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California v. Texas: The Role of Congressional Procedure in Severability Doctrine

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CALIFORNIA V. TEXAS: THE ROLE OF CONGRESSIONAL PROCEDURE IN SEVERABILITY DOCTRINE

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I. INTRODUCTION

The United States Supreme Court is currently considering a case that could dramatically change American health care—all because Congress eliminated a penalty tax on a party-line vote using a special procedure designed to facilitate budget matters.[1] The case is *California v. Texas*,[2] called *United States v. Texas* in the lower courts.[3] The penalty tax enforced the Affordable Care Act's ("ACA")[4] individual mandate to purchase health insurance, and it was lowered to zero in the 2017 Tax Act under a streamlined Congressional procedure called budget reconciliation.[5] The Federal District Court for the Northern District of

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[2] Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *aff'd in part, vacated in part, remanded,* 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (2020) (No. 19-840).

[3] *Id.*

[4] What is commonly referred to as the Affordable Care Act is actually the compilation of two different bills: Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). This Article uses the term "ACA" to refer to the compilation of both acts, available at https://www.hhs.gov/sites/default/files/ppacacon.pdf [hereinafter *ACA*].

[5] Pub. L. No. 115-97, 131 Stat. 2054 (2017) [hereinafter *2017 Tax Act*]. This legislation was introduced as the Tax Cuts and Jobs Act, but the short title was removed because the reference to "jobs" in the title was deemed to be extraneous to the budget and thus violated budget reconciliation rules under which the legislation was being considered. Therefore, the law is technically called the "Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," but is still often colloquially known as the Tax Cuts and Jobs Act or the TCJA. *See also* Steve Akers, et al, *The 2017 Tax Act*, 52 U. MIAMI PHILIP E. HECKERLING INST. ON EST. PLAN. Paragraph 100 (2018). This Article uses the more neutral 2017 Tax Act to reflect the fact that the short title Tax Cuts and Jobs Act was actively removed as violating Congressional procedure.

Texas decided that the individual mandate could not be considered a constitutional exercise of Congressional power without the penalty tax, and further found that the individual mandate was not severable from any portion of the ACA.[6] In other words, the District Court found that the now-unconstitutional individual mandate infected the entire ACA and made it unconstitutional. On appeal, the Fifth Circuit agreed that the individual mandate is unconstitutional without a higher-than-zero penalty tax, but it remanded the case back to the District Court for additional analysis on the severability question.[7] Before the District Court could provide this additional analysis, the Supreme Court granted certiorari to resolve the issue.[8] Oral arguments were heard on November 10, 2020, and a decision is expected in the summer of 2021.[9] This leaves open the possibility that the entire ACA, or significant portions of it, will be struck down by the Supreme Court.[10]

The ACA has fundamentally changed our health care system through reforms that improve health care coverage, delivery, and quality, and that lower cost. Because Congress lowered a tax in a budget bill, you may be kicked off your parent's health plan if you are 18 to 26 years old.[11] Your pre-existing conditions may be excluded from coverage altogether, or may cause your premiums to skyrocket.[12] You may lose the Premium Tax Credit that helps you afford insurance, or you may lose access to lowered cost sharing that helps you afford your share

[6] Texas v. United States, 340 F.Supp. 3d 579 (N.Dist. Tex. 2018), *aff'd in part, rev'd in part & remanded*, 945 F.3d 355 (5th Circ. 2019) [hereinafter *Texas D.Ct.*].

[7] Texas v. United States, 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom.* Texas v. California, No. 19-1019, 206 L. Ed. 2d 253, 2020 WL 981805 (Mar. 2, 2020) [hereinafter *Texas 5th Cir.*].

[8] *Id.*

[9] *California v. Texas*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/california-v-texas/ (last visited Nov. 23, 2020).

[10] Pundits are speculating based on the tenor of questions during oral arguments that the Supreme Court will not strike down the entire ACA. See, e.g., Katie Keith, *Supreme Court Arguments: Even if Mandate Falls, Rest of Affordable Care Act Looks Likely To Be Upheld*, Health Affairs Blog (Nov. 11, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201111.916623/full/. Nevertheless, this result remains a distinct possibility, in part because since the court's *National Federation of Independent Businesses v. Sebelius* ("NFIB") decision, Justices Bader Ginsburg and Kennedy no longer sit on the court. Justices Kavanaugh and Coney Barrett have joined the bench. *Justices 1789 to Present,* SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 23, 2020); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

[11] ACA § 1001, codified at 42 U.S.C. § 300gg–14.

[12] ACA § 1201, codified at 42 U.S.C. § 300gg–3; ACA § 1201, codified at 42 U.S.C. § 300gg–1.

of medical costs.[13] You may once again face the possibility of hitting a lifetime cap if you have the misfortune of becoming catastrophically ill.[14] You may lose your Medicaid coverage.[15] You may lose the ability to compare the quality and safety records of nursing homes.[16] Government programs that improve preventive care, that fund research regarding treatment efficacy, that tie provider reimbursement to patient outcomes, and that fund new approaches to lowering medical error may cease.[17] These are only some examples of what is at stake if the ACA is entirely struck down as unconstitutional.

From the moment that the ACA was signed into law, it has been under repeated attack, both in the courts and through the political process. Various portions of the ACA have been challenged in court; some of those court challenges have been successful and others have not.[18] The ACA, however, has remained largely intact despite court decisions striking down portions of the law. Politicians have attempted to pass legislation to overturn or fundamentally alter the ACA; some important changes have been made legislatively, but outright repeal has failed.[19] President Trump's executive branch has sought to weaken the ACA administratively, and while those attempts have indeed weakened the impact of the ACA, the ACA remains largely in force. The case currently before the United States Supreme Court threatens to finally kill the ACA in its entirety.

This Article examines the decisions of the lower courts in *California v. Texas* as well as relevant United States Supreme Court precedent with respect to the question of severability. Proceeding on the assumption that the individual mandate is no longer constitutional, this Article analyzes how the severability analysis should be applied in this case.

[13] ACA § 1401, codified at 26 U.S.C. § 36B; ACA § 1402, codified at § 42 U.S.C. 18071.

[14] ACA § 1001, codified at 42 U.S.C. § 300gg–11.

[15] ACA § 2001, codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

[16] ACA § 6103, codified at 42 U.S.C. § 1395i-3.

[17] See e.g., ACA Title IV, Subtitle B; ACA Title III, Subtitle F; ACA Title III, Subtitle A, Part 1; ACA § 10607.

[18] See e.g. *NFIB*, 132 S. Ct. 2566, 2580 (2012) (constitutionality of the individual mandate and Medicaid expansion); Sissel v. United States Department of Health & Human Services, 760 F.3d 1 (D.C. Cir. 2014) (constitutionality of individual responsibility payment); King v. Burwell, 135 S. Ct. 2480, 2485 (2015) (permissibility of extending premium tax credits to federal exchanges as well as state exchanges); Maine Community Health Options v. United States, 590 U.S. ___ (2020) (right of insurers to risk corridor payments).

[19] Johnathan Cohn, *The ACA, Repeal, and the Politics of Backlash*, HEALTH AFFAIRS BLOG, Mar. 6, 2020, https://www.healthaffairs.org/do/10.1377/hblog20200305.771008/full/. *See also* Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471 (2020).

This Article explores budget reconciliation and what the choice to use this procedure should tell us about Congressional intent. This Article concludes that courts should have a very strong presumption in favor of severability when the offending legislation was passed in a manner that precluded the legislative body from directly repealing the statute. In other words, a court should not do what the legislative body itself could not do.

Part II of this Article provides background information on the ACA, what it does, and the challenges it has faced. Part III provides background on the 2017 Tax Act and budget reconciliation and explains how the 2017 Tax Act impacted the ACA. Part IV examines the severability question presented by the *California v. Texas* litigation and provides analysis of how severability analysis should be applied in this case. Part V concludes the Article.

II. THE AFFORDABLE CARE ACT

A. *Overview*

The ACA represents a stark departure from the public health policy of the American past. Prior to the 1920s, Americans typically paid cash for treatment and health care was inexpensive because medical knowledge and technology was not very advanced.[20] Some limited forms of health insurance started to develop in the 1920s as medical technology advanced and the demand for hospital care rose.[21] Employer-sponsored health care became popular during World War II as a way for employers to boost employees' economic well-being without running afoul of the World War II-era wage control rules and in response to demands for health care benefits made by newly-powerful workers unions.[22] Since then, health insurance for the adult, non-elderly population has continued to be primarily employment based, leaving the unemployed largely unprotected.[23] The elderly generally receive health care through Medicare, a federal program, while the "deserving"

[20] Alex Blumberg and Adam Davidson, *Accidents of History Created U.S. Health System*, NAT'L PUB. RADIO (Oct. 22, 2009), http://www.npr.org/templates/story/story.php?storyId=114045132.

[21] *Id.* An early player in the health insurance market was Blue Cross.

[22] Ezekiel J. Emanuel and Ron Wyden, *Why Tie Health Insurance to a Job?*, WALL ST. J. (Dec. 10, 2008), https://www.wsj.com/articles/SB122887085038593345; BARRY FURROW ET AL., HEALTH LAW 302 (3d ed. 2015).

[23] Paul Fronstin, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey*, 362 EMP. BENEFITS RESEARCH INST. 4 (Sept. 2013) https://www.ebri.org/content/sources-of-health-insurance-and-characteristics-of-the-uninsured-analysis-of-the-march-2013-current-population-survey-5272.

poor (children and those unable to work due to disability) generally receive health care through Medicaid, a federal-state partnership.[24] Even with these federal and federal-state programs, the majority of health care is provided through employers.[25]

Before the ACA, unemployed people faced serious difficulty in finding and maintaining health coverage. In addition, employees of smaller companies frequently do not have employer-provided health coverage, because their employers frequently are unable to offer coverage because of cost or administrative obstacles.[26] Even the passage of the Employee Retirement Income Security Act of 1974 ("ERISA"), which fundamentally altered employment-sponsored benefit plans, left health care virtually untouched. In fact, ERISA created a sort of "health care black hole" by preempting state efforts to regulate self-funded plans while putting into place only limited federal rules.[27] Only with the advent of the ACA has the federal government seriously attempted to methodically address health coverage for the adult non-elderly population.

With the passage of the ACA, American society had hoped that the era of health and financial insecurity due to lack of health insurance would begin to fade into history. The ACA utilizes a uniquely American approach to expanding health care coverage. Rather than opting for a more socialized path to expanded coverage, such as having government provide health care directly or having government be the sole or primary payer of health care expenses, the ACA continues the American tradition of placing private insurance companies at the heart of the health care financing system.[28]

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[24] Nicole Huberfeld, *Federalizing Medicaid*, 4 U. PA. J. CONST. L. 431, 432 (2011).

[25] *Health Coverage of the Total Population*, THE HENRY J. KAISER FAMILY FOUND., https://www.kff.org/other/state-indicator/total-population/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D(last visited Jan. 12, 2020).

[26] Fronstin*, supra* note 23, at 11.

[27] Hinda Ripps Chaikind, *CRS Report for Congress: ERISA Regulation of Health Plans: Fact Sheet*, CRS Report for Congress: Received through the CRS Web (Mar. 6, 2003), https://www.everycrsreport.com/files/20030306_RS20315_06391c3dd8dee6d755db573ba96efd09f32ed668.pdf. Employer-sponsored health coverage funded through insurance, rather than being self-funded by the sponsor, is subject to the very limited ERISA rules and health insurance regulations imposed by the state. *Id.*

[28] *Compare* The Commonwealth Fund, *The United States Health Care System*, 2014*, in* 2014 INT'L PROFILES OF HEALTH CARE SYS. 153–162 (January 2015) (the primary U.S. health system where private sector providers are paid for services via private sector insurance companies), *with* Ruth Thorlby & Sandeepa Arora, *The English Health Care System,* 2014 *in* 2014 INT'L PROFILES OF HEALTH CARE SYS. 43–52 (The Commonwealth Fund January 2015) (the health system of England where the vast majority of providers are employed directly by the governmental National Health Service (a system similar to

The Supreme Court described the aim of the ACA as "to increase the number of Americans covered by health insurance and decrease the cost of health care."[29] It is clear that one of the primary goals of the ACA is to dramatically expand health care coverage, and that a corollary goal is to put coverage within reach of the average American by making coverage more affordable. These are not the only goals of the ACA, however.[30] The ACA also seeks to improve the quality and efficiency of the health care system (by, for example, rating hospitals' performance with respect to quality of care) and to eliminate or reduce "junk" health plans and ensure meaningful insurance coverage (by, for example, mandating a certain minimum level of benefits).[31] In addition, the ACA operates somewhat as an omnibus health care act. It includes numerous provisions that advance public health or improve health care quality and that are either unrelated or tangentially related to the more-talked-about goals of insurance access and health care cost. As examples of lesser-known, but still important, ACA provisions, the Fifth Circuit pointed to ACA requirements that certain chain restaurants disclose nutritional information and the ACA modification of health care fraud rules.[32]

At the time that the ACA was passed, it was thought that there were three interlocking, core provisions affecting access to market-based individual insurance coverage. The Supreme Court described these provisions as follows: "First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people

the U.S. Veteran's Health Administration)), *and* Isabelle Durand-Zaleski, *The French Health Care System,* 2014 *in* 2014 INT'L PROFILES OF HEALTH CARE SYS. 53–62 (The Commonwealth Fund January 2015) (the health system of France where private sector providers are reimbursed directly by the government (a system similar to U.S. Medicare)). While Medicare, Medicaid, and Tricare are important public health care payers in the United States, most Americans continue to be covered by employer-sponsored health plans. *Health Coverage of the Total Population*, *supra* note 25. In 2018, private insurance, most frequently through group employer-based plans, covered approximately 55% of the population, government programs covered approximately 35% of the population, and approximately 9% of the population was uninsured. *Id.*

29 *NFIB*, 132 S. Ct. at 2580 (2012).

30 For an excellent overview of the different goals of the ACA and the specific provisions that promote those goals, see Wilton B. Hyman, *An Explanation of the Patient Protection and Affordable Care Act*, 38 OHIO N.U. L. REV. 579 (2012).

31 42 U.S.C. § 1395ww(o) (Supp. 2015), 42 U.S.C. §§ 18022(a)(1), (b)(1) (Supp. 2014).

32 *Texas 5th Cir*, 945 F.3d at 401 (2019).

to make insurance more affordable."[33] These provisions are commonly referred to as Preexisting Condition Protection, the Individual Mandate, and Premium Tax Credits, and they were designed to make market-based insurance more accessible to individuals. Each of these provisions is discussed in more detail below.

In addition to these three provisions that the Supreme Court labeled "core," there are other very important provisions that affect efficient market-based health care coverage. To make it easier for individuals and small businesses to shop for and purchase health coverage, the ACA required each state to set up an Amazon-style online exchange (also called a marketplace) with standardized features.[34] If a state failed (or refused) to set up an exchange, the federal government was tasked with creating and operating an exchange on behalf of that state.[35] Much like the Medigap supplemental insurance rules, the ACA sought to standardize individual policies to facilitate comparison shopping by creating a set of relatively standardized covered services and by establishing metal-rating levels indicating the required amount of cost-sharing under the policies.[36] The ACA reduced cost sharing for lower income individuals enrolled in certain marketplace plans.[37] The ACA established mechanisms to protect the insurance industry during ACA implementation (risk sharing corridors and reinsurance), and on an ongoing basis (risk adjustment).[38] The ACA required that premiums be established using modified community rating, rather than using actual claims experience.[39]

There are other provisions that are core to the overall goal of increased coverage without respect to the source of that coverage. While the ACA utilized a market-driven approach to increase health insurance coverage, that was not the only approach pursued. As discussed more below, the ACA attempted to expand Medicaid to cover all lower-income individuals, even able-bodied adults, which is a major

[33] King v. Burwell, 135 S. Ct. 2480, 2485 (2015).

[34] ACA § 1311(b), codified at 42 U.S.C. § 18031(b), (d); *see The Affordable Care Act: A Brief Summary*, NCSL (Mar. 2011), https://www.ncsl.org/portals /1/ documents/health/HRACA.pdf.

[35] ACA § 1311(b), codified at 42 U.S.C. § 18041(c).

[36] ACA § 1302, codified at 42 U.S.C. § 18022(c), (d).

[37] *Id.*

[38] ACA § 1341–1343, codified at 42 U.S.C. §§ 18061–18063; *see* Cynthia Cox et al., *Explaining Health Care Reform: Risk Adjustment, Reinsurance, and Risk Corridors*, THE HENRY J. KAISER FAMILY FOUND. (Aug. 2016), http://files.kff.org/attachment/Issue-Brief-Explaining-Health-Care-Reform-Risk-Adjustment-Reinsurance-and-Risk-Corridors.

[39] ACA § 2701, codified at 42 U.S.C. § 300gg.

shift from traditional Medicaid eligibility criteria.[40] The ACA mandated that larger employers offer health coverage of a certain quality or face a penalty.[41] It also required that dependent children be allowed to remain on their parents' insurance until age twenty-six.[42] Further, the ACA prohibited lifetime caps on benefits.[43] This is a non-exhaustive list.

B. *Select ACA Provisions: Demonstrating Continuing Effectiveness of the ACA Without an Individual Mandate*

The courts in *California v. Texas* are grappling with the question of whether, now that the penalty tax has been lowered to zero, the individual mandate is still a constitutional exercise of Congressional power. This Article proceeds on the assumption that it is not, even though the parties are actively arguing this issue. Even without an individual mandate, however, many core provisions of the ACA would continue to remain effective and if left in place would continue to advance the goals of the Congress that passed the ACA and of the subsequent Congresses that have left most of the ACA in place.

1. Protections for Individuals with Preexisting Conditions

The provision of the ACA that is most closely tied to the individual mandate is the protection for individuals with pre-existing conditions. The ACA extends access to coverage for people with medical conditions that previously prevented them from obtaining coverage or that qualified them only for coverage with an insurmountably high price tag. Specifically, the ACA prohibits insurers from excluding coverage for pre-existing conditions (i.e., covering conditions other than the one which the individual already has) or otherwise discriminating based on health status;[44] it requires insurers to issue policies without respect to pre-existing conditions (guaranteed availability);[45] it requires insurers to renew policies without respect to preexisting conditions or claims experience;[46] and it prohibits insurers from basing premiums on health

[40] ACA § 2001, codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII); *see The Affordable Care Act: A Brief Summary,* NCSL (Mar. 2011), https://www.ncsl.org/portals/1/documents/health/HRACA.pdf.

[41] ACA § 1513, codified at 26 U.S.C. § 4980H(a), (c)(2); *see The Affordable Care Act: A Brief Summary,* NCSL (Mar. 2011), https://www.ncsl.org/portals/1/documents/health/HRACA.pdf.

[42] ACA § 1001, codified at 42 U.S.C. § 300gg–14.

[43] ACA § 1001, codified at 42 U.S.C. § 300gg–11.

[44] ACA § 1201, codified at 42 U.S.C. § 300gg-3.

[45] ACA § 1201, codified at 42 U.S.C. § 300gg-1.

[46] ACA § 1201, codified at 42 U.S.C. § 300gg-2.

status, the receipt of health care, claims experience, or the existence of a preexisting condition.[47] This is one of the more politically popular features of the law.[48] Congress deemed the protections for persons with pre-existing conditions so important that it mandated the nearly immediate establishment (within 90 days of the passage of the ACA) of a high risk pool to quickly provide coverage for the affected individuals.[49]

Such strong protections for individuals with pre-existing medical conditions risks creating adverse selection—a skewed market situation where people buy health insurance (or buy better coverage) only once they become ill which generally results in higher premium costs to cover the higher risks of the insured population. To avoid creating adverse selection, the ACA's individual mandate requires most people in the United States to have a minimum level of health care coverage.[50]

As discussed below, the Supreme Court upheld the individual mandate in 2012 as a constitutional exercise of the federal government's taxation authority by reading the individual mandate in conjunction with the penalty tax for not maintaining the required coverage (the penalty tax is called the shared responsibility payment).[51] Without the individual mandate, the pre-existing condition protections are at risk, and it must be admitted that the two provisions are very closely linked. The individual mandate, however, is not the only or even the best method for preventing adverse selection. Robust enrollment that includes healthy individuals is what prevents adverse selection and, as discussed below, the ACA incentives like the Premium Tax Credit have proven to be effective at boosting insurance enrollment.

2. Medicaid Expansion

The ACA expands access to health care coverage in several important ways, many of which have already been attacked in the courts. Medicaid expansion is undoubtedly one of the more significant ways that Congress sought to expand access to coverage. The ACA provides incentives for the states to expand eligibility for Medicaid coverage to include all adults under age sixty-five with incomes up to

[47] ACA § 2701, codified at 42 U.S.C. § 300gg.

[48] *Poll: The ACA's Pre-Existing Condition Protections Remain Popular with the Public, including Republicans, As Legal Challenge Looms This Week*, THE HENRY J. KAISER FAMILY FOUND. (Sep. 5, 2018), https://www.kff.org/health-costs/press-release/poll-acas-pre-existing-condition-protections-remain-popular-with-public/.

[49] ACA § 1101, codified at 42 U.S.C. § 18001.

[50] 26 U.S.C. § 5000A.

[51] *NFIB*, 132 S. Ct. at 2571 (2012).

133% of poverty.[52] Children in households with incomes up to 133% of poverty were already eligible for Medicaid prior to the passage of the ACA.[53] The ACA made the Medicaid expansion mandatory for all states and provided 100% funding from the federal government for the first three years, gradually lowering the funding each year to 90% by 2020.[54] The sanction for not implementing the expansion was the loss of all federal funding for Medicaid—not just the funding for the expansion.[55] The Supreme Court, however, found that the threat of withdrawing all Medicaid funding violates the United States Constitution and struck down that provision of the ACA.[56] The Court explained that the federal government can use incentives under its Spending Clause authority to entice the states to enact programs, but only if the states voluntarily and knowingly accept the terms of the program.[57] The ACA Medicaid expansion was deemed too dramatic a transformation of the program to qualify as a mere amendment of an existing program, and the threat of losing all funding was deemed to cross the line between encouragement and coercion.[58] The Court went on to find that the provision withdrawing federal Medicaid funding was severable from the ACA as whole, meaning that a state that does not accept the Medicaid expansion may continue to operate under the prior Medicaid rules, effectively making the Medicaid expansion voluntary.[59]

This decision, making the Medicaid expansion effectively voluntary for the States, creates strange side effects. The Premium Tax Credit is only available to taxpayers with household incomes between 100% and 400% of poverty, Medicaid expansion (if adopted by the state) is

[52] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

[53] Right before the ACA was passed, federal law required Medicaid programs to cover pregnant women and children aged 5 or under with household incomes at or below 133% of poverty, and to cover children aged six through eighteen with household income at or below 100% of poverty. Nicole Huberfeld, Elizabeth Weeks Leonard, & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid And Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U.L. REV. 1, 19 (2013). Despite this, all states had made the permissible election for more generous eligibility criteria for children, often using federal funding available through the Children's Health Insurance Program (or CHIP). Donna Cohan Ross & Caryn Marks, *Challenges of Providing Health Coverage for Children and Parents in a Recession: A 50 State Update on Eligibility Rules, Enrollment and Renewal Procedures, and Cost-Sharing Practices in Medicaid and SCHIP in 2009*, THE HENRY J. KAISER FAMILY FOUND. at 6 (Jan. 2009), https://www.kff.org/wp-content/uploads/2013/01/7855.pdf.

[54] 42 U.S.C. § 1396d(y)(1).

[55] 42 U.S.C. § 1396c, *invalidated by NFIB*, 132 S. Ct. 2566 (2012).

[56] *NFIB*, 132 S. Ct. at 2608 (2012).

[57] *Id.* at 2602.

[58] *Id.* at 2603–04.

[59] *Id*. at 2607.

available up to 133% of poverty, and traditional Medicaid is often not available to able-bodied, childless adults unless their incomes are exceptionally low.[60] Counterintuitively, a taxpayer with income *at* 100% of federal poverty may receive federally subsidized health care coverage but a taxpayer with income *below* 100% of federal poverty may not.[61] This would have made sense if Medicaid expansion were mandatory because the poorer person would have had access to Medicaid, but that is no longer guaranteed.[62] Additionally, in a state that has not expanded Medicaid, poorer taxpayers with incomes under 100% of poverty frequently are not eligible for Medicaid are also not eligible for federally subsidized coverage, yet they remain subject to the individual mandate unless they apply for and receive an exception.[63] It is hard to imagine any rational Congress passing this combination of rules; nonetheless, the Supreme Court decided that the rest of the ACA, including its most significant provisions, could be severed from mandatory Medicaid expansion, despite the anomalies created.[64]

The link between Medicaid expansion and expansion of access to health coverage became more complicated, but is still vital. Many states expanded Medicaid right away.[65] While some states have not yet expanded Medicaid,[66] many adopted the expansion even after the Supreme Court decision that permitted them to decline.[67] States that

[60] Huberfeld, Leonard, & Outterson, *supra* note 53, at 85-86.

[61] Huberfeld, Leonard, & Outterson, *supra* note 53, at 85-86.

[62] Huberfeld, Leonard, & Outterson, *supra* note 53, at 85-86.

[63] Huberfeld, Leonard, & Outterson, *supra* note 53, at 85-86.

[64] *NFIB*, 132 S. Ct. (2012).

[65] The earliest possible Medicaid expansion effective date was January 1, 2014, and the following states adopted Medicaid expansion at that time: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Vermont, Washington, and West Virginia. *Status of State Medicaid Expansion Decisions: Interactive Map*, THE HENRY J. KAISER FAMILY FOUND., (Nov. 2, 2020), https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?activeTab=map&currentTimeframe=0&selectedDistributions=status-of-medicaid-expansion-decision&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D#note-4 (last visited Jan. 12, 2020).

[66] States that have not yet adopted Medicaid expansion are as follows: Alabama, Florida, Georgia, Kansas, Mississippi, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming. *Id.* There is no deadline for a state to accept the Medicaid expansion, so some states may later change their positions.

[67] States that have adopted Medicaid expansion, but with delayed effective dates are as follows: Michigan (Apr. 1, 2014), New Hampshire (Aug. 15, 2014), Pennsylvania (Jan. 1, 2015), Indiana (Feb. 1, 2015), Alaska (Sept. 1, 2015), Montana (Jan. 1, 2016), Louisiana (Jul. 1, 2016), Virginia (Jan. 1, 2019), Maine (Jan. 1, 2019 with retroactive coverage), Idaho (Jan. 1, 2020), Utah (Jan. 1, 2020), Nebraska (Oct. 1, 2020), Missouri (Jul. 1, 2021),

have yet to adopt it continue to consider Medicaid expansion. For example, the governor of Kansas announced in January 2020 that she and the legislature had reached a bipartisan deal that she anticipated would enable Medicaid expansion to pass the Kansas legislature in 2020, a full ten years after President Obama signed the ACA into law and the Supreme Court struck down mandatory expansion, although that effort ultimately stalled in the 2020 Kansas legislative session.[68] Research has shown that Medicaid expansion positively correlates with a lower uninsured population; in other words, Medicaid expansion works to provide access to coverage.[69] Despite the anomalies created by voluntary Medicaid expansion, Congress' vital goal of expanding coverage advances even without mandatory expansion.

Similarly, it is now clear that the individual mandate and the tax enforcing the individual mandate, while helpful, are not actually critical to Congress' goal of expanding coverage. Enrollment numbers have remained strong, despite numerous administrative challenges that have existed from the beginning.[70] The IRS has always been limited in its

and Oklahoma (not later than Jul. 1, 2021). *Status of State Medicaid Expansion Decisions: Interactive Map,* supra note 65. Several of these states modified the Medicaid expansion rules through a Section 1115 waiver approved by the federal government. *Id.* Section 1115 of the Social Security Act authorizes the Secretary of the U.S. Department of Health and Human Services ("HHS") to "waive provisions of Section 1902 of the Medicaid Act for a limited period of time to allow states to engage in innovative 'experimental, pilot, or demonstration' projects that are 'likely to assist in promoting the objectives of [the Medicaid Act].'" Sidney D. Watson, *Out of the Black Box and Into the Light: Using Section 1115 Medicaid Waivers to Implement the Affordable Care Act's Medicaid Expansion*, 15 YALE J. HEALTH POL'Y L. & ETHICS 213, 214 (2015) (quoting Social Security Act § 1115(a), 42 U.S.C. § 1315(a)(1)(2012)); *see also* Mary Pareja, *Humanizing Work Requirements for Safety Net Programs*, 39 PACE L. REV. 833, 852-53 (2019).

68 Mitch Smith and Abby Goodnough, *Expanding Medicaid Was a Pipe Dream in Kansas. Now It May Become Reality.*, N.Y. TIMES, Jan. 9, 2020, https://www.nytimes.com/2020/01/09/us/kansas-medicaid-expansion.html; *see also* Louise Norris, *Kansas and the ACA's Medicaid expansion*, HEALTHINSURANCE.ORG, (Dec. 7, 2019), https://www.healthinsurance.org/kansas-medicaid/ (last visited Nov. 14, 2020). Medicaid expansion has been a bitter fight in Kansas, with the governor vetoing expansion in 2017 and expansion passing the house but dying in the Senate in 2019. *Id.*

69 A Commonwealth Fund survey found that the non-elderly adult uninsured rate fell nationwide from 20% to 15% after the ACA's first open enrollment period. Among those living below the poverty line, the uninsured rate fell a dramatic 11% (from 28% to 17%) in states that expanded Medicaid versus a paltry 2% drop in states without a Medicaid expansion. Sara R. Collins, Petra W. Rasmussen & Michelle M. Doty, *Gaining Ground: Americans' Health Insurance Coverage and Access to Care After the ACA's First Open Enrollment Period*, The COMMONWEALTH FUND (July 10, 2014), https://www.commonwealthfund.org/publications/issue-briefs/2014/jul/gaining-ground-americans-health-insurance-coverage-and-access (last visited Nov. 14, 2020).

70 *Marketplace Enrollment, 2014-2020: Trend Graph, THE HENRY J. KAISER FAMILY FOUND.*, (last visited Dec. 20, 2020), https://www.kff.org/health-reform/state-indicator/marketplace-

ability to enforce the penalty tax; the law allows the IRS to offset refunds to pay an outstanding penalty tax but prohibits the IRS from using other enforcement mechanisms, such as garnishments, liens, and levies.[71] From 2014 through 2016, the IRS accepted so-called "silent tax returns"—returns in which the taxpayer leaves the question about health insurance coverage unanswered.[72] The Trump administration shortened open enrollment periods,[73] slashed funding for education and outreach to boost enrollment,[74] sought to advance alternative insurance such as short term policies and association health plans that are allowed to offer less than the federal minimum essential benefits and also escape state coverage mandates,[75] and generally received criticism for attempting to "sabotage" the ACA because outright repeal has proven elusive.[76] The 2017 Tax Act lowered the penalty tax to zero effective January 1, 2019.[77] Despite all this, enrollment numbers have remained strong.[78] It appears that the availability of subsidized coverage (the

enrollment/?activeTab=graph&currentTimeframe=0&startTimeframe=6&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (showing that marketplace enrollment has been trending downward under the Trump administration (since 2016), but the downward trend is relatively flat and certainly not as marked as the initial enrollment surge was during the first two years of the marketplace).

[71] 26 U.S.C. § 5000A(g).

[72] Louise Norris, *Will the IRS Still Enforce the Individual Mandate Penalty for 2018 Tax Returns?*, HEALTHINSURANCE.ORG, (Jan. 17, 2019), https://www.healthinsurance.org/faqs/does-the-presidents-executive-order-mean-the-irs-wont- enforce-the-individual-mandate-penalty/ (last visited Jan. 12, 2020). The IRS rejected "silent" returns for tax years 2017 and 2018, which counterintuitively represents an increase in enforcement right at the time that Congress voted to eliminate the penalty in the 2017 Tax Act. The IRS had planned to start rejecting silent returns for 2016 returns, but reversed course in response to an executive order signed by President Trump on his first day in office that directed agencies to use any discretion they had to waive or delay provisions or requirements of the ACA that "impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications." Exec. Order No. 13765, 82 Fed. Reg. 8351, 8531 (Jan. 24, 2017).

[73] Patient Protection and Affordable Care Act; Market Stabilization, 82 Fed. Reg. 18,346, 18,346 (Apr. 18, 2017) (to be codified at 45 C.F.R. pt. 147, 155-56).

[74] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-565, HEALTH INSURANCE EXCHANGES: HHS SHOULD ENHANCE ITS MANAGEMENT OF OPEN ENROLLMENT PERFORMANCE, (July 2018).

[75] Exec. Order No. 13813, 82 Fed. Reg. 48385 (Oct. 17, 2017), https://www.govinfo.gov/content/pkg/FR-2017-10-17/pdf/2017-22677.pdf.

[76] *See generally* Timothy S. Jost, *The Affordable Care Act Under the Trump Administration*, THE COMMONWEALTH FUND (Aug. 30, 2018), https://www.commonwealthfund.org/blog/2018/affordable-care-act-under-trump-administration.

[77] 2017 Tax Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054 (2017). The effective date of the change is actually for "months beginning after December 31, 2018" because the penalty tax was imposed on a monthly basis.

[78] See *Marketplace Enrollment, 2014-2020: Trend Graph*, *supra* note 70.

carrot) is much more effective at achieving enrollment than the threat of the penalty tax (the stick). Just as the Supreme Court's leaving the ACA in place despite the seemingly crucial mandatory Medicaid expansion facilitated the advancement of Congress' goal of expanded access to coverage, so too the *California v. Texas* court has the opportunity to leave in place the ACA mechanisms that advance expanded access, even if it ultimately decides that the individual mandate itself is no longer constitutional.

3. Employer Mandate

Similar to the individual mandate coupled with the penalty tax, the ACA also mandates that larger employers provide health care coverage to their employees or face potential penalties (commonly called the "employer mandate").[79] This provision applies only to employers who had an average of fifty full-time employees in the prior year.[80] An employer incurs the penalty only if one of the employer's full-time employees enrolls in a plan through a Marketplace exchange and receives a Premium Tax Credit or is eligible for reduced cost sharing.[81] The employer mandate and employer penalty tax were not changed by the 2017 Tax Act, despite facing criticism since the ACA's passage.[82] This

[79] 26 U.S.C. §§ 4980H(a), (c)(2).

[80] *Id.*

[81] *Id.* The issue of whether Premium Tax Credits are available in states that have not established their own exchanges was resolved in the affirmative by the United States Supreme Court in *King v. Burwell*. King v. Burwell, 576 U.S. 473, 498 (2015). The statute requires that the individual be enrolled "through an Exchange established by the State . . ." 26 U.S.C. § 36B(c)(2)(A)(i). The IRS interpreted this to include exchanges established by the federal government on behalf of states that declined to establish their own exchanges. 26 C.F.R. § 1.36B-1(k); Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377–78 (May 23, 2012) (the preamble explains the IRS's reasoning for adopting this rule). This interpretation generated intense controversy, but ultimately the Fourth Circuit unanimously upheld the IRS's interpretation as a permissible exercise of the IRS's discretion to interpret ambiguous statutes, and the Supreme Court reached the IRS's same conclusion through its own independent analysis. *King*, 576 U.S. at 493. The litigation was exceptionally important to the employer mandate because if a person living in a state that has not established its own exchange is not eligible for a Premium Tax Credit or reduced cost sharing because their only option is a federally-facilitated exchange, then that person's employer also may escape the penalty for not offering health coverage to that employee, effectively gutting the employer mandate. 26 U.S.C. § 4980H(a), (c)(2).

[82] *The Current Status of the ACA Employer Mandate: 2020,* Integrity Data, updated Sept. 15, 2019, https://www.integrity-data.com/blog/current-status-of-aca-employer-mandate-2019/. The effective date of the employer mandate, originally scheduled for 2014, was delayed because of concerns about the provision. Internal Revenue Service, *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, Question 2, https://www.irs.gov/affordable-care-act/employers/questions-

also sheds light on Congress' intent in lowering the individual mandate penalty to zero, as related to the severability question. Congress could have similarly lowered the employer mandate to zero, even using the budget reconciliation process. The 2017 Tax Act Congress, however, chose not to do so, instead leaving in place a politically unpopular mandate and penalty tax. For a judge to do what Congress chose not to do, under the guise of the constitutional severability doctrine, is simply legislating from the bench.

4. Affordability Rules

The ACA takes several steps to help people afford what, for many, is the significant new expense of health care coverage. First, those who are newly eligible for Medicaid as a result of the expansion will receive quality coverage with low to no cost sharing or premiums.[83] Second, the ACA implements limits on cost sharing (deductibles, coinsurance, and copayments) that a lower-income or middle-income individual will face.[84] Third, the federal government created a new refundable income tax credit called the "Premium Tax Credit" to help offset the cost of health coverage for lower-income and middle-income taxpayers.[85] The Premium Tax Credit is a significant part of the overall ACA strategy. Indeed, 85% of people who enrolled in an exchange plan during the first open enrollment period for coverage in 2014 qualified for advance payments of the Premium Tax Credit.[86] Without the Premium Tax Credit, premium costs likely would keep coverage out of reach for many Americans.

The Premium Tax Credit is a subsidy designed to help low-income to middle-income taxpayers afford to buy health insurance on an exchange. Generally speaking, a person is eligible for a Premium Tax Credit if he or she has a household income between 100% and 400% of

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and-answers-on- employer-shared-responsibility-provisions-under-the-affordable-care-act#Limited (last visited Nov. 14, 2020).

[83] *See supra* Part II.B.2.

[84] 42 U.S.C. § 18071 (2010); HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10750, 10826 (Feb. 27, 2015) (to be codified at 45 C.F.R. pts. 145, 147, 153, 154, 155, 156, and 158). Cost sharing reductions can apply for individuals with household income between 100% and 250% of poverty, on a sliding scale basis. To receive the cost sharing reductions, the taxpayer is required to enroll in a silver plan. *Id.* Special, more generous, rules apply to Native Americans. *Id.* at 10799. *See infra* note 100 and accompanying text regarding the classification of health insurance policies by precious metals.

[85] ACA §1401, codified at 26 U.S.C. § 36B (2006).

[86] OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH INSURANCE MARKETPLACE: SUMMARY ENROLLMENT REPORT FOR THE INITIAL ANNUAL OPEN ENROLLMENT PERIOD 9 (May 1, 2014), https://aspe.hhs.gov/system/files/pdf/76876/ib_2014Apr_enrollment.pdf.

poverty, purchases health insurance on an ACA exchange, and is not otherwise eligible for or actually covered by a qualifying employer or public health plan.[87] Similar to the Earned Income Tax Credit ("EITC"), the Premium Tax Credit is a refundable tax credit.[88] This credit will reduce the taxpayer's tax liability (as shown on the return) to as low as zero, and if there is credit left over, the taxpayer will receive that left over credit amount as a refund.[89] Taxpayers may claim the Premium Tax Credit retroactively on a tax return; the credit for any month in 2014 would be claimed on a 2014 tax return, normally filed before April 15, 2015.[90] The Premium Tax Credit also may be paid on an advanced basis.[91] If the advance credit is elected, the estimated amount of the credit is calculated by the health insurance exchange through which the person obtained the coverage and payments are made directly to the insurance company covering the individual.[92] Advance credit payments are reconciled on the tax return for the year of the payments, meaning advance payments made during 2014 were reconciled on the tax return for 2014, which would normally have been filed before April 15, 2015.[93] If the actual amount of the credit on the tax return is less than the advance payments made during the year, the taxpayer must pay back the difference, subject to certain repayment caps.[94] If the actual amount

[87] 26 U.S.C. § 36B (2006). For a more detailed explanation of the eligibility rules for the Premium Tax Credit, see Mary Pareja, *Beyond the Affordable Care Act's Premium Tax Credit: Ensuring Access to Safety Net Programs*, 38 HAMLINE L. REV. 241 (2015). The federal poverty figures used for the Premium Tax Credit are published by the Department of Health and Human Services in the Federal Register at the start of every year. 26 U.S.C. § 36B(d)(3) (2006). The figures that apply for a year are the most-recently published figures as of the beginning of the open enrollment period for that year. *Id.* The open enrollment period for 2020 began November 1, 2019. *Key 2020 Open Enrollment Dates*, HealthCare.gov Blog (Aug. 22, 2019), https://www.healthcare.gov/blog/2020-open-enrollment-key-dates/. Thus, the poverty figures that apply for 2020 are the figures published at the start of 2018. For 2018, the poverty line for a single individual not living in Alaska or Hawaii is $12,140; each additional family member adds $4320 to the poverty line. Annual Update of HHS Poverty Guidelines, 83 Fed. Reg. 2642, 2643 (Jan. 18, 2018). Thus, for 2018, between 100% and 400% of poverty for a single person means between $12,140 and $48,560. The poverty line is higher in Alaska and Hawaii. *Id.*

[88] 26 U.S.C. §§ 36B(b)(2).

[89] INTERNAL REVENUE SERVICE, *Questions and Answers on the Premium Tax Credit*, Question 1, https://www.irs.gov/affordable-care-act/individuals-and-families/questions-and-answers-on-the-premium-tax-credit (last visited Nov. 14, 2020).

[90] 26 U.S.C. § 36B(a).

[91] 42 U.S.C. § 18082 (2010).

[92] *Id.*

[93] 26 U.S.C. § 36B(f).

[94] *Id.* *See also* INTERNAL REVENUE SERVICE, *supra* note 89. While advance credit payments may make health insurance accessible by solving a cash flow problem,

of the credit on the tax return is greater than the advance payments made during the year, the taxpayer will receive the excess amount as a refundable credit.[95]

The tax code calculates the Premium Tax Credit based on the taxpayer's family size,[96] household income,[97] and the cost for a

advance credit payments also create the risk that the taxpayer will have a nasty surprise come tax time. This risk can be mitigated by opting to receive only a portion of the expected credit amount on an advanced basis. The taxpayer can also mitigate this risk by diligently reporting to the exchange every month changes to the taxpayer's household income or family size, which will adjust the advance credit payments made to the insurance company. In the author's experience working with low-income taxpayers through a low-income tax clinic, this sort of diligence is likely to be the exception, rather than the rule. Persons living in poverty typically have more urgent matters that occupy their attention and time, such as finding their next meal (especially at the end of the month when the food stamps have long been exhausted), picking between paying the gas or electricity bill, and coordinating the family's transportation to and from school and work often with no car and limited public transportation.

[95] INTERNAL REVENUE SERVICE, *supra* note 89.

[96] "Family" consists of all the individuals "for whom a taxpayer is allowed" to claim a "personal exemption amount" under Code § 151 for the taxable year. 26 U.S.C. § 36B(d)(1) (2017). Code § 151 generally allows a taxpayer to deduct from his or her income a "personal exemption amount" for themselves, their spouse if filing jointly, and for eligible dependents claimed on the return. 26 U.S.C. §§ 151(a)–(c) (2017). Thus, "family" for ACA purposes refers to the tax unit and not the common understanding of family. *See generally* Tessa R. Davis, *Taxing Modern Families: Mapping the Families of Tax*, 22 VA. J. SOC. POL'Y & L. 179 (2015) (discussing the Code's broad conceptions of family and how the Code's conceptions of family compare to family law's conceptions of family). The following broad categories of people potentially qualify as dependents when the corresponding requirements are met: (1) qualifying children: the taxpayer's descendants, siblings, and sibling's descendants (nieces and nephews, grand-nieces and grand-nephews, etc.) provided the dependent is unmarried, lives with the taxpayer for a majority of the year, is under age 19, is a full-time student and under age 24, or any age but permanently disabled, and does not provide a majority of the individual's financial support; and (2) qualifying relatives: almost anyone that lives with the taxpayer as part of the household for the entire year as well as the taxpayer's descendants, siblings, nieces and nephews (but not grand-nieces and grand-nephews), direct ancestors, and aunts and uncles (but not their descendants), provided the dependent makes less than the personal exemption amount for the year and the taxpayer provides for more than half of the dependent's financial support. 26 U.S.C. §§ 152(c)–(d) (2017). This is merely a broad summary of the rules; there are many wrinkles and exceptions that are beyond the scope of this Article. Thus, for ACA purposes, a "family" includes the taxpayer, the taxpayer's spouse, and the taxpayer's dependents as described above. In addition, there are exceptions and special rules for non-citizens. 26 U.S.C. §152(b)(3) (2017).

[97] "Household income" is based on "modified adjusted gross income," which begins with the taxpayer's "adjusted gross income." 26 U.S.C. § 36B(d)(2)(2017). Adjusted gross income is the taxpayer's gross income as reported on his or her return less certain "above-the-line" deductions, such as the deduction for certain tuition payments and certain deductions for self-employed individuals. 26 U.S.C. §§ 62(a)(6), (18) (2020). The IRS modifies adjusted gross income by adding back any amounts excluded under the foreign income exclusion of Code § 911, any tax-exempt interest, and any portion of Social Security benefits excluded under Code § 86. 26 U.S.C. § 36B(d)(2)(B) (2017).

benchmark plan (or the cost for the actual plan selected, if lower).[98] The benchmark plan is the second-lowest priced "silver" plan that can cover the taxpayer's entire household.[99] The ACA exchanges categorize plans by "metal colors"; plans are classified in ascending order from least generous to most generous, *i.e.*, bronze, silver, gold, and platinum.[100] In comparison, a silver plan benefit structure (the amount of copayments, coinsurance, and deductibles) is more generous than a bronze plan but less generous than a gold or platinum plan.[101] The cost for the benchmark plan is the cost to the taxpayer if he or she were to actually

There are clear inequities in using this definition to measure an individual's ability to afford health care. For example, inherited or gifted wealth is completely excluded from this definition of income. *See* 26 U.S.C. § 36B(d)(2)(B) (2017). This exclusion means a person could qualify for the Premium Tax Credit even if the person receives thousands, or even millions of dollars, from a family trust. "Household income" is the modified gross income of each member of the "family," or tax unit, with an important exception. 26 U.S.C. §§ 5000A(c)(4)(B)–(C) (2019). The IRS ignores income of a family member (*i.e.*, a spouse or dependent) if the family member is not "required to file a return of tax imposed by [Code] section 1 for the taxable year." 26 U.S.C. § 36B(d)(2)(A)(ii)(II) (2017). Code § 1 is the section that imposes the income tax; it does not contain any rules regarding the requirement to file a return. *See* 26 U.S.C § 1 (2019). Code § 6012 contains the rules regarding when there is a requirement to file a return to report taxes imposed under Code § 1. *See* 26 U.S.C. § 6012 (2018). Code § 6012 exempts an individual from the obligation to file a return to report the tax applicable under Code § 1 if the individual's income is not more than the personal exemption amount (currently $0) plus the applicable standard deduction amount (for most single taxpayers in 2020 this is $12,400 and for most married couples this is $24,800). 26 U.S.C. §§ 6012(a)(1)(A)–(B) (2018); *see also Publication 501 (2019), Dependents, Standard Deduction, and Filing Information*, INTERNAL REVENUE SERV., at 2, https://www.irs.gov/pub/irs-pdf/p501.pdf (last updated Jan. 13, 2020). In other words, for ACA purposes, a family member's income (including a spouse) would not count toward household income if it is under the applicable threshold that triggers the obligation to file a return. 26 U.S.C. § 6012(a)(1)(A) (2018). An individual may be required to file a tax return for other reasons, even though he or she is exempt from filing a return under the Code § 6012 rules. For example, if a person has over $400 of income from self-employment, he or she must file a return to report employment taxes. 26 U.S.C. § 6017 (2018). In addition, there are many situations where a person will want to file a return even if they are not required to, *e.g.*, to receive an over withholding refund or a refundable tax credit like the Earned Income Tax Credit. Rocky Mengle, Kiplinger.com, *7 Reasons to File a Tax Return Even If You Don't Have To (Hint: They're Due July 15!)*, (Jul. 14, 2020), https://www.kiplinger.com/taxes/tax-filing/601011/reasons-to-file-a-tax-return-even-if-you-dont-have-to. In such cases, that person's income should not be counted toward household income for ACA purposes.

[98] 26 U.S.C. § 36B(b)(2) (2017).

[99] This could be a combination of plans if a single plan cannot cover the entire family, for example because a child is away at college or because of the relationships between the family members. Treas. Reg. §§ 1.36B-3(f)(1)–(2), (4) (2017).

[100] *See generally Health Reform and Your Insurance Options*, WEBMD, https://www.webmd.com/health-insurance/reform-options#1 (last visited Nov. 21, 2020).

[101] *Id.*

enroll in the benchmark plan.[102] Thus, the cost of the benchmark plan will vary depending on the taxpayer's location, family size, and the ages of the enrollees.[103] The Premium Tax Credit amount is the difference between the premium amount for the benchmark plan and the expected taxpayer contribution toward the premium.[104] The taxpayer's contribution varies depending on the taxpayer's household income and ranges from 2% of income to 9.5% of income.[105] It is important to note that, although the Premium Tax Credit is based on the benchmark plan's cost, the taxpayer is free to enroll in a lower- or higher-cost plan.[106]

There are several eligibility criteria for claiming a Premium Tax Credit: (1) the taxpayer[107] must have "household income" between 100% and 400% of the poverty line;[108] (2) the taxpayer cannot be eligible to be claimed as the dependent of any other person;[109] (3) the taxpayer must file a joint return if considered married within the

[102] 26 U.S.C. § 36B(b)(3)(C) (2017).

[103] The ACA permits insurers to charge higher premiums to older insureds; an older insured may be charged up to three times more than a younger insured. 42 U.S.C. § 300gg(a)(1) (2010). Any age-based adjustment in premiums will be taken into account under the benchmark plan for Premium Tax Credit calculations. 26 C.F.R. § 1.36B-3(e) (2017). The benchmark plan, however, will not take into account a premium adjustment for tobacco use; the ACA allows insurers to charge tobacco users up to 1.5 times the premium it would charge a non-user. 42 U.S.C. § 300gg(a)(1); 26 C.F.R. § 1.36B-3(e).

[104] 26 U.S.C. § 36B(b) (2017).

[105] 26 U.S.C. §§ 36B(b)(2), (3)(A) (2017). The calculation of the taxpayer's required contribution is fairly complicated, although online calculators can help taxpayers (and their advisors) estimate the likely contribution amount. *See, e.g.*, *Health Insurance Marketplace Calculator*, THE HENRY J. KAISER FAMILY FOUND. (Nov. 21, 2020), https://www.kff.org/interactive/subsidy-calculator/.

[106] 26 U.S.C. § 36B(b)(3)(B) (2017); *see also* Health Reform: Beyond the Basics, *Premium Tax Credits: Answers to Frequently Asked Questions*, CTR. BUDGET & POL'Y PRIORITIES 2, 2 (July 2013), http://www.cbpp.org/files/QA-on-Premium-Credits.pdf.

[107] The term "taxpayer" is used because the claimant must file a federal tax return to receive a Premium Tax Credit and it is the term used in the statute. However, the term includes individuals who may not pay any federal income taxes, either because their income is too low to trigger the income tax or because their income tax liability is fully reduced by available credits, such as the EITC or the Child Tax Credit.

[108] 26 U.S.C. § 36B(c)(1)(A) (2017). As discussed *supra* in note 87, eligibility for the Premium Tax Credit for 2020 is calculated using 2018 poverty figures, and under those poverty figures, between 100% and 400% of poverty for a single person means between $12,140 and $48,560 with higher amounts in Alaska and Hawaii. Annual Update of HHS Poverty Guidelines, 83 Fed. Reg. 2,642 (Jan. 18, 2018).

[109] 26 U.S.C. § 36B(c)(1)(D) (2017). Notice that this is different than actually being claimed as a dependent of another taxpayer, despite the language in the FAQs posted on the IRS's website. The IRS's website states that the claimant "cannot be claimed as a dependent by another person." INTERNAL SERVICE REVENUE, *supra* note 89. This is contrary to the plain language of the statute and likely represents an oversight rather than a conscious interpretation choice.

meaning of Code § 7703;[110] (4) the taxpayer must not be eligible for government-sponsored coverage such as Medicare, Medicaid, CHIP, or TRICARE;[111] (5) the taxpayer must not be eligible for an employer-sponsored plan that is affordable and provides minimum value;[112] (6) neither the taxpayer nor any member of the taxpayer's family[113] can be actually enrolled in an employer-sponsored plan, whether or not the plan is considered affordable or to provide minimum value;[114] and (7) the taxpayer, taxpayer's spouse, or taxpayer's dependent must have purchased coverage through an exchange and paid the premium for the coverage.[115] There are special rules that apply to non-citizens that are beyond the scope of this Article.

All of these affordability rules would work perfectly well in the absence of an individual mandate. Indeed, they have been effectively increasing enrollment from the beginning, even though the individual mandate has always been weak. The affordability rules even continued to effectively boost enrollment after the individual mandate was gutted by the 2017 Tax Act's repeal of the penalty tax. It appears that Americans respond better or equally as well to carrots than to sticks.

III. THE 2017 TAX ACT AND BUDGET RECONCILIATION

A. *Background of the 2017 Tax Act*

The 2017 Tax Act was passed on December 20, 2017, on a nearly complete party-line vote, with Republicans voting in favor of the act and Democrats voting against it.[116] Touted as pro-growth tax legislation, one

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110 26 U.S.C. § 36B(c)(1)(C) (2017).

111 26 U.S.C. §§ (c)(c)(2)(B), 5000A(f)(1)(A) (2017). This applies on a month-by-month basis and is based on eligibility for the plan, not enrollment in the plan. Thus, if a person meets all the eligibility requirements for a Premium Tax Credit in January, but becomes eligible for Medicaid starting in February, the person will receive a Premium Tax Credit only for January, even if the person does not actually enroll in Medicaid. 26 U.S.C. § 36B(c)(2)(B)(i) (2017).

112 26 U.S.C. § 36B(c)(2)(C) (2017). A plan is considered "affordable" if the employee's share of the premium for self-only coverage is 9.5% or less of the employee's "household income." 26 U.S.C. § 36B(c)(2)(C)(i) (2017). A plan is considered to provide minimum value if it covers at least 60% of the total allowed costs of benefits under the plan. 26 U.S.C. § 36B(c)(2)(C)(ii) (2017).

113 See *supra* note 96 for an explanation of the term "family" as used Code Section 36B.

114 26 U.S.C. § 36B(c)(2)(C)(iii) (2017).

115 26 U.S.C. § 36B(c)(2)(A) (2017).

116 In the Senate, with only Senator McCain not voting due an illness, all Republicans voted in favor of the bill while all Democrats and both Independents voted no. *Roll Call Vote 115th Congress – 1st Session,* UNITED STATES SENATE (Dec. 20, 2017), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress

of the primary features of the 2017 Tax Act was a permanent reduction in the corporate tax rate to a flat 21%.[117] The 2017 Tax Act, however, made many other changes to the U.S. tax system, both large and small. For example, it doubled the estate tax exemption amount which, with annual inflation adjustments, allows a taxpayer dying in 2020 to pass $11.58 million estate-tax-free;[118] for American businesses doing business internationally, it adopted a territorial taxation system rather than a world-wide system with credits for foreign taxes paid;[119] it created a new deduction for certain businesses taxed on a pass-through basis;[120] it allowed a 100% immediate deduction for many new business investments;[121] it doubled the standard deduction amounts for individual taxpayers;[122] it lowered individual income tax rates across the board;[123] it lowered the cap on the home mortgage interest deduction;[124] it instituted a new cap on the deduction for state and local taxes;[125] it doubled the child tax credit;[126] it eliminated the personal

=115&session=1&vote=00323. In the House, of those Representatives voting, all Democrats voted against the bill along with 12 Republicans, while 224 Republicans voted in favor of the bill. FINAL VOTE RESULTS FOR ROLL CALL 699 (Dec. 20, 2017), http://clerk.house.gov/evs/2017/roll699.xml. The twelve Republican representatives who voted against the bill were almost all from California, New York, or New Jersey, states with high state and local taxes, which would be hit hardest by the new cap on deducting state and local taxes (one of the dissenting Republicans was from North Carolina). Sam Petulla, Sean O'Key, and Hannah Lang, *The House Republicans Who Voted 'No' on Tax Reform*, CNN (Nov. 16, 2017), https://www.cnn.com/2017/11/16/politics/house-republicans-vote-no-tax-bill/index.html.

[117] *See* NAT. ASS'N OF TAX PROFESSIONALS, *Tax Cuts and Jobs Act of 2017, HR 1*, (nd), https://www.natptax.com/explore/Documents/Tax%20Cuts%20and%20Jobs%20Act%202017
%20Summary.pdf.; *see also* Adam Michel, *Analysis of the 2017 Tax Cuts and Jobs Act*, THE HERITAGE FOUNDATION. (Dec. 19, 2017), https://www.heritage.org/sites/default/files/2017- 12/IB4800_0.pdf.

[118] 2017 Tax Act, Pub. L. No. 115-97, § 11061, 131 Stat. 2054 (2017); for 2020 exemption amount, see Rev. Proc. 2019-44.

[119] 2017 Tax Act, Pub. L. No. 115-97, § 13541(D), 131 Stat. 2054 (2017); for a partial critique of the international tax changes; see David Kamin, David Gamage, Ari Glogower, Rebecca Kysar, Darien Shanske, Reuven Avi-Yonah, Lily Batchelder, J. Clifton Fleming, Daniel Hemel, Mitchell Kane, David Miller, Daniel Shaviro, & Manoj Viswanathan, *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L REV. 1439, 41-42 (2019).

[120] 2017 Tax Act, Pub. L. No. 115-97, § 11011, 131 Stat. 2054 (2017).

[121] 2017 Tax Act, Pub. L. No. 115-97, § 13201, 131 Stat. 2054 (2017).

[122] 2017 Tax Act, Pub. L. No. 115-97, § 11021, 131 Stat. 2054 (2017).

[123] 2017 Tax Act, Pub. L. No. 115-97, § 11001, 131 Stat. 2054(2017).

[124] 2017 Tax Act, Pub. L. No. 115-97, § 11043, 131 Stat. 2054 (2017).

[125] 2017 Tax Act, Pub. L. No. 115-97, § 11042, 131 Stat. 2054 (2017).

[126] 2017 Tax Act, Pub. L. No. 115-97, § 11022, 131 Stat. 2054 (2017).

exemption amount;[127] and it made multiple other changes not listed here.[128] Most of these changes expire or "sunset" in 2025 (a common feature of tax bills due to the Senate budget reconciliation rules discussed below), while others are permanent.[129]

Significantly for this Article, the 2017 Tax Act reduced the shared responsibility tax to zero.[130] While it is commonly misreported that the 2017 Tax Act eliminated the individual mandate, it did not do so; it lowered the tax that enforces the individual mandate to zero. In other words, after the 2017 Tax Act, an individual who fails to maintain adequate health coverage, as required by the individual mandate of the ACA, faces no penalty; there is no enforcement mechanism for the individual mandate after the 2017 Tax Act changes.[131] At the same time, the 2017 Tax Act left in place other taxes that were introduced by the ACA, such as the 0.9% additional Medicare tax and the 3.8% tax on net investment income, both of which are imposed on higher-income individuals—a strong indicator that the 2017 Congress thought the rest of the ACA could stand on its own even without an individual mandate penalty tax.[132]

At first glance, it seems odd to reduce the enforcement tax to zero while leaving in place the mandate itself, until one considers the procedural posture of the 2017 Tax Act. The 2017 Tax Act was introduced in the House on November 2, 2017 as H.R. 1 pursuant to budget reconciliation instructions and was passed using budget reconciliation authority.[133] As explained more fully below, budget reconciliation is a process that allows Congress to pass budget-related legislation without the threat of a filibuster in the Senate. This process allows such legislation to pass with a simple majority in the Senate, whereas regular legislation is always subject to a threat of a filibuster.

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[127] 2017 Tax Act, Pub. L. No. 115-97, § 11041, 131 Stat. 2054 (2017).

[128] *See generally* NAT'L ASS'N OF TAX PROF, *supra* note 117; *see also* Michel, *supra* note 117.

[129] *See generally* NAT'L ASS'N OF TAX PROF, *supra* note 117; *see* Michel, *supra* note 117; *see also* Rebecca M. Kysar, *The Sun Also Rises: The Political Economy Of Sunset Provisions In The Tax Code*, 40 GA. L. REV. 335 (2006); Manoj Viswanathan, *Sunset Provisions In The Tax Code: A Critical Evaluation And Prescriptions For The Future*, 82 N.Y.U.L. REV. 656 (2007) (giving background on the proliferation of sunsetting provisions in tax bills).

[130] 2017 Tax Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054 (2017).

[131] *See Id.*

[132] *See* 26 U.S.C. § 3101(b)(2) (additional Medicare tax); 26 U.S.C. § 1411 (net investment tax).

[133] Bill History in the Congressional Record, Congress.gov, https://www.congress.gov/bill/115th-congress/house-bill/1/history; for general information on budget reconciliation and tax legislation, see Rebecca Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROB. 61 (2018).

Indeed H.R. 1 (which became the 2017 Tax Act) passed the Senate on the slimmest of margins, 51-48 with one Senator not voting.[134] If the 2017 Tax Act were not a budget reconciliation measure, it would certainly have failed due to a filibuster and a failed attempt at cloture.

B. *Budget Reconciliation: Purpose and Practice*

The Senate has long had a rule of procedure that allows Senators to indefinitely extend debate on pending matters—to filibuster.[135] The Senate rules have no limitations on the length of time a debate can last, which allows any Senator or group of Senators to extend debate until the chamber recesses.[136] Filibuster can effectively prevent any question pending in the Senate from proceeding to a final vote. Although the filibuster has been part of Senate procedure since the beginning, the Senate also has, since 1917, had a rule that allows a supermajority of Senators (currently 60%) to end a filibuster and proceed to a final vote on a pending matter following an additional period of debate (currently 30 hours); this is referred to as cloture.[137] Commonly proffered reasons for the filibuster and cloture rules are that they encourage full deliberation, protect the minority voice in the Senate, and also promote consensus.[138]

By the 1970s, Congress became concerned that the filibuster (and the difficult-to-pass cloture motion) was making passing a budget difficult. Thus, in 1974, Congress passed the Congressional Budget and Impoundment Control Act of 1974 that allows certain budget-related

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134 See *supra* note 116.

135 *See* S. Res. 285, 113th Cong. § 1 (2013); *see also* VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 4 (2017); *see also Filibuster and Cloture*, U.S. SENATE, https://www.senate.gov/ artandhistory/history/ common/briefing/Filibuster_Cloture.htm (last visited Feb. 12, 2020).

136 *See* S. Res. 285, 113th Cong. § 1 (2013); *see also* VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 4 (2017); *see also Filibuster and Cloture*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (last visited Feb. 12, 2020).

137 CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 98-425, INVOKING CLOTURE IN THE SENATE 1-2 (2017). The cloture rule was added in 1917, so while it has a long history, the filibuster existed for a long time without the limitation of the cloture rules; *see also Cloture Rule*, U.S. Senate, https://www.senate.gov/artandhistory/ history/minute/Cloture_Rule.htm (last visited Feb. 12, 2020) (describing the history surrounding the adoption of the cloture rule during President Woodrow Wilson's term).

138 VALERIE HEITSHUSEN, CONG. RESEARCH SERV. 96-548, THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION 1 (2019).

legislation to pass without threat of filibuster in the Senate.[139] A budget reconciliation bill that qualifies under this procedure will pass on a simple majority in both chambers, rather than needing the support of more than sixty Senators (60%) to defeat a potential filibuster.[140]

Under budget reconciliation, the House and Senate pass a concurrent budget resolution that gives reconciliation instructions to committees in each chamber; the budget resolution adopts budget goals for at least the next five fiscal years and instructs committees in each chamber to "reconcile" current law with the budgetary goals adopted.[141] The committees then create legislation that implements the instructions, and each chamber votes on the legislation produced by their committees. If the legislation passed by the House and Senate are not identical, a conference committee is convened to work out the differences.[142] The concurrent budget resolutions are not binding and are not subject to veto by the President.[143]

For example, for fiscal year 2018 (the year the 2017 Tax Act was passed) the House passed House Concurrent Resolution number 71 as a budget resolution.[144] The Senate also introduced its own budget resolution,[145] but ultimately the Senate amended the House concurrent resolution and the House accepted the Senate's amendment.[146] The budget resolution recommended levels for revenue and outlays for the next ten years (a common practice for budget resolutions) (Section

[139] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended in scattered sections of 2 U.S.C. and 31 U.S.C.).

[140] *Id.* at §§ 305(b), (c) (codified at 31 U.S.C. § 1326) (limiting the time for debate in the Senate).

[141] MEGAN S. LYNCH & JAMES V. SATURNO, CONG. RESEARCH SERV., R44058, THE BUDGET RECONCILIATION PROCESS: STAGES OF CONSIDERATION 1 (2017); *see also Policy Basics: Introduction to the Federal Budget Process*, CTR. ON BUDGET AND POLICY PRIORITIES, https://www.cbpp.org/sites/default/files/atoms/files/3-7-03bud.pdf (last updated Apr. 2, 2020).

[142] MEGAN S. LYNCH & JAMES V. SATURNO, CONG. RESEARCH SERV., R44058, THE BUDGET RECONCILIATION PROCESS: STAGES OF CONSIDERATION 9 (2017); *see also Policy Basics: Introduction to the Federal Budget Process*, CTR. ON BUDGET AND POLICY PRIORITIES, https://www.cbpp.org/sites/default/files/atoms/files/3-7-03bud.pdf (last updated Apr. 2, 2020).

[143] David Reich & Richard Kogan, *Introduction to Budget "Reconciliation,"* CTR. BUDGET & POL'Y PRIORITIES (Nov. 9, 2016), https://www.cbpp.org/sites/default/files/atoms/files/1-22-15bud.pdf.

[144] H.R. Con. Res. 71, 115th Cong. (2017).

[145] S. Con. Res. 25, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-concurrent-resolution/25.

[146] H.R. Con. Res. 71, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-concurrent-resolution/71/all actions?q=%7B%22search%22%3A%5B%22h.con.res.+71%22%5D%7D&s=1&r=5 (all actions on bill).

1101), recommended a budget level for specific governmental functions (Section 1102), and limited the overall increase in the deficit (sections 2001 and 2002).[147]

A full understanding of the budget reconciliation process is impossible without considering the impact of the Byrd rule, named after its proponent, former West Virginia Senator Robert Byrd. The Byrd rule was unanimously adopted by the Senate as a temporary measure and was later codified.[148] Senator Byrd, and Congress, had concerns that the budget reconciliation process would be used to pass non-budget related measures on a simple majority vote, circumventing the filibuster and cloture procedures that protect the deliberative process in the Senate. Therefore, under the Byrd rule (in its current form), "extraneous" provisions cannot be considered by the Senate at any point during the budget reconciliation process. A provision is extraneous if it: (A) does not produce a change in outlays or revenues; (B) produces an increase in outlays or decrease in revenues that does not follow the reconciliation instructions in the budget resolution; (C) is not in the jurisdiction of the committee that reported the provision; (D) produces changes in outlays or revenues that are merely incidental to the nonbudgetary components of the provision; (E) increases the deficit in any fiscal year after the period specified in the budget resolution (i.e., the "budget window"); or (F) recommends changes to Social Security.[149]

The Byrd rule is not self-executing; a court cannot strike a provision as violative of the Byrd rule.[150] To enforce the Byrd rule, a Senator must raise a point of order challenging a provision as extraneous under the Byrd rule.[151] The presiding officer of the Senate then must rule on the point of order.[152] If the presiding officer sustains the point of order, finding the provision extraneous, the provision is stricken from the legislation.[153] If the presiding officer rejects the point of order, finding the provision to not be extraneous, the provision remains in the legislation.[154] Sixty Senators (60%), however, can vote to waive the Byrd rule violation, or overrule the presiding officer.[155]

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[147] *Id.*

[148] 2 U.S.C. § 644 (2018); BILL HENNIFF JR., CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 1 (2016).

[149] *See* 2 U.S.C. § 644(b)(1).

[150] Ellen P. Aprill and Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROB. 99, 105 (2018).

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

This is the same supermajority needed to invoke cloture to overcome a filibuster in a non-budget reconciliation process. In practice, the presiding officer typically consults with either the Senate Budget Committee Chair or the Senate Parliamentarian before ruling on a Byrd rule point of order, depending on the argument for why the provision is extraneous.[156] Furthermore, in practice, sponsors of the legislation frequently consult with the Senate Parliamentarian before legislation goes to a final vote, and often before points of order are raised; members of both parties will raise arguments regarding Byrd rule compliance with the Parliamentarian off the record. This non-public process is referred to as a "byrd bath."[157]

Clearly, the Senate could not have used the budget reconciliation process to completely repeal the ACA without a supermajority of Senators in favor. Recall that the Byrd rule prohibits any provision that "produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision."[158] Generally speaking, the application of this provision often is not entirely clear because it is a standard rather than a bright line rule. The presiding officer, relying on the parliamentarian, must exercise judgement in determining whether a particular provision's budget impact is "merely incidental" to its non-budget impact.[159] The fact that so much of this decision-making occurs off the record by the parliamentarian makes it even less certain which provisions are likely to violate the Byrd rule and which are not.[160] Nevertheless, it remains clear that a repeal of the ACA would violate this provision of the Byrd rule. While ACA repeal would certainly change the federal budget, the budgetary impact of repealing the ACA is clearly secondary to the profound policy changes of an ACA repeal.

156 Aprill & Hemel, *supra* note 150 at 107.

157 *Id.* at 107.

158 2 U.S.C. § 644(b)(1)(A).

159 Aprill & Hemel, *supra* note 150 at 107.

160 In 1993, the Senate Budget Committee stated "This subparagraph contributes much of the ambiguity created by [the Byrd rule]. Its language calls for the exercise of judgment. The Parliamentarian has not laid down any bright-line test to aid that judgment, and reserves the right to consider each individual case on its merits. The drafters of this subparagraph wished to prohibit provisions in which policy changes plainly overwhelmed deficit changes. For example, a nationwide abortion prohibition might marginally reduce Government spending, but would constitute a much more significant policy change than budgetary action. The application of this subparagraph, however, has ranged wider than such plain cases." WILLIAM G. DAUSTER, BUDGET PROCESS LAW ANNOTATED 208 n.580 (1993).

IV. CALIFORNIA V. TEXAS AND SEVERABILITY DOCTRINE

A. *Background of the California v. Texas Case*

In *California v. Texas*, states and individuals are once again challenging the constitutionality of the ACA. The provision under direct attack in *California v. Texas* is the individual mandate. As explained above, the individual mandate requires most individuals to maintain health coverage. In 2012, in *National Federation of Independent Businesses v. Sebelius* ("NFIB"),[161] the United States Supreme Court upheld the individual mandate as a constitutional exercise of Congress' taxing power because the consequence of not maintaining health coverage was the imposition of a penalty tax.[162] Subsequent to that ruling by the United States Supreme Court, however, Congress passed the 2017 Tax Act which reduced the tax (called the shared responsibility payment) that enforces the individual mandate to zero.[163] The challengers in *California v. Texas* argue that because Congress reduced the tax to zero, the individual mandate can no longer be considered a constitutionally permissible exercise of taxing authority.[164] The District Court judge agreed with this argument, holding that the individual mandate is no longer constitutional.[165] The District Court referred to the Supreme Court's decision in *NFIB*, which found that the individual mandate standing alone would be an unconstitutional overreach, exceeding Congressional authority, but that the inclusion of a penalty tax to enforce the individual mandate made the mandate constitutional under the taxing authority.[166] The District Court further found that a tax set at zero is the same as no tax at all.[167] Thus, without a tax, the individual mandate cannot be upheld under the taxing authority.

The states and individual parties seeking to uphold the ACA appealed the decision to the Fifth Circuit, which issued a decision on December 18, 2019.[168] The Fifth Circuit agreed with the District Court that the individual mandate can no longer be considered a constitutional exercise of Congressional authority—without a tax, the individual mandate cannot be considered an exercise of Congress' tax and

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161 *NFIB*, 132 S. Ct. 2566 (2012).
162 *Id.* at 2580.
163 2017 Tax Act, Pub. L. No. 115-97 § 11081, 131 Stat. 2054 (2017).
164 *Texas D.Ct.*, 340 F.Supp. 3d 579, 585 (N.Dist. Tex. 2018).
165 *Id.*
166 *Id.*
167 *Id.* at 601.
168 See generally *Texas 5th Cir.,* 945 F.3d 355 (5th Cir. 2019).

spending power.[169] Because this Article focuses on the severability question, this Article proceeds on the assumption that these holdings will be upheld by the United States Supreme Court, although this is far from certain.[170]

Having found the individual mandate unconstitutional, the District Court judge next examined whether the now-unconstitutional individual mandate could be severed from the rest ACA and determined that it could not.[171] Therefore, the District Court's ruling strikes down the entire ACA as unconstitutional because it is not severable from the individual mandate.[172] On appeal, the Fifth Circuit remanded the severability question to the District Court, instructing it to provide additional analysis.[173] Before the District Court could revisit the case, the Supreme Court granted cert.[174]

In determining that the individual mandate is not severable from the entirety of the ACA, the District Court judge focused on Congressional intent—whether Congress would have wanted the rest of the ACA to stand knowing that that the individual mandate was unconstitutional.[175] This court's analysis did not adequately take into consideration a very important element of Congressional intent, however: the particular procedure that Congress used to pass the 2017 Tax Act. The individual mandate was ruled unconstitutional only because Congress lowered the tax to zero.[176] Congress lowered the tax to zero through the budget reconciliation process, which allows budget-related legislation to pass the Senate without threat of a filibuster.[177] Congress could not have directly repealed the ACA through the budget

169 See generally *id.*

170 The case raises a variety of issues that are outside the scope of this Article. For example, it is possible that individual mandate continues to be constitutional, even without a tax to enforce the mandate, because without an enforcement mechanism it does not alter anyone's legal rights. This would make the severability question moot. Another issue in the case is whether the plaintiffs have standing to challenge the ACA. Arguably plaintiffs have no damages from the individual mandate because it is effectively non-enforceable without the penalty tax. Another issue is whether the shared responsibility payment continues to be a tax even though it is now set to zero. Congress did not repeal the tax or eliminate it from the tax code, but rather set the tax rate at zero.

171 *Texas D.Ct.,* 340 F.Supp. 3d 579 at 585-86.

172 *Id.*

173 *Texas 5th Cir.*, 945 F.3d at 369.

174 Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *aff'd in part, vacated in part, remanded,* 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (2020) (No. 19-840).

175 See *Texas D.Ct.*, 340 F. Supp. 3d at 606-607.

176 *Id.* at 605.

177 See generally 2017 Tax Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

reconciliation process, and judges should not allow Congress to indirectly repeal the ACA through this process.[178] Judges should consider the procedural posture of the legislation in determining Congressional intent with respect to severability. While the District Court acknowledged that the 2017 Tax Act was passed using budget reconciliation authority, and that Congress could not have used this process to repeal the rest of the ACA, the court did not discuss this aspect of the legislation in its analysis.[179]

The Fifth Circuit instructed the District Court to more carefully consider the intent of the Congress that passed the 2017 Tax Act, and to use a "finer-toothed comb" regarding which specific provisions of the ACA are constitutionally inseverable.[180] Because the 2017 Tax Act was passed through the budget reconciliation process, and because the same process could not have been used by Congress to repeal most other parts of the ACA, it could not have been the intent of Congress to repeal the entirety of the ACA. Or if that was their intent, it was an intent that violated Congress' own rules of procedure. It also seems clear that Congress must have intended the rest of the ACA to continue to function without the individual mandate, because that is precisely what Congress did in the 2017 Tax Act.

This Article does not argue that provisions of laws can never be struck down as being inseverable from provisions amended under budget reconciliation in a manner that makes them unconstitutional. This practice, however, should be rare. It should be incumbent on Congress to use a procedure that fully implements its intent, rather than relying on a court to do so. In other words, if the 2017 Congress intended to eliminate the individual mandate by lowering the penalty tax, and if the 2017 Congress intended that the individual mandate be inseverable from the rest of the ACA, then the 2017 Congress should have employed a Congressional procedure that would allow it to repeal the ACA itself rather than asking the court to do so. Judges should consider the procedural posture of such legislation when making severability determinations. Simply put, there should be a very strong presumption that Congress did not intend to alter legislation indirectly that it could not have altered directly because of the legislative process used. The hurdle of severability should be high or judges risk engaging in legislating from the bench. The Fifth Circuit acknowledged that "[s]everability doctrine places courts between a rock and hard place."[181]

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178 See Part III, supra.
179 *Texas D.Ct.,* 340 F. Supp. 3d at 591.
180 *Texas 5th Cir.*, 945 F.3d at 402.
181 *Id.* at 394.

Severability doctrine rests in large part on a respect for the separation of powers.[182] Because of this, courts should be especially wary of Congress weaponizing the courts to accomplish indirectly what the Congress could not accomplish directly. Justice Roberts, during oral arguments, appeared to be animated by this concern when he asked the Solicitor General for California, "I think it's hard for you to argue that Congress intended the entire Act to fall if the mandate were struck down when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the Act. I think, frankly, that they wanted the Court to do that. But that's not our job."[183]

B. *The 2010 Congressional Findings Are Not Dispositive*

At the Supreme Court, the respondents are a group of states led by Texas, the federal government, and individuals Neill Hurley and John Nantz.[184] Collectively, they argue that the 2017 Tax Act made the individual mandate unconstitutional, that the individual mandate is not severable from the remainder of the ACA, and that, therefore, the entire ACA is unconstitutional.

In their briefs before the Supreme Court, the respondents Texas and the Federal Government each rely heavily on the 2010 ACA Congressional findings; the Congressional findings refer to the individual mandate as "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."[185] Texas argues that this statement acts as an "inseverability" clause, that the 2017 Congress effectively readopted these findings by amending the ACA without amending the findings, and that the Supreme Court should defer to this statement of Congressional intent and refuse to sever the now-unconstitutional individual mandate from the rest of the ACA.[186]

While the 2010 Congress clearly viewed the individual mandate as an important part of the ACA, Texas tries to convert this into a finding

[182] Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. LAW & POL. 1, 39-52 (2011).

[183] Transcript of Oral Argument at 62-63, California v. Texas (2020) No. 19-840.

[184] Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *aff'd in part, vacated in part, remanded,* 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (2020) (No. 19-840).

[185] Brief for the Federal Respondents at 37, California v. Texas, No. 19-840 (filed June 25, 2020; Brief for Respondent/Cross-Petitioner States at 37, California v. Texas, No. 19-840 (filed June 25, 2020); *see also* 42 U.S.C. § 18091(2)(I) (2018).

[186] Brief for Respondent/Cross-Petitioner States at 37, California v. Texas, No. 19-840 (filed June 25, 2020).

that the individual mandate is indispensable.[187] In short, Texas is trying to make the 2010 finding do too much work. It seems clear that the 2010 statement of Congressional findings was an attempt by that Congress to articulate a basis for the ACA under the Commerce Clause of the United States Constitution. In fact, all of the findings are described as "effects" that demonstrate the mandate "is commercial and economic in nature, and substantially affects interstate commerce."[188] A set of findings aimed at bolstering an argument that the legislation is constitutional is entirely distinct from a true inseverability clause.[189] If the question is whether the 2010 Congress would have passed all or large portions of the ACA without the individual mandate, the 2010 findings do not provide an answer.

If the question is whether the 2017 Congress functionally readopted the findings when it passed the 2017 Tax Act, that answer is also elusive. The 2017 Congress had the benefit of the *NFIB* decision, where the Supreme Court explained that the ACA is not a constitutional exercise of the Commerce Clause power.[190] From a political standpoint, it would not make sense for a legislature to spend time and political capital tinkering with findings that functionally were a nullity. The 2017 Congress also had the benefit of hindsight and would have understood that the individual mandate was never as effective at incentivizing enrollment in insurance as the 2010 Congress apparently assumed it would be. As explained above, and as noted in an amicus brief filed by a bipartisan group of economic scholars, the insurance markets remained stable even in years when there was no tax penalty, supported primarily by the Premium Tax Credit subsidies and expanded Medicaid.[191] Finally, the 2017 Congress could not have amended the findings under the budget reconciliation process it chose to use—such a change in the findings would be violative of the Byrd rule as an extraneous provision.

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187 *Id.* at 29-31.

188 42 U.S.C. § 18091(1) (2018).

189 The Supreme Court had an opportunity to rule on a true severability clause in 2020. The Court cited 4 U.S.C. § 125 to justify its decision that certain provisions of the Telephone Consumer Protection Act of 1991 were inseverable from a provision ruled unconstitutional. Barr v. American Association of Political Consultants, Inc, 140 S. Ct. 2335, 2349 (2020). 4 U.S.C. § 125 provides: "If a court of competent jurisdiction enters a final judgment on the merits that— 1. Is based on federal law; 2. Is no longer subject to appeal; and 3. Substantially limits or impairs the essential elements of sections 116 through 126 of this title, then sections 116 through 126 of this title are invalid and have no legal effect as of the date of entry of such judgment.

190 *See* generally *NFIB*, 132 S. Ct. 2566 (2012).

191 Br. Amici Curiae for Bipartisan Economic Scholars in Support of Pet'rs at 5, California v. Texas, No. 19-840 (filed May 13, 2020).

C. *The ACA Case Is Not a Frost-Style Convergent Constitutional Violation*

While neither the District Court nor the Fifth Circuit explored this remedy, scholars have argued that a court could sever off or invalidate the provision in the 2017 Tax Act that lowered the shared responsibility payment to zero.[192] Under this argument, *California v. Texas* does not present a simple severability question—where a single statute passed by a single Congress contains both constitutional and unconstitutional provisions—but rather presents what is known as a "convergent constitutional violation."[193] A convergent constitutional violation occurs when there are two statutory provisions, both of which would be constitutional on their own, but are unconstitutional when read together. In *Frost v. Corporation Commission of Oklahoma*,[194] the United States Supreme Court struck down an amendment that rendered an unamended portion of an existing statute unconstitutional.[195] There, an Oklahoma statute required a permit based on public necessity in order to operate a cotton gin.[196] The plaintiff/appellant obtained a cotton gin permit upon a showing of public necessity.[197] The statute was later amended by the legislature to add an exception that allowed cotton gins organized as cooperatives to obtain permits without a showing of public necessity.[198] The Supreme Court found that this scheme of requiring a public necessity showing for some applicants but not for others violated the Equal Protection Clause of the Constitution.[199] The remedy that the Court fashioned was to enjoin the amendment, leaving the original statute in force, unamended.[200]

None of the parties discuss this issue in their briefs, although the Cato Institute filed an amicus brief that relies heavily on the *Frost* precedent, arguing that the 2017 Congressional intent should be ignored, leaving in place the original intent of the 2010 Congress which called the individual mandate "essential" in its findings and which the Cato Institute argues is dispositive of 2010 Congressional intent with

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[192] James Durling & E. Garrett West, *Severing Unconstitutional Amendments*, 86 U.CHI. L. REV. 1, 1-2 (2018); Josh Blackman, *Undone: The New Constitutional Challenge to ObamaCare*, 23 TEX. REV. L. & POL. 1 (2018).

[193] *See generally* Durling & West, *supra* note 192, at 7-8.

[194] Frost v. Corp. Com. Of Okla., 278 U.S. 515 (1929).

[195] *Id.* at 528.

[196] *Id.* at 517.

[197] *Id.* at 517.

[198] *Id.* at 517.

[199] *Id.* at 528.

[200] *Frost*, 278 U.S. at 528.

respect to severability.[201] Other scholars have argued that *Frost* paves the way for the Supreme Court to enjoin the 2017 Tax Act's lowering of the tax penalty to zero.[202]

Frost presents a close, but distinct, situation from the ACA facts, however. In *Frost,* the second legislative action did not directly amend the first legislative action, but instead created a new permitting scheme for certain entities. Either scheme (requiring a showing of public necessity or not) would be perfectly constitutional on its own, but read together it created a scheme where some entities were required to show public necessity but others were not, which violated equal protection. In the ACA case, the second legislative action did directly amend the first legislative action, after taking into account the *NFIB* holding. The 2017 Congress changed the tax rate of the penalty adopted by the 2010 Congress, which is not a constitutional problem on its own. The Supreme Court created a saving construction in the *NFIB* case, however, and the tax provision is inextricably linked to the mandate because of that savings construction.[203] Thus, the 2017 Tax Act effectively amended not only the tax provision but also the mandate.[204] Whereas *Frost* is provision A (first-in-time) *plus* provision B (later-in-time), the ACA case is provision AB (first-in-time) *minus* provision A (later-in-time). *Frost*'s A and B were each constitutional standing on their own, which contrasts with the ACA case where the individual mandate is likely not constitutional standing on its own (as decided by the Court in *NFIB*). Thus, *Frost* is not perfectly applicable, although could be instructive if the Court decides the individual mandate is constitutional without the penalty tax.

D. *If the Individual Mandate Is Unconstitutional, It Is Severable from the Rest of the ACA*

Assuming for the sake of argument that the District Court and the Fifth Circuit are correct in finding the individual mandate to be unconstitutional following the passage of the 2017 Tax Act, how should the Court assess whether the individual mandate is severable from the rest of the ACA?

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201 Br. For The Cato Institute as Amicus Curiae Supporting Resp'ts at 3, California v. Texas, No. 19-840 (filed July 2, 2020); *see also* 42 U.S.C. § 18091(2)(I). Note that one of the primary authors of The Cato Institute's brief is Professor Josh Blackman, author of the one of the law review articles discussing the applicability of *Frost* to this case.

202 *See generally* Durling & West, *supra* note 192, at 9-10.

203 *See generally NFIB,* 132 S. Ct. 2566 (2012).

204 Arguably, eliminating the penalty tax violated the Byrd rule because of its impact on the individual mandate, but a point of order was not raised at the time and a court cannot enforce the Byrd rule after the fact.

When a portion of a statute is deemed to be unconstitutional, the Court must determine whether to allow the remaining parts of the statute to continue in force without the objectionable portion. Whether portions of a statute can be separated, or severed, from the objectionable portions of the statute is essentially a test of legislative intent—if Congress had known that a portion of the statute would be found to be unconstitutional, would it have passed the remainder of the statute anyway?[205] The test is not whether Congress *would prefer* to include the invalidated provision or not, but whether Congress *would pass* the rest of the legislation without the problematic provision.[206] In keeping with the focus on legislative intent, courts strive to save as much of the legislation as possible. David Gans has described this principle as "the core command of severability doctrine, a firmly established tenet of judicial restraint."[207]

Both the Fifth Circuit and the District Court cite the leading United States Supreme Court decision in stating the test for severability: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[208] The District Court explains that the court first looks to see if Congress' intent is evident through statutory interpretation, and if it is, the court follows that intent.[209] If the intent is not evident, then the court will ask if the rest of the statute is capable of functioning independently; if it is not, it is presumed that Congress could not have intended them to

[205] Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. LAW & POL. 1 (2011). Professor Klukowski explains that the modern severability test is actually a two-part test. First, the court should ask if the rest of the statute would be fully functional without the excised provision, and if so, then the statute should be severed, unless it is evident that Congress would not have wanted that result. *Id.* at 54-56. Professor Klukowski acknowledges that Congressional intent is relevant to both parts of his test and that the parts overlap, so it is not surprising that courts place such heavy emphasis on Congressional intent. *Id.* at 57. Further, the Supreme Court has noted that it is "fairly unusual" for a statute to fail the first part of the test. Barr v. American Association of Political Consultants, Inc., 140 S.Ct. 2335, 2352 (2020).

[206] *Id.*

[207] David H. Gans, *American Constitution Society Issue Brief – To Save and Not to Destroy: Severability, Judicial Restraint, and the Affordable Care Act*, CONSTITUTIONAL ACCOUNTABILITY CENTER at 1 (Dec. 9, 2019), https://www.theusconstitution.org/wp-content/uploads/2019/12/Issue-Brief-To-Save-and-Not-to-Destroy-Severability-Judicial-Restraint-and-the-Affordable-Care-Act.pdf.

[208] *Texas D.Ct.*, 340 F. Supp. 3d 579, 607 (N.D. Tex. 2018), (citing *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987)); *Texas 5th Cir.*, 945 F.3d 355 (5th Cir. 2019) (citing *Alaska Airlines*, 480 U.S. at 684).

[209] *Texas D.Ct.*, 340 F. Supp. 3d at 607.

stand alone, and the entire statute will fall.[210] The Fifth Circuit explains the process slightly differently. It starts with asking if the constitutional parts of the statute are able to operate "in 'a manner consistent with the intent of Congress[]'" and then moves onto the inquiry of whether Congress would have passed such a statute.[211]

The District Court appears most concerned with not legislating from the bench by leaving in place a truncated law that Congress did not actually pass, explaining that "were a court to overplay deference to sever an inseverable statute, it would embrace the very evil the doctrine is designed to deter."[212] The Fifth Circuit, stating that "[s]everability doctrine places courts between a rock and hard place,"[213] recognizes not only the danger that motivates the District Court but also the danger of a court "invalidating more of the statute than is necessary.'"[214] The Fifth Circuit also acknowledges the duty to preserve as much as a statute as possible, noting that scholars have described this duty as a presumption of severability.[215]

The parties to the case disagree as to which Congress' intent should be considered: the intent of the Congress that passed the ACA in 2010 or the intent of the Congress that passed the 2017 Tax Act. The District Court did not consider this issue because it deemed it to be irrelevant, since the District Court found that it was the intent of both Congresses that the rest of the ACA is inseparable from the individual mandate. There are several problems with this analysis. First, it seems clear that looking at the intent of the original 2010 Congress alone is insufficient. The challenge is not to the statute as passed by that Congress but rather to the statute as amended by the 2017 Congress. Giving due deference to legislative power, a court could not tie the hands of a later Congress by looking exclusively at the intent of an earlier Congress. Even if the 2010 Congress that passed the ACA intended the individual mandate to be inseparable from the rest of the statute, the later-in-time Congress that amended the individual mandate (through amending the tax that enforced the mandate) could well have a different intent—an intent informed by seven years of experience with the statute. Generally speaking, a later-in-time Congressional action is given priority over an

210 *Id.*

211 *Texas 5th Cir.*, 945 F.3d at 394, (citing *Alaska Airlines*, 480 U.S. at 685.)

212 *Texas D.Ct.*, 340 F. Supp. 3d at 606.

213 *Texas 5th Cir.*, 945 F.3d at 394.

214 *Id.* (citing *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 328 (2006)).

215 *Id.* at 395 (citing Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1950 n.28 (1997)).

earlier-in-time Congressional action if they are inconsistent.[216] Thus, while the intent of the original Congress is not irrelevant, it is the intent of the amending Congress that is paramount. A court should not look solely at the intent of an earlier Congress to determine severability of an amended statutory provision when it is the amendment itself that causes the provision to be unconstitutional. Despite this, the District Court spends most of its decision discussing the intent of the original 2010 Congress, emphasizing the interlocking nature of the ACA's provisions and dismissing the intent of 2017 Congress as essentially unknowable.[217]

Second, the parties to the case all acknowledge that the Congress that passed the 2017 Tax Act could not have repealed the ACA directly because the 2017 Tax Act was passed pursuant to the budget reconciliation process.[218] Despite describing determining the intent of the 2017 Congress as a "fool's errand," the District Court reasoned (without making an explicit finding) that the intent of the 2017 Congress must have been against severability because it did not repeal either the individual mandate or the statement of legislative intent that declares the individual mandate to be essential, nor did the 2017 Congress otherwise repudiate severability.[219] The court found this intent based on what the 2017 Congress "did *not* do" (emphasis in original)—it did not directly repeal any part of the ACA.[220] Indeed, the 2017 Congress could not have done so because the 2017 Congress was operating under budget reconciliation authority. The court's logic cuts both ways. Congress did not directly repeal any part of the ACA other than the penalty tax; therefore, it can be inferred that the 2017 Congress did not intend to dismantle the ACA and would want it to stand even absent an individual mandate.[221]

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[216] Watt v. Alaska, 451 U.S. 259, 266, 101 S. Ct. 1673, 1678 (1981) (in dicta, the Court recognizes the general rule of construction that "the more recent of two irreconcilably conflicting statutes governs"); Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143, 120 S. Ct. 1291, 1306 (2000) ("In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years. At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings.").

[217] *See generally Texas D.Ct.*, 340 F. Supp. 3d.

[218] *Id.* at 591 ("Congress took no other action pertaining to the ACA. Nor could it. The reconciliation process limited Congress to doing exactly what it did: reducing taxes.").

[219] *Id.* at 616.

[220] *Id.* at 617.

[221] It seems apparent that the 2017 Congress understood that repealing the penalty tax (always couched as eliminating the individual mandate) could result in a higher rate of uninsured Americans and higher insurance premiums, but it also seems apparent that the 2017 Congress did not envision that the entire ACA would fall. In fact, there was

Third, in considering whether the individual mandate is severable from the rest of the ACA, the court should take judicial notice of the facts that the 2017 Congress would have had about how the ACA has functioned. It was assumed when the law was passed that the elements of the ACA were intertwined—that they were essential cogs in a machine. As discussed above, however, it is notable that the ACA did not collapse when the Supreme Court made the Medicaid expansion voluntary, which prompted many states to decline its invitation to expand Medicaid. It is also notable that many of those original non-expansion states are now considering Medicaid expansion. It is further notable that enrollment in marketplace plans has remained fairly robust despite the fact that the individual mandate has always been a weak requirement, and that the IRS has not been able to enforce the shared responsibility payments with the same vigor that it can enforce other taxes. This is not the pattern one would expect to see with respect to an indispensable, non-severable legislative provision. Indeed, it appears that the subsidies in the form of Premium Tax Credits and Cost Sharing Reductions do far more to urge people toward maintaining health insurance than the individual mandate ever could.

V. CONCLUSION

The Supreme Court is hearing yet another challenge to the Affordable Care Act. This latest challenge raises unique and challenging issues about severability. Severability doctrine has long been anchored in courts' deference to the intent of the legislature, but this simple statement obscures difficult questions such as how courts should determine legislative intent and which intent matters when the legislative bodies have changed. This Article applies severability doctrine to the challenge currently before the Supreme Court and argues that the procedural stance of the legislation that creates a Constitutional violation should matter to the severability analysis. Specifically, this Article argues that because the 2017 Tax Act that created the Constitutional problem was passed via a special Congressional procedure that could not have been used to revoke the entire ACA, this fact weighs heavily in favor of severability. To do otherwise would allow Congress to circumvent its own procedures and

serious consideration about passing a parallel measure that would stabilize the ACA insurance marketplaces, indicating an assumption that the ACA would continue without the individual mandate. *See generally* Thomas Kaplan & Jim Tankersley, *Senate Plans to End Obamacare Mandate in Revised Tax Proposal*, N.Y. TIMES, Nov. 14, 2017, https://www.nytimes.com/2017/11/14/us/politics/tax-plan-senate-obamacare-individual-mandate-trump.html.

ask the Court to do indirectly what Congress could not do directly. Such a result would completely warp the separation of powers principles that undergird the severability doctrine.