingly, there is no government defendant to enjoin. Thus, the plaintiff's injury cannot be redressed by enjoining Section A. Section B likewise injures the plaintiff. The government does enforce Section B. And the injury from Section B could be redressed by enjoining the enforcement of Section B. But there is no allegation that Section B is unconstitutional.

In this second hypothetical, the plaintiff mixes and matches the Article III analysis based on inseverability. The injury in fact is premised on the injurious-and-unconstitutional-but-unenforced Section A, while traceability and redressability are premised on the injurious-and-constitutional-and-enforced Section B. Sections A and B both injure the plaintiff. And Section B, which is inseverable from Section A, can be enjoined to redress the injuries caused by

Sections A and B jointly. The inseverability clause expressly holds this triptych together. The theory underlying this second hypothetical can be described as *standing-through-inseverability*.

This second analysis should not be controversial, but it is under modern doctrine. The Supreme Court has approved of enjoining constitutional provisions of law that do not satisfy any of the three elements of Article III standing, solely by virtue of inseverability. See the first hypothetical. But the Supreme Court has not approved of enjoining an unconstitutional provision of law that satisfies the first element of Article III standing and also satisfies the other two elements by virtue of inseverability. Justice Thomas observed that the Court "has not addressed standing-through-inseverability in any detail, largely relying on it through implication."[69] Still, standing-through-inseverability is far less objectionable than inseverability-without-standing.

Standing-through-inseverability has several virtues. First, unlike with hypothetical 1, in hypothetical 2 all of the enjoined provisions actually injure the plaintiff. The latter example avoids the problems identified in *Murphy* where the courts enjoin noninjurious provisions. Second, standing-through-inseverability prevents Congress from creating unenforceable-but-unconstitutional mandates that cannot be challenged in court. Some law-abiding citizens will still follow a mandate even if there is no penalty for ignoring the mandate. Nudges can sometimes be just as effective as shoves. These sorts of requirements are novelties in federal jurisprudence and should not be encouraged.

The third virtue was illustrated during oral arguments in *California v. Texas*. Justice Alito asked about a statute with two sections, in which Section A is unconstitutional but imposes no injury.[70] For example, Section A has a "clearly racially discriminatory provision."[71] Section B is constitutional but does not injure the plaintiff. And Sections A and B are inseverable. If you reject standing-through-inseverability, no plaintiff could challenge this statute. Donald Verrilli, who defended the ACA on behalf of the House of Representatives, recognized that

[69] Texas, 141 S. Ct. at 2122 (Thomas, J., concurring).

[70] Transcript of Oral Argument at 42, California v. Texas, 141 S. Ct. 2104 (2021) (No. 19-840).

[71] *Id.* at 94.

Alito's hypothetical statute likely could be challenged in court.[72] He said that Alito's question "definitely tests the limits of our objection to standing-through-inseverability."[73] He stated that "it would be hard to maintain [the House's] position in the face of a statute like that.'"[74]

As a theory, standing-through-inseverability cannot be rejected out of hand. Indeed, standing-through-inseverability was the *only* basis for standing in *NFIB*.

C. Standing in NFIB, *Revisited*

What was the basis for standing in *NFIB*? Let's consider each of the three elements of Article III jurisdiction. First, the individual mandate imposed an injury-in-fact. And that injury was imposed without regard to the penalty—see part III.A above. But what about the other two elements: traceability and redressability? These elements could not be supported by the penalty. The plaintiffs forfeited any standing arguments premised on the penalty. Nor could traceability and redressability be supported by the individual mandate standing by itself. To understand why, we have to consider what a mandate actually means.

NFIB found that the "most straightforward reading of the mandate is that it commands individuals to purchase insurance."[75] I agree. In a legal sense, there is indeed a command that people must buy insurance. But the ACA does not actually require people to maintain insurance. *Actual* mandates, backed by government compulsion, are exceedingly rare in the law. And many legal regimes described as mandates are not really mandates. To use a topical example, *Jacobson v. Massachusetts* is usually cited to support compulsory vaccine mandates.[76] Not quite. Under the Cambridge law, people could receive a free vaccine or pay a modest $5 fine.[77] The city of Cambridge did

[72] *Id.* at 42.

[73] *Id.*

[74] *Id.*

[75] NFIB, 567 U.S. at 562 (opinion of Roberts, C.J.).

[76] See Buck v. Bell, 274 U.S. 200, 207 (1927) (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.").

[77] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70–71 (2020) (Gorsuch, J., concurring). See also, Josh Blackman, "Told You So about Jacobson v. Massachusetts," Volokh Conspiracy, Nov. 26, 2020, https://perma.cc/2MCW-RZN9.

not forcibly strap Henning Jacobson to a gurney and jab a needle in his arm. By contrast, *Buck v. Bell* involved an actual mandate. Carrie Buck was forced to undergo an involuntary tubal ligation. She was sterilized for being an "imbecile." Buck did not have the choice to pay a fine.

With the ACA, bureaucrats are not empowered to garnish wages or withdraw funds to pay a person's insurance premiums. No federal agent can accost scofflaws on the street, take their wallets, and deposit money on the health-insurance exchanges. Even those people who paid the penalty—a sum less than the cost of policies—could still remain uninsured. In short, no government officer can actually enforce the individual mandate in § 5000A(a)—not today, and not in 2012.

During oral arguments in *NFIB*, Solicitor General Verrilli made an important representation. He "confirm[ed] that if someone chooses to pay [the penalty] rather than obtain health insurance, they have fully complied with the law."[78] This representation proved essential to the chief justice's saving construction.[79] But it should not have been particularly difficult for the government to make this representation. Congress gave the federal government no mechanism to actually force people to purchase insurance. At most, uninsured people could be required to pay a penalty. But as far as the government was concerned, no further action can be taken because the government was not authorized to take any further action. Here, the executive branch could not actually make people buy insurance.

Imagine a different statute in which people who failed to buy insurance were subject to wage garnishment, and those funds would then be used to automatically enroll a person in an insurance policy. That law would amount to a true mandate. But the ACA did not create this mechanism. By contrast, the ACA "bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies."[80]

The individual mandate is *unprecedented* in many regards. Section 5000A(a) has *always* imposed an unenforced command to purchase insurance. Indeed, the ACA provided that several people would be

[78] NFIB, 567 U.S. at 568 (citing Brief for United States 60–61; Transcript of Oral Argument 49–50 (Mar. 26, 2012)).

[79] Unprecedented, *supra* note 2, at 180, 274.

[80] NFIB, 567 U.S. at 539.

subject to the mandate but not to the penalty.[81] For these people, the government expressly established an unenforceable mandate without adverse consequences.

Some critics argue that an unenforced command is not a command at all. This position may be grounded in the nuances of federal standing law, but often it amounts to a philosophical debate: When the government says "thou shalt," are the people are under no obligation unless the government also says "or else . . ."? I disagree with this approach from both a legal and a moral perspective. Some people follow the law simply for the sake of following the law. That respect for the law is a value our polity should praise, not deride. These actions are not self-inflicted injuries; citizens are responding to a very rare sort of command from their government. During oral arguments in *California v. Texas*, Justice Kavanaugh questioned whether Congress had ever enacted a "true mandate with no penalties" "to do something" or "to purchase a good or service."[82] In reply, Texas Solicitor General Hawkins said that the mandate was "unprecedented."[83]

Still, an injury-in-fact is not enough to establish Article III standing. The problem with an unenforced mandate concerns the other two elements of the Article III inquiry: traceability and redressability. Imagine that Congress enacted a variant of the ACA in which § 5000A(a) was completely severable from the remainder of the statute. In this case, I do not think private plaintiffs would have standing to challenge the individual mandate. Plaintiffs could claim an injury-in-fact, but the court could not redress that injury through an injunction of the unconstitutional-but-unenforced mandate. They would have no luck in federal court.

In *NFIB*, § 5000A(a) by itself was not enough to support standing. The plaintiffs' injuries could not be *traced* to the enforcement of § 5000A(a) because the provision was not enforced. And the plaintiffs' injuries could not be *redressed* by enjoining § 5000A(a) because there is no defendant to enjoin. Injunctions run against the enforcement of a law, not the mere existence of a statute. Moreover, enjoining the penalty would not have redressed the plaintiffs' injury in 2012 because the penalty had not been assessed. Additionally, some

[81] See 28 U.S.C. § 5000A(e).

[82] Transcript of Oral Argument, *supra* note 70, at 84.

[83] *Id.*

people were—and still are—subject to the mandate but not to the penalty. Enjoining the penalty would never redress their injuries. Plus, the *NFIB* plaintiffs forfeited any standing argument premised on the penalty. Thus, to satisfy traceability and redressability, some *other* provision of the ACA had to be enjoined. In *NFIB*, the only path to satisfy traceability and redressability involved standing-through-inseverability.

Specifically, in *NFIB* the plaintiffs and the federal government agreed that the mandate was inseverable from insurance reforms known as guaranteed issue and community rating (GICR).[84] Under these regulations, insurers (1) are required to issue policies to customers regardless of their pre-existing conditions, and (2) cannot charge customers higher rates because of their pre-existing conditions.

Congress included two statutory findings about the relationship between the individual mandate and GICR.[85] First, Congress concluded that the "individual responsibility requirement"—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."[86] Second, Congress found that the individual mandate was "*essential* to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs."[87] In short, the individual mandate was "essential" to GICR. Chief Justice Roberts cited these findings in his controlling opinion.[88] In *NFIB*, the Obama administration read these two statutory findings as the functional equivalent of an inseverability clause. The government argued that if the individual mandate was unconstitutional, then the Court should also enjoin GICR.[89]

I agree with the Obama administration's argument: The statutory findings functioned as an inseverability clause. The mandate and GICR operated together. This cohesive grouping required people to

[84] 42 U.S.C. §§ 300gg, 300gg-1, 300gg-3, 300gg-4, 18032(c), and some related provisions.

[85] 42 U.S.C. § 18091(2)(J).

[86] *Id.* at § 18091(2)(I) (emphasis added).

[87] *Id.*

[88] NFIB, 567 U.S. at 556 (opinion of Roberts, C.J.).

[89] *Id.* at 542.

purchase insurance that provided "minimum essential coverage." For some people—the elderly and sick—this grouping potentially lowered the cost of insurance. For other people—the young and healthy—this grouping potentially raised the cost of insurance. Catastrophic policies, for example, would not comply with the mandate. Rather, to comply with the mandate people would have to purchase comprehensive and expensive policies.

Now, the full scope of the standing inquiry comes into view. The mandate, standing by itself, imposes an injury in fact. Alternatively, the mandate, in conjunction with GICR, imposes an injury in fact. (In *California v. Texas*, the U.S. solicitor general favored the latter view and Cato favored the former view.). Both injuries are classic pocket-book injuries: The purchase of an unwanted product. And those products are unwanted because of GICR, which can raise prices and reduce selection. In either case, those injuries can be traced to officials who enforce GICR, and those injuries can be redressed by enjoining the enforcement of GICR. In *NFIB*, traceability and redressability could only have been satisfied if the mandate was inseverable from GICR. Many observers simply assumed the penalty provided the basis for standing in *NFIB*. The penalty did not, and could not, have played a role in the Article III inquiry for the *NFIB* private plaintiffs.

Standing-through-inseverability established Article III jurisdiction in 2012. But was this theory still available after the Tax Cuts and Jobs Act of 2017?

D. Congressional Intent Before and After 2017

In popular discourse, the severability analysis in *California v. Texas* was largely informed by realpolitik. After President Trump's surprise victory in 2016, congressional Republicans spent nearly a year trying to repeal large portions of the ACA. Those efforts failed. Instead, Congress relied on the budget reconciliation process to reduce the penalty to $0. Republican politicos from Trump on down boasted that the Tax Cuts and Jobs Act "repealed" the individual mandate. The TCJA did no such thing. The mandate remained in place; the penalty was simply zeroed out. How did this change affect the severability analysis?

Under modern severability doctrine, purpose matters—a lot. If one portion of a law is declared unconstitutional, courts imagine

what Congress would have wanted to do with the remainder of the statute. "'Would Congress still have passed' the valid sections 'had it known' about the constitutional invalidity of the other portions of the statute?"[90] For the ACA, the answer to this question is straightforward. Had congressional Republicans and Democrats been polled in late 2017, I speculate that a super-majority would have agreed: If the mandate was declared unconstitutional, the remainder of the ACA should remain unchanged. The sense of Congress—on both sides of the aisle—was that the TCJA made a surgical excision from the ACA.

Before the Supreme Court, this understanding of legislative history was articulated by the Democratic-controlled House of Representatives[91] and 47 Democratic senators.[92] No Republican members of Congress signed an amicus brief to the contrary, suggesting they did not disagree with the Democrats. The Cato brief acknowledged this dynamic: "if the Court were to defer to the will of the [2017] Congress, the severability analysis would be straightforward: the unconstitutional individual mandate should be severed from the rest of the ACA."

Still, I do not hold the handiwork of the 2017 Congress in very high regard. The *NFIB* saving construction was straightforward: The ACA could be saved because the penalty raised revenue. Any competent attorney should have recognized that zeroing out the penalty risked toppling the saving construction and throwing the ACA into constitutional jeopardy. Before 2017, the ACA was dangling by a constitutional thread. The TCJA severed that thread. In my view, the actions of the 2017 Congress were a constitutional "nullity."[93]

But on a deeper level, I profoundly disagree with the purposivist nature of modern severability doctrine. "Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make 'a nebulous inquiry into hypothetical

[90] United States v. Booker, 543 U.S. 220, 258 (2005) (quoting Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996) (plurality op.)).

[91] Opening Brief for the United States House of Representatives as Respondent Supporting Petitioners, California v. Texas, 141 S. Ct. 2104 (2021) (No. 19-840), https://perma.cc/RCZ8-FQ46.

[92] Brief of 47 Members of the United States Senate as Amici Curiae in Support of Petitioners, California v. Texas, 141 S. Ct. 2104 (2021) (No. 19-840), https://perma.cc/3SCG-VXHK.

[93] Blackman, Undone, *supra* note 43, at 47–48.

congressional intent.'"[94] Often, "the enacting Congress [lacked] any intent" on the severability question.[95] That problem does not concern the TCJA. Here individual members of Congress were quite forthright: If the mandate was declared unconstitutional, then the rest of the ACA should remain in effect. But so what? Intentions only count if "they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment."[96] In 2017, Congress did not repeal the statutory findings that linked the "essential" mandate to GICR—the very findings that the Obama administration treated as an inseverability clause in *NFIB*.

Finally, I recognize that members of Congress who supported and opposed the TCJA did not expect any other portions of the ACA to fall. Again, so what? Congress can enact a statute with one intent, which can later be interpreted to achieve radically different policy outcomes. "[L]egislators' . . . intended expected applications" or "a statute's purpose is [not] limited to achieving applications foreseen at the time of enactment."[97] And frankly, the consequences of zeroing out the penalty should have been entirely foreseeable—at least it was obvious to the attorneys general who challenged the ACA.

As a matter of first principles, the inseverability analysis should have been the same in 2012 and in 2017. The penalty played no role in resolving severability in *NFIB*. And nothing in the TCJA altered that analysis. Furthermore, the standing analysis should have been the same in 2012 and in 2017. The penalty played no role in resolving standing in *NFIB*. And zeroing out the penalty did not change the linkage between the mandate and GICR. "[S]tanding and remedies are joined at the hip."[98] They rise together, and they fall together. In *California v. Texas*, the Supreme Court should have "fashion[ed] a remedy that actually redresses Plaintiffs' harms."[99] Or at least that is what I hoped would happen.

[94] Murphy, 138 S. Ct. at 1486 (Thomas, J., concurring) (quoting Booker, 534 U.S. at 320 n.7 (Thomas, J., dissenting)).

[95] *Id.* at 1487.

[96] *Id.*

[97] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1750 (2020).

[98] Collins, 141 S. Ct. at 1796 n.34 (Gorsuch, J., concurring) .

[99] Collins v. Mnuchin, 938 F.3d 553, 611 (5th Cir. 2019) (Oldham, J., concurring in part and dissenting in part).

E. Cato's and the U.S. Solicitor General's "Novel" Theory of Standing-through-Inseverability

The Cato brief argued that the two private plaintiffs had standing based on provisions that were inseverable from the unconstitutional mandate. The U.S. solicitor general also contended that the individual plaintiffs had standing-through-inseverability.[100] Cato and the solicitor general advanced very similar theories about traceability and redressability, though we parted company on the nature of the injury in fact. In *California v. Texas*, both Justice Breyer's majority opinion and Justice Alito's dissent referred to our theories as "novel."[101] Ultimately, both opinions declined to consider standing-through-inseverability for the private plaintiffs. This part will address what could have been on standing.

1. Injury in fact

The Cato brief contended that *NFIB* stands for a simple proposition: The individual mandate inflicted a pocketbook injury without regard to the penalty. Congress imposed a command to purchase health insurance. Nothing in the TCJA altered that injury. The solicitor general did not advance this argument directly. Rather, the United States established the injury in fact through inseverability. The Department of Justice argued that "[t]he individual plaintiffs have shown that the ACA's insurance-reform provisions," like GICR, "injure them by limiting their options with regard to insurance coverage and by raising their costs."[102] Specifically, "the plaintiffs challenge[d] the insurance-reform provisions that do injure them, and the basis for their challenge is that the insurance-reform provisions are inseverable from the mandate, which is invalid."[103]

Stated differently, the individual mandate—working in conjunction with the ACA's insurance-reform provisions—force the plaintiffs to buy unwanted, overpriced products. The plaintiffs claimed they were injured by regulations, which were inseverable from the

[100] Brief for the Federal Respondents, California v. Texas, 141 S. Ct. 2104 (2021) (Nos. 19-840, 19-1019) [hereinafter Brief for the Federal Respondents], https://perma.cc/HZZ5-4MT9.

[101] Texas, 141 S. Ct. at 2116; *id.* at 2126 (Alito, J., dissenting).

[102] Brief for the Federal Respondents, *supra* note 100, at 11–12.

[103] *Id.* at 20.

individual mandate. This approach to standing-through-inseverability can be referred to as a *bootstrap* theory: The individual mandate and other inseverable insurance reforms are bootstrapped together for the standing inquiry.

I have no problem with the solicitor general's approach to the injury-in-fact prong. It has the virtue of avoiding an unconventional reading of *NFIB* that was not directly addressed by the Court. But the more direct approach is to argue that the plaintiffs are injured by the unconstitutional individual mandate.

2. Traceability

The individual mandate, standing by itself, creates an injury-in-fact. But the unenforced requirement, standing by itself, creates problems for the second prong of Article III standing: traceability. During oral arguments, Justice Barrett asked Texas Solicitor General Hawkins how the alleged injuries with respect to the mandate were "traceable to the defendants that the individual[] [plaintiffs] have actually sued here."[104] She asked, "Why is it [the defendants'] action that's actually inflicting the injury?"[105] Later in the argument Acting Solicitor General Jeffrey Wall acknowledged that "Justice Barrett [asked] some very difficult questions about traceability with respect to the individual" plaintiffs.[106]

The private plaintiffs' injuries cannot be traced to § 5000A(a), standing by itself, as that provision is not actually enforced. But the insurance reforms, like GICR, are enforced. The bootstrap theory addresses Justice Barrett's questions. The U.S. solicitor general argued that the plaintiffs established "a cognizable injury traceable to the insurance-reform provisions," such as GICR.[107] Here, the plaintiffs' injury can be traced to the defendants' "'allegedly unlawful conduct,'" and not to the allegedly unlawful "provision of law that is challenged."[108] And "[t]he individual plaintiffs can make this merits argument regardless of whether they would have Article III standing

[104] Transcript of Oral Argument, *supra* note 70, at 88.

[105] *Id.*

[106] *Id.* at 107.

[107] Brief for the Federal Respondents, *supra* note 100, at 19.

[108] Collins, 141 S. Ct. at 1765 (quoting Allen v. Wright, 468 U. S. 737, 751 (1984)).

to challenge the individual mandate by itself."[109] Traceability could only be established through inseverability. This premise was true in *NFIB*, and it was true in *California v. Texas*.

3. Redressability

The third element of Article III standing—redressability—can also be satisfied through inseverability. It is unclear how a court could enjoin a requirement that is not enforced. But a court could enjoin the ACA's inseverable insurance reforms, such as GICR. The solicitor general contended that "the individual plaintiffs have standing to obtain an injunction barring enforcement against them of the insurance reforms that injure them."[110] And this redressability analysis was "joined at the hip" with the remedial analysis.[111] The federal government argued that "the relief the Court orders should be limited to redressing the injury actually incurred—that is, the relief should reach only the enforcement of the ACA provisions that injure the individual plaintiffs."[112]

Cato likewise urged the Court to "fashion a remedy that actually redresses [the plaintiffs'] harms."[113] I thought that this approach to standing and severability threaded the needle between the Court's modern severability doctrine and the *Murphy* concurrence. Alas, I only garnered one of the *Murphy* concurrers: I got Justice Gorsuch, but lost Justice Thomas.

III. *California v. Texas* Is Unreviewable

California v. Texas split 7-2. Justice Breyer wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Thomas, Kagan, Sotomayor, Kavanaugh, and Barrett. Justice Thomas concurred. And Justice Alito dissented with Justice Gorsuch.

The majority held that the challenge to the mandate was unreviewable. The Court only considered the second standing prong and ruled that the plaintiffs' alleged injuries were not traceable to

[109] Brief for the Federal Respondents, *supra* note 100, at 14.

[110] *Id*. at 23 n.4.

[111] See Collins, 141 S. Ct. at 1796 (Gorsuch, J., concurring).

[112] Brief for the Federal Respondents, *supra* note 100, at 12.

[113] Cato Amicus, *supra* note 18, at 29 (quoting Collins v. Mnuchin, 938 F.3d 553, 611 (5th Cir. 2019) (Oldham, J., concurring in part and dissenting in part)).

any governmental action. Both the majority and dissent declined to consider standing-through-inseverability with respect to the private plaintiffs. But Justice Alito, in dissent, concluded that the state plaintiffs established standing-through-inseverability. Justice Thomas maintained that none of the plaintiffs had standing.

A. Standing-through-Inseverability

Justice Breyer's majority opinion declined to consider the solicitor general's "alternative theory" of standing-through-inseverability.[114] Breyer wrote that this position was "raised for the first time" before the Supreme Court, "was not directly argued by the plaintiffs in the courts below," and "was nowhere presented at the certiorari stage."[115]

Justice Alito also declined to consider standing-through-inseverability with respect to the private plaintiffs.[116] Rather, he relied on standing-through-inseverability for the state plaintiffs. He wrote that "costly obligations imposed on [the states] by other provisions of the ACA cannot be severed from the mandate."[117] In other words, the ACA's insurance reforms were *inseverable* from the unconstitutional mandate. The dissent found this line of reasoning was "conceptually sound."[118] Finally, the dissent rejected the argument that the state plaintiffs' forfeited the standing-through-inseverability argument.[119]

Only Justice Thomas addressed the bootstrap theory for the private plaintiffs. Justice Thomas acknowledged that "[t]his theory" of standing-through-inseverability "offers a connection between harm and unlawful conduct."[120] And, he explained, this theory "might well support standing in some circumstances."[121] But Justice Thomas would not address standing-through-inseverability in this case. First, he agreed with the majority that the issue was forfeited. Second, he

[114] Texas, 141 S. Ct. at 2116.

[115] *Id.*

[116] *Id.* at 2127 (Alito, J., dissenting).

[117] *Id.*

[118] *Id.*

[119] *Id.* at 2134.

[120] *Id.* at 2122 (Thomas, J., concurring).

[121] *Id.*

wrote that "this Court has not addressed standing-through-inseverability in any detail, largely relying on it through implication."[122] Third, and most damning, he cast doubt on the validity of the theory. He wrote that "standing-through-inseverability—*assuming* it is a legitimate theory of standing—is fundamentally a merits-like exercise."[123] He concluded, "standing-through-inseverability could only be a valid theory of standing to the extent it treats inseverability as a merits exercise of statutory interpretation."[124]

Justice Gorsuch apparently viewed the issue differently. He had joined the *Murphy* concurrence and also joined the *California* dissent. He was content to consider inseverability at the standing stage. Justice Thomas, alas, was not. Here, we see a fracture between the Court's two most conservative members. In the end, Justice Thomas cast the seventh vote against the plaintiffs.

B. No Standing-without-Inseverability

Justice Breyer declined to consider whether the individual mandate imposes an injury in fact. Rather, the entire majority opinion turned on traceability. Even if the Court "assume[d] that [the plaintiffs'] pocketbook injury satisfies the injury element of Article III standing," the plaintiffs still failed to show "that the injury they will suffer or have suffered is 'fairly traceable' to the 'allegedly unlawful conduct' of which they complain."[125]

The Court recognized that the minimum essential coverage requirement "has no means of enforcement."[126] Justice Breyer concluded, "there is no action [by the government]—actual or threatened—whatsoever."[127] Here, the majority echoed Justice Barrett's questions from oral argument. Thus, the private plaintiffs could not trace their injuries to any governmental action.

Justice Breyer also rejected the state plaintiffs' arguments for standing. The Court concluded that "the plaintiffs in this suit failed to show a concrete, particularized injury fairly traceable to the

[122] *Id.*

[123] *Id.* at 2122 n.2 (emphasis added).

[124] *Id.* at 2122.

[125] *Id.* at 2113–14.

[126] *Id.* at 2114.

[127] *Id.* at 2115.

defendants' conduct in enforcing the specific statutory provision they attack as unconstitutional."[128]

C. The ACA Imposes a Mandate—Not a Choice—That Is Unconstitutional

The majority did not "reach" any "questions of the Act's validity."[129] Still, language in Justice Breyer's majority opinion seems inconsistent with the argument that the ACA imposed a *choice*. First, the Court accurately described § 5000A(a): "As originally enacted in 2010, the Patient Protection and Affordable Care Act *required* most Americans to obtain minimum essential health insurance coverage."[130] There was a "requirement," not a choice. Indeed, § 5000(A) is described as a requirement throughout the majority opinion. Second, the words "choice" or "choose" appear nowhere in the decision. Third, the Court described the penalty as an altogether separate provision from the requirement.[131] The ACA imposes a requirement to buy insurance; it does not offer a choice to pay a tax-penalty. That fact was true in 2010. It was true in *NFIB*. And it remains true today.

Justice Alito found that the individual mandate does not "fall[] within a power granted to Congress."[132] However, *NFIB* saved "the mandate [as] a lawful exercise of Congress's taxing power"—in part because the penalty raised revenue.[133] And "raising revenue is an 'essential feature' of any exercise of the taxing power."[134] But in 2017, the TCJA reduced the penalty to zero. It no longer raised revenue. "Now, in the trilogy's third episode," Justice Alito wrote, "the Court is presented with the daunting problem of a 'tax' that does not tax."[135] He asked rhetorically, "[c]an the taxing power, which saved the day in the first episode, sustain such a curious creature?"[136] No, he answered. "[T]he slender reed that supported the decision in *NFIB*

[128] *Id.* at 2120.

[129] *Id.* at 2112.

[130] *Id.* (emphasis added).

[131] *Id.*

[132] *Id.* at 2135 (Alito, J., dissenting).

[133] *Id.*

[134] *Id.* at 2136.

[135] *Id.* at 2123.

[136] *Id.*

was seemingly cut down" by Congress.[137] The saving construction no longer holds. And the taxing power argument that garnered five votes in 2012 "is no longer defensible."[138]

The final "installment [of the] epic Affordable Care Act trilogy" ended not with a bang, but a whimper.[139]

Conclusion

In dissent, Justice Alito wrote that "in all three episodes, with the Affordable Care Act facing a serious threat, the Court has pulled off an improbable rescue."[140] Justice Alito lamented, "once again the Court has found a way to protect the ACA."[141] Justice Alito predicted, "[o]ur Affordable Care Act epic may go on."[142]

The unconstitutional individual mandate will remain until a party with standing challenges it. For example, a person who is subject to an ACA enforcement action can raise the mandate's unconstitutionality as a defense. Soon enough, the trilogy will become a quadrilogy. You can check out of the Hotel *California v. Texas* any time you like. But I can never leave.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 2123.

[140] *Id.*

[141] *Id.*

[142] *Id.*