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California v. Texas: Avoiding an Antidemocratic Outcome

JON LUCAS, MBA[1]

ABSTRACT. The Affordable Care Act ("ACA") contains a section titled "Requirement to Maintain Essential Minimum Coverage." Colloquially known as the Individual Mandate, this section of the Act initially established a monetary penalty for anyone who did not maintain health insurance in a given tax year. But with the passage of the Tax Cuts and Jobs Act, the monetary penalty was reset to zero, inducing opponents of the ACA to mount a legal challenge over the Individual Mandate's constitutionality. As the third major legal challenge to the ACA, *California v. Texas* saw the Supreme Court punt on the merits and instead decide the case on grounds of Article III standing. But how would the ACA have fared if the Court had in fact reached the merits? Did resetting the Individual Mandate penalty to zero uncloak the provision from the saving construction of *Nat'l Fed'n of Indep. Bus. v. Sebelius*? This Note posits that, had the Court reached the merits, it would have found the Individual Mandate no longer met the requirements for classification as a tax under the rule relied on in *NFIB*. Moreover, it argues that the Court would have found the unconstitutional provision to be inseverable from the ACA insofar as it was integral to funding both the novel structure of the reformed healthcare system and the prohibition against insurance carriers denying coverage due to a pre-existing condition. This examination ultimately reveals that an outright repeal of the ACA would have been antidemocratic in the face of current consensus opinion that favors the reform and highlights the impact its abrogation would have had.

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I. INTRODUCTION

Nearly nine years to the day of the decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*,[2] the Supreme Court decided *California v. Texas*.[3] The third major legal challenge to the Patient Protection and Affordable Care Act ("ACA"), *California* was brought by Texas, 17 other states, and two individuals alleging that § 5000A titled "Requirement to Maintain Essential Minimum Coverage" was unconstitutional.[4] This challenge to the "Individual Mandate" followed the reset of the penalty under § 5000A to $0 by the 115th Congress with the Tax Cuts and Jobs Act ("TCJA") in December 2017.[5] In particular, the plaintiffs argued that § 5000A, without any monetary penalty, now violated both the Commerce Clause and the Tax Clause.[6]

Indeed, *NFIB* originally found § 5000A to be unconstitutional under the Commerce Clause but upheld it under the Tax Clause.[7] But does a tax cease to be a tax if the effective rate is zero? In response to this question, the Northern District of Texas held that it did and further found § 5000A to be inseverable from the ACA.[8] The Fifth Circuit affirmed in part[9] but the Supreme Court reversed in a 7-2 decision on the grounds that the plaintiffs lacked standing to attack § 5000A as unconstitutional.[10] Specifically, the Court held that the plaintiffs had failed to show "a past or future injury fairly traceable to defendants' conduct enforcing . . ." the Individual Mandate[11]—an outcome that the district court had predicted to be "unlikely."[12] Moreover, the Court found no possibility of redress, as "[u]nenforceable statutory language alone is not sufficient to establish standing."[13]

By declining to reach the merits and instead deciding the case on the jurisdictional issue, did the Supreme Court "pull[] off an improbable rescue" as Justice Alito posited in his dissent?[14] Would the outcome have been worse for the subsistence of the ACA if the Court had reached the merits? This Note argues that the Court correctly decided *California* on the issue of standing and that reaching the merits would have resulted in an antidemocratic outcome, *e.g.* a complete repeal of the ACA. Part II will establish a comprehensive background underlying *California* and the Supreme Court's examination of the jurisdictional issue. Part III will further analyze the district court's holding and suggest an additional point of view that the Supreme Court overlooked. Part IV will submit that, had the Court reached the merits, it would have found § 5000A no longer met the requirements to be classified as a tax under *Sonzinsky v. United States*[15] and under the rule

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[2] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
[3] California v. Texas, 141 S. Ct. 2104 (2021).
[4] *Id.* at 2112.
[5] Tax Cuts and Jobs Act, 115 Pub. L. No. 97, § 11081 (2017).
[6] *California*, 141 S. Ct. at 2112.
[7] *NFIB*, 567 U.S. at 575.
[8] Texas v. United States (*Texas I*), 352 F.Supp.3d 665, 685 (N.D. Tex. 2018).
[9] Texas v. United States (*Texas II*), 945 F.3d 355 (5th Cir. 2019).
[10] *California*, 141 S. Ct. at 2120.
[11] *Id.* at 2104.
[12] *See Texas I* at 672.
[13] *California*, 141 S. Ct. at 2104.
[14] *Id.* at 2123 (Alito, J. dissenting).
[15] 300 U.S. 506 (1937).

relied on in *NFIB*. Part V discusses the likelihood that the Court would have found § 5000A to be inseverable insofar as the provision was integral to funding both the novel structure of the reformed healthcare system and the prohibition against insurance carriers denying coverage due to a pre-existing condition. Part VI examines how an outright repeal of the ACA would have been antidemocratic in the face of current consensus opinion that favors the reforms established by the Act. Finally, Part VII concludes that *California* was rightly decided and that the Court avoided an antidemocratic outcome by not reaching the merits.

II. PASSAGE OF THE ACA AND TEN YEARS OF LEGAL CHALLENGES

The history of U.S. health reform leading up to the passage of the ACA is marred with failed attempts and disparate strategies. In fact, beginning with President Harry Truman, "every president . . . has proposed major health legislation, much of it involving national health insurance."[16] Arguably, the most significant health law reforms prior to the ACA came with President Lyndon B. Johnson's signing of the Medicare and Medicaid Act in 1965[17] and President George W. Bush's Medicare Modernization Act in 2003.[18] When President Barack Obama took office, he signaled an understanding of the lessons learned from the successes of his predecessors and, more notably, the failure of President Clinton's attempt at health reform. On the day of his inauguration, Obama appointed former Congressional Budget Office ("CBO") Director Peter Orszag as the new head of the Office of Management and Budget ("OMB"), a move some viewed as an attempt to later predict how the CBO would score certain pieces of reform legislation.[19] To wit, the most important distinction between the Clinton health reform attempt and Obama's was that Obama made the conscious decision to develop the legislation through the usual congressional process.[20] As a result, the 2009 health reform process incorporated a hallmark of Washington methodology: deal making.

Within weeks of Obama's inauguration, "private negotiations began in earnest with insurers and its lobbyist arm, America's Health Insurance Plans (or 'AHIP')."[21] By autumn 2009, the insurers' worst nightmare—the public option—gave way to their ultimate "profit-generating dream": the Individual Mandate.[22] In fact, the insurers' predilection for

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[16] CAROL S. WEISSERT & WILLIAM G. WEISSERT, GOVERNING HEALTH: THE POLITICS OF HEALTH POLICY 121 (3d ed. 2006).
[17] *Medicare and Medicaid Act (1965)*, NATIONAL ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/medicare-and-medicaid-act.
[18] *Privacy Impact Assessments (PIAs): Medicare Modernization Act*, SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/privacy/pia/Medicare%20Modernization%20Act%20(MMA)%20FY07.htm (last visited Nov. 4, 2022).
[19] LAWRENCE R. JACOBS & THEDA SKOCPOL, HEALTH CARE REFORM AND AMERICAN POLITICS: WHAT EVERYONE NEEDS TO KNOW 65 (2010). The CBO was established in 1974 to assess the fiscal impact of legislation and serves as Congress' nonpartisan analytic arm. *See* Joseph Hogan, *Ten Years After: The US Congressional Budget and Impoundment Control Act of 1974*, 63 PUB. ADMIN. 133 (1985).
[20] *Id.* at 182 (contrasting Obama having involved Congress in the legislative process versus the Clinton administration having unilaterally drafted a massive bill and then "dropped it in the lap of Congress").
[21] *Id.* at 72.
[22] *Id.*

the Individual Mandate became obvious when the Senate Finance Committee reduced the penalties planned as part of the mandate.[23] As Jacobs and Skocpol observed:

> This weakening of the individual mandate worried private insurers, because they feared that new reform regulations would force them to take all patients regardless of health conditions, whereas insignificant penalties for people choosing not to buy insurance would allow a lot of younger Americans to skip coverage. In that scenario, the companies' profit margins would decline.[24]

The utilization of the Individual Mandate to curry favor with the insurers' powerful lobby is important to the analysis set forth below in Part V.

The ACA was signed into law on March 23, 2010.[25] Legal challenges to the reform quickly mounted and on April 8, 2010, Florida and 12 other states challenged the constitutionality of the ACA on several grounds.[26] They were soon joined by 13 additional states, the National Federation of Independent Business, and individual plaintiffs Kaj Ahlburg and Mary Brown.[27] The legal challenge brought by Florida *et al*. culminated in the well-known Supreme Court case *NFIB*. While a full recitation of *NFIB*'s outcome and significance is beyond the scope of this note, the Court's holding on the Individual Mandate is important here.

The challengers in *NFIB* argued that the Individual Mandate under § 5000A of the ACA "exceeded Congress's powers under Article I of the Constitution."[28] The Court agreed with the plaintiffs in part, holding that because "[t]he individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity[,] . . . [s]uch a law cannot be sustained under" the Commerce Clause.[29] However, the Court went on to uphold the Individual Mandate as being "within Congress's enumerated power to 'lay and collect Taxes.'"[30] Under § 5000A, "those who do not comply with the mandate must make a '[s]hared responsibility payment' to the Federal Government."[31] This payment is further described as a "penalty" in § 5000A(c).[32] But despite its assigned moniker, the Court found that this penalty exacted upon those who do not purchase health insurance shared many characteristics of a tax.[33] In the majority opinion, Chief Justice Roberts noted that the penalty "is paid into the Treasury by 'taxpayers' when they file their tax returns [and is] enforced by the IRS."[34] He went on to

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[23] *Id.* at 73.
[24] *Id.*
[25] *Id.* at 1.
[26] *See* Florida v. United States HHS, 2010 U.S. Dist. LEXIS 58240, at *1 (N.D. Fla. Apr. 8, 2010).
[27] *See* Florida v. United States HHS, 2010 U.S. Dist. LEXIS 55270, at *1 (N.D. Fla. Apr. 23, 2010).
[28] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 540 (2012).
[29] *Id.* at 558.
[30] *Id.* at 561 (citing US CONST. art. I, § 8, cl. 1).
[31] *Id.* at 539.
[32] *Id.*
[33] *Id.* at 563.
[34] *Id.*

stipulate that "[t]his process yields the essential feature of any tax: It produces at least some revenue for the Government."[35] It was these "essential features" that Texas *et al.* later argued in *California* are now absent from the shared responsibility payment following the TCJA.

In *California*, the district court applied Chief Justice Roberts' five factors test from *NFIB* to the newly reset penalty, finding that it "now fails four out of the five factors . . . including the one feature the Supreme Court identified as 'essential.'"[36] Once it disposed of the shared responsibility payment, the court then reasoned that it was left with the "plain text that mandates the Individual Plaintiffs to purchase minimum essential coverage[,]" which it found to be impermissible under *NFIB*.[37] In doing so, it again cited Chief Justice Roberts' opinion and posited that "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance."[38] Furthermore, *NFIB* had found the alternate interpretation of the shared responsibility payment as a tax to be "fairly possible."[39] Without the essential factors upon which the Court relied, the district court reasoned that "[t]he Individual Mandate no longer triggers a tax, so the saving construction crafted in *NFIB* no longer applies."[40] On the severability issue, the district court held that § 5000A was inseverable from the rest of the ACA because the text was unambiguous regarding the importance of the Individual Mandate to the omnibus Act.[41] Moreover, in an examination of Congressional intent, it found that Congress had characterized the Individual Mandate as "essential to the ACA" and had further stipulated on six occasions that it was the "Individual Mandate 'together with the other provisions' that allowed the ACA to function as Congress intended."[42]

The Supreme Court never reached the merits of *California* outlined above, going no further than the issue of standing.[43] First, the Court found that, with the penalty reset to $0, "there is no possible Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance."[44] Furthermore, the plaintiffs were seeking injunctive relief with their suit, which "could amount to no more than a declaration that the statutory provision they attack is unconstitutional" in light of the provision being unenforceable by the Government.[45] According to the majority, it is well-settled law that a declaratory judgment "alone does not provide a court with jurisdiction."[46] Thus, the individual plaintiffs failed to satisfy Article III standing[47] and the state plaintiffs likewise failed to "demonstrate[] that an unenforceable mandate will cause their residents to enroll

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[35] *Id.* at 564 (citing United States v. Kahriger, 345 U.S. 22, 28 n.4 (1953) (overruled on other grounds)).
[36] *Texas I* at 679.
[37] *Id.* at 680.
[38] *Id.* at 681 (citing NFIB, 567 U.S. at 562).
[39] *NFIB*, 567 U.S. at 563 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).
[40] *Texas I* at 680.
[41] *Id.* at 685.
[42] *Id.* at 686 n.67.
[43] California v. Texas, 141 S. Ct. 2104, 2113 (2021).
[44] *Id.* at 2114.
[45] *Id.* at 2116.
[46] *Id.* at 2115.
[47] *Id.* at 2116.

in valuable benefits programs that they would otherwise forgo."[48] With this result, the Court kept intact the ACA and upheld the reform that is now favored by 55% of Americans.[49]

III. JURISDICTION IS IN THE EYE OF THE BEHOLDER

Federal courts bear an "independent obligation" to dismiss suits containing a jurisdictional defect, even if the parties do not raise that issue.[50] But that obligation is subjective in that it necessarily requires the court to first discern that the defect is present. Indeed, the district court in *California* reasoned that the Fifth Circuit (and presumably the Supreme Court as well) was "unlikely" to find a lack of standing.[51] In its own analysis, the district court appeared to prop up its finding of standing on the premise that the unenforceability of the Individual Mandate following TCJA was irrelevant and only to be addressed in the merits.[52] Central to their reasoning was the misunderstanding that the shared responsibility payment only operates when the plaintiffs "break the law" and § 5000A(a) is violated.[53] However, this reasoning is fundamentally flawed.

For the district court to find that § 5000A(c) only operates when the Individual Mandate is "disobeyed" is to ignore the statute's classification as a tax following *NFIB*. To wit, their reasoning requires the statute to be treated as a regulation and the shared responsibility payment to be treated as a penalty, not a tax.[54] The district court failed to view § 5000A through the adjusted lens of *NFIB* to read the *entire* section as falling under Congress' taxing power. On the one hand, subsection (a) requires that covered individuals purchase health insurance meeting the minimum standards set out in the statute. On the other hand, subsection (c) levies a tax on those who opt not to purchase insurance under subsection (a). Concordantly, *NFIB* adopted the Government's argument that the Individual Mandate does not "order[] individuals to buy insurance, but rather [imposes] a tax on those who do not buy that product."[55] While the district court's treatment of § 5000A may directly follow from its assertion that the shared responsibility payment ceased to be a tax following the 2017 reset, it is an obvious attempt to end-run the threshold inquiry of Article III standing. By doing so, the court ironically takes part in the same fallacy in which they presuppose the Fifth Circuit is "unlikely" to engage: using a conclusion on the merits to inform their position on the jurisdictional issue.[56]

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[48] *Id.* at 2119.
[49] *Percentage of public with favorable or unfavorable opinion of the Affordable Care Act (ACA) from April 2010 to March 2022*, STATISTA (Aug. 15, 2022), https://www.statista.com/statistics/246901/opinion-on-the-health-reform-law-in-the-united-states/.
[50] Summers v. Earth Island Inst., 555 U.S. 488, 499 (2009).
[51] *Texas I* at 672.
[52] *See id.* at 676.
[53] *Texas I* at 677.
[54] Conversely, *NFIB* held that § 5000A compelled individuals to enter into commerce through an impermissible application of Congress' Commerce Power. Thus, the Individual Mandate was invalid as a regulatory penalty but was nevertheless permissible under the Taxing and Spending Clause. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012).
[55] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012).
[56] *Texas I* at 676.

The Fifth Circuit's examination of standing is equally unconvincing. The court first observed that the individual plaintiffs demonstrated two types of injury: "(1) the financial injury of buying [health] insurance; and (2) the 'increased regulatory burden' that the individual mandate imposes."[57] Citing the individual plaintiffs' declarations, the court noted that their financial injury arose out of the purchase of health insurance, which they would have otherwise forgone but for their belief that "'following the law is the right thing to do.'"[58] The court further identified this injury as being both actual and concrete by dint of its economic nature.[59] It did not directly address how it found the individual plaintiffs to be subject to an increased regulatory burden. After finding a concrete and particularized injury, the Fifth Circuit then cited *Contender Farms L.L.P. v. United States Dep't of Agric.*[60] in reasoning that "[c]ausation and redressability 'flow naturally'" from the injury.[61]

Treating causation and redressability as a *fait accompli*, the court engages in an analysis that can be generously described as cursory. First, to find that the latter two elements of standing "flow naturally" from the concrete injury allegedly present here is to misapply *Contender Farms*. There, the plaintiffs challenged a USDA rule that regulated private Horse Industry Organizations ("HIO") and imposed sanctions on those found to have engaged in "soring."[62] The regulation relied on these HIOs to provide inspectors at horse events who would monitor for evidence of soring.[63] The regulation further required participants in these events to agree to be bound by the suspension and appeal procedures as a condition to entry.[64] The plaintiffs argued that, among other things, the regulation exceeded USDA's rulemaking authority and harmed small businesses in the industry, while the USDA argued a lack of standing.[65]

On the issue of standing, the Fifth Circuit there held that the plaintiffs satisfied all three elements. First, the court found that the increased regulatory burden satisfied the injury in fact requirement because "competitors like Contender Farms . . . now face harsher, mandatory penalties from HIOs . . . [and] may also face prosecution from the USDA pursuant to its own enforcement authority."[66] Second, the injury was fairly traceable to the USDA because it was the USDA who promulgated and enforced the regulation through HIOs and its own authority. Lastly, if the regulation were found to be beyond the rulemaking authority of the USDA, the plaintiffs' injury would be redressed because they

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[57] *Texas II* at 379.
[58] *Id.* at 380.
[59] *Id.* at 380-81.
[60] 779 F.3d 258 (2015).
[61] *Texas II* at 381 (citing *Contender Farms*, 779 F.3d at 266).
[62] *Contender Farms*, 779 F.3d at 262. According to the Humane Society: "Soring involves the intentional infliction of pain to a horse's legs or hooves in order to force the horse to perform an artificial, exaggerated gait." *What is horse soring?*, THE HUMANE SOCIETY OF THE U.S., https://www.humanesociety.org/resources/what-soring (last visited Nov. 27, 2022).
[63] *Contender Farms*, 779 F.3d at 262.
[64] *Id.* at 265.
[65] *Id.* at 262.
[66] *Id.* at 266.

could "again participate in competitions with a range of available sanctions and appellate processes."[67]

The inapplicability of *Contender Farms* to *California* is obvious on its face. Unlike the regulation promulgated by the USDA, the Individual Mandate is unenforceable; thus, the pocketbook injury that the Fifth Circuit identified would not be redressed by simply declaring § 5000A unconstitutional. Moreover, since the Individual Mandate operates as a tax and not a regulatory command, a causal connection does not exist between the plaintiffs' alleged injury and the Government's conduct. The Fifth Circuit attempted to gloss over this key distinction by proclaiming that causation and redressability "flow[ed] naturally"[68] without critically engaging the precedent case. Indeed, it was the increased regulatory burden rooted in "harsher, mandatory penalties from HIOs" that allowed for causation and redressability to naturally flow from the injury in *Contender Farms*.[69] In this way, the Fifth Circuit relied on casuistic taxonomy in lieu of analogical reasoning as it clambered toward the merits. Furthermore, the court employed the same fallacy as the district court in presupposing the shared responsibility payment's surrender of its tax status and failed to note the difference between the plaintiffs' request for relief from the statute versus relief from the Government's conduct for purposes of standing.

The Supreme Court correctly rejected the Fifth Circuit's flawed analysis. While the Court did not directly address the lower court's application of *Contender Farms*, they pointed out that a declaratory judgment was insufficient to provide jurisdiction.[70] But perhaps even more fundamentally, the Court rejected the determination by both lower courts that the plaintiffs had been injured at all. Indeed, the Court noted the well-established rule that the injury claimed to establish standing must be "the result of a statute's actual or threatened enforcement, whether today or in the future."[71] The majority went on to further state that "no unlawful Government action 'fairly traceable' to § 5000A(a) caused the [individual] plaintiffs' pocketbook harm" since the statute was unenforceable and there was no possible action whatsoever.[72] With regard to the state plaintiffs, the Court similarly noted that they failed to establish an injury fairly traceable to the unlawful conduct of the Government. Quite simply, the state plaintiffs did not adduce any evidence showing that their residents would continue to enroll in the minimum essential coverage, against their will, with no prospect of a penalty.[73] As Justice Breyer wrote: "Unsurprisingly, the States have not demonstrated that an unenforceable mandate will cause their residents to enroll in valuable benefits programs that they would otherwise forgo."[74]

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[67] *Id.* at 267.
[68] *Texas II* at 381.
[69] *Contender Farms*, 779 F.3d at 266.
[70] California v. Texas, 141 S. Ct. 2104, 2115 (2021).
[71] *Id.* at 2114.
[72] *Id.* at 2115.
[73] *Id.* at 2117.
[74] *Id.* at 2119.

IV. A TAX BY ANY OTHER NAME

In deciding *California* on the jurisdictional issue, the Supreme Court did not reach the merits. However, had they agreed with the findings of the lower courts on the issue of standing and moved on to the merits, what result? Would they have once again upheld § 5000A as a tax despite its current effective rate of $0? Or, conversely, would they have agreed with the district court's finding that it ceased to fit the requirements of a tax following the TCJA and thus rendered *NFIB*'s construction of § 5000A inapplicable? For the reasons discussed below, the Court most likely would have found § 5000A no longer contained the features necessary to retain its status as a tax under *Sonzinsky* and under the rule relied on in *NFIB*.

A. The "Some Revenue" Requirement of Tax Statutes

NFIB upheld § 5000A as a tax because, among other things, "[i]t produce[d] at least some revenue for the Government."[75] In his dissenting opinion in *California*, Justice Alito pointed to a number of cases upon which *NFIB* predicated its reasoning that producing revenue is an essential feature of any tax.[76] Among these was *Sonzinsky*, the very case that the state appellees relied on in their brief to the Fifth Circuit.[77] As the states argued: "no matter Congress's goals, a statute is only valid under the Tax Clause if it is 'productive of some revenue' for the Government."[78] However, it should be noted that the question presented in *Sonzinsky* was different than the one presented in *California* with regard to a statute's status as a tax. In *Sonzinsky*, the statute at issue was § 2 of the National Firearms Act of 1934.[79] Specifically, the defendant had been found guilty of violating the statute by dealing firearms without paying the annual $200 licensing tax assessed to firearms dealers.[80] In his appeal to the Supreme Court, Sonzinsky argued that § 2 was not a tax but a penalty that violated the Commerce Clause of the U.S. Constitution. He contended that the penalty was "imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not [*sic*] granted to the national government."[81] In arguing the tax's penal character, Sonzinsky pointed to the amount of the tax as well as its disregard for the value and frequency of firearms transferred.[82] Thus, he said, the "legislative purpose to regulate rather than to tax" was unmistakable.[83]

The Supreme Court upheld § 2 of the National Firearms Act as permissible under Congress' taxing authority. It reasoned that § 2 was a *prima facie* taxing measure and that although it had a deterrent effect on the covered activities, "[e]very tax is in some measure regulatory."[84] Moreover, the Court held that since the tax was "productive of some

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[75] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564 (2012).
[76] *California*, 141 S. Ct. at 2136 (Alito, J. dissenting).
[77] Brief for State Appellees at 32, *Texas II* (No. 19-10011).
[78] *Id.*
[79] Sonzinsky v. United States, 300 U.S. 506, 511 (1937).
[80] *Id.*
[81] *Id.* at 512.
[82] *Id.*
[83] *Id.* at 513.
[84] *Id.*

revenue[,]" Congress may exercise its taxing power without "collateral inquiry as to the measure of the regulatory effect of [the] tax."[85] In other words, a tax is permissible as long as it serves a revenue-producing purpose. In the years following *Sonzinsky*, the Court repeatedly pointed to the generation of revenue as a key indicator of Congress exercising its taxing power in passing a particular statute.[86]

Under the *Sonzinsky* rule, is § 5000A of the ACA only permissible to the extent that the Federal Government is *profiting* from those covered persons who choose to forgo the minimum essential coverage? This remains unsettled law. The question before the Court in *Sonzinsky* was whether a statute that produced some revenue for the Government was a tax, and the Court affirmed that it was. However, while the negative implication of *Sonzinsky* is that a statute that does not produce revenue for the Government is not a tax, the Court has yet to affirmatively take this position. Nevertheless, there are two persuasive arguments supporting the assertion that they would. First, Congress has simply never passed "any statute . . . under the taxing power that did not raise revenue."[87] The reason for this is inextricably linked to the second argument. Under the Taxing Clause of the U.S. Constitution, Congress may "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[88] Of course, for the tax to pay debts and provide for the common defense and general welfare, the tax must generate some positive cashflow for the Government. Furthermore, as noted by Justice Alito in his dissent, "the concept of laying and collecting taxes plainly entails the collection of revenue."[89] It is these two arguments that provide the foundation for the five factors of a tax upon which the *NFIB* majority relied.

B. Operative Features of a Tax

In *NFIB*'s majority opinion, Chief Justice Roberts cited five features of any tax: 1) the payment is made to the Treasury Department upon filing one's tax return; 2) "[i]t does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold;" 3) the "amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status;" 4) the IRS enforces payment under the Internal Revenue Code; and, 5) "[i]t produces at least some revenue for the Government."[90] As just noted in Section IV-A, the feature of producing some revenue is common to the Court's historical analyses of tax statutes. Indeed, Chief Justice Roberts cited controlling precedent in his assertion of the tax feature's "essential" status[91] and, through this pronouncement, added *NFIB* itself to the list of authorities. However, the other four features were also held to be dispositive in *NFIB*, thus the district court in *California* pointed to their absence in revoking § 5000A's tax classification. Specifically, the district court reasoned that, following the TCJA, § 5000A "now fails at least Factor 1 (no longer paid by taxpayers into the Treasury), Factor 3 (. . . $0 is not

[85] *Id.* at 514.
[86] *See, e.g.* United States v. Sanchez, 340 U.S. 42, 44 (1950); United States v. Kahriger, 345 U.S. 22, 28 (1953); Dep't of Revenue of Montana v. Kurth Ranch, 511 U. S. 767, 778 (1994).
[87] California v. Texas, 141 S. Ct. 2104, 2136 (2021) (Alito, J. dissenting).
[88] U.S. CONST. art. I, § 8, cl. 1.
[89] *California*, 141 S. Ct. at 2136 (Alito, J. dissenting).
[90] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563-64 (2012).
[91] *Id.* at 564.

determined by familiar factors), Factor 4 (not enforced by the IRS) and, crucially, Factor 5 (no longer yields the 'essential feature' of a tax)."[92]

Unsurprisingly, the intervenor defendants did not argue that these factors were still being met by the shared responsibility payment following the TCJA. Instead, they argued that Congress has the power to undo something that they had previously done under an enumerated authority and that it "does not need an enumerated power to make a prior enactment inoperative."[93] Still, the defendants conceded that the Supreme Court "has not had occasion to squarely hold that Congress may create a statutory provision that does nothing."[94] They further argued that this was of little consequence because "[a]n inoperative provision does not cause anyone legally cognizable harm."[95] In making this argument, however, the defendants appear to have misunderstood the backdrop for the issue. The Court was not reviewing *de novo* a recently promulgated law with no prior history of judicial review. Instead, the issue at bar was whether a statute, as amended, still met the operative criteria that were quintessential to its constitutionality following a previous review by the Supreme Court. As illustrated above, the Court has never granted an exception to the "some revenue" requirement that a valid exercise of Congress' tax power must satisfy. This was highlighted by Chief Justice Roberts' enunciation of the feature as "essential" in *NFIB*.[96]

The fact that the defendants did not rebuke the plaintiffs' assertion that § 5000A no longer exhibited these features is revealing though not unexpected because the features are self-evident. Nevertheless, the defendants' primary argument in defense of the statute was that, before the Court even reaches the issue of whether the "some revenue" requirement is dispositive, it should first consider whether § 5000A still presents a "'lawful choice' between obtaining the minimum essential coverage . . . and making the alternative tax payment."[97] They pointed out that "[w]hen Congress amends a statute that [the] Court previously construed, the presumption is that Congress acted 'with full cognizance' of that construction."[98] As they saw it, the TCJA simply made the Individual Mandate a choice between purchasing the minimum essential coverage and doing nothing.[99] For the defendants, it is the statutory construction of § 5000A that wins the day over the constitutional issue posited by the plaintiffs.[100] However, this once again ignores the backdrop for the issue.

As the district court pointed out, "[f]ive Supreme Court Justices concluded '[t]he most straightforward reading of the mandate is that it commands individuals to purchase

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[92] *Texas I* at 679.
[93] Response and Reply Brief for the Petitioners–Cross-Respondents at 13, *NFIB*, 567 U.S. at 519 (Nos. 19-840, 19-1019).
[94] *Id.* at 13.
[95] *Id.* at 14
[96] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564 (2012).
[97] Response and Reply Brief for the Petitioners–Cross-Respondents at 8, *NFIB*, 567 U.S. at 519 (Nos. 19-840, 19-1019).
[98] *Id.* (citing Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992)).
[99] *Id.* at 9.
[100] *Id.* at 10.

insurance.'"[101] For the defendants' argument to succeed, the Court would have to 1) accept that its own decision in *NFIB* did not establish a "saving construction" for § 5000A but instead "supplanted Congress's intent by altering the very nature of the ACA[,]"[102] and 2) overlook the fact that our jurisprudence has yet to determine whether Congress may pass a statutory provision that is inoperative on its face (or settle that issue here). To be sure, the shortest distance between two points is a straight line. The Court is more likely to understand its own opinion as a saving construction, in that it upheld a statutory provision in the face of the text's most straightforward reading being repugnant to the Constitution. Furthermore, because that saving construction relied on the provision meeting five dispositive features—four of which are no longer satisfied—the Court would draw that proverbial straight line between its reasoning in *NFIB* and the merits here. Thus, had the Court reached this question, it would have found that § 5000A no longer operated as a tax. The loss of its status as a tax would likewise remove § 5000A from the saving construction under *NFIB*. Uncloaked from its saving construction, the result would have been a provision that *NFIB* already determined was unconstitutional given its violation of the Commerce Clause.

V. THE SEVERABILITY OF § 5000A

Assuming that the Supreme Court would have found § 5000A to be impermissibly regulatory and therefore unconstitutional, the next issue before the Court would have been to assess the severability of § 5000A. It is unclear how the Court would have handled the issue of severability; they have not considered a major severability case since Justice Barrett replaced Justice Ginsberg in 2020.[103] However, with Barrett on the Court, it is likely that the majority would have adopted the dissenting position in *NFIB* that viewed severability as an inappropriately legislative device wielded by the judiciary.[104] As a result of this aversion to judicial severability in addition to the following analysis, the Supreme Court would have likely found § 5000A to be inseverable from the rest of the ACA and would have invalidated the entire Act.

A. The Modern Test

The doctrine of severability historically emanated from the institutional comity shown by the Supreme Court toward Congress. In its simplest form, severability reflects the belief that "a court should refrain from invalidating more of the statute than is necessary."[105] As Chief Justice Roberts famously put it, it is "a scalpel rather than a bulldozer."[106] To that end, the modern test of severability is applied in two parts:

> First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner

[101] *Texas I* at 681.
[102] *Id.* at 672.
[103] The last major severability case for the Court was Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335 (2020).
[104] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 692 (2012) (joint dissent).
[105] Texas v. United States (*Texas III*), 340 F.Supp.3d 579, 606 (N.D. Tex. 2018) (citing Regan v. Time, Inc., 468 U.S. 641, 652 (1984)).
[106] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2210 (2020).

> Congress intended. If not, the remaining provisions must be invalidated. . . Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated.[107]

The two inquiries are often interrelated, though it is not always the case that the statutory functionality test informs the legislative intent.[108]

To be sure, the Court has demonstrated a strong presumption of severability over the years. In fact, in the term preceding its decision in *California*, the Court held severable two different unconstitutional provisions from their parent statutes by a vote of 7-2 in both cases.[109] In both decisions, Justices Thomas and Gorsuch voted against severability. In the interim period between these decisions and the Court hearing *California*, it was theorized that the proclivity of that Court to find a provision severable—even in the absence of a severability clause—boded well for the ACA.[110] However, that may have been a castle in the sky for those who adamantly supported the ACA and who recognized what might befall the American people if it were abrogated wholesale. The two cases, *Seila Law* and *Am. Ass'n of Pol. Consultants*, both dealt with statutes that hardly had a similar catholic impact on U.S. citizens as health policy. In *Seila Law*, the issue of the single-director structure of the Consumer Financial Protection Bureau was rooted in the President's removal power and separation of powers.[111] In *Am. Ass'n of Pol. Consultants*, the Court examined an exception to the Telephone Consumer Protection Act that permitted calls to be made "to collect a debt owed to or guaranteed by the United States."[112] While arguably all Supreme Court decisions are at least modestly important, the implications of the Court's decisions in these two cases were far from comparable to the significance of *California*. In fact, the Court has never before considered the issue of severability "in the context of an omnibus enactment like the ACA."[113] Therefore, the outcome of a major severability issue before the 2021 Supreme Court was far from predetermined.

As indicated above, another complicating factor to the issue of severability was the addition of Amy Coney Barrett to the Supreme Court in October 2020. Barrett, a former law clerk for Justice Scalia, noted during her confirmation hearing that although she shared certain of Scalia's viewpoints, it did not necessarily mean that she would reach the same conclusions.[114] Although she walked the center line on severability of the Individual

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[107] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 692 (2012) (joint dissent).
[108] *Id.* at 694.
[109] *See Seila Law*, 140 S. Ct. at 2183; Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335 (2020).
[110] *See* Abbe R. Gluck, *"A scalpel rather than a bulldozer": Severability is in the spotlight as the newest ACA challenge looms*, SCOTUSBLOG (Jul. 28, 2020, 10:33 AM), https://www.scotusblog.com/2020/07/a-scalpel-rather-than-a-bulldozer-severability-in-the-spotlight-as-the-newest-aca-challenge-looms/.
[111] *Seila Law*, 140 S. Ct. at 2191.
[112] *Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2341 (2020).
[113] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 705 (2012) (joint dissent).
[114] *Supreme Court Nominee Amy Coney Barrett Confirmation Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020), https://www.c-span.org/video/?476317-1/barrett-confirmation-hearing-day-3-part-1.

Mandate during questioning by the Senate Judiciary Committee, Barrett had indicated throughout her academic career a strong tendency toward the originalist views of Scalia. In her review of Randy Barnett's *Our Republican Constitution*—a writing that liberal opponents of Barrett's confirmation had seized on as proof that the ACA would be doomed if subject to her vote—Barrett implored the Court to sustain "textual fidelity" instead of seeking "a way to uphold a statute when determinate text points in the opposite direction."[115] By advocating for "judicial constraint—in the sense of promising to narrow the discretion of judges" in lieu of "deference to legislative majorities," Barrett seemingly endorses Scalia's view that the operation of the statutory scheme as a whole should be singularly determinative of its severability.[116] Therefore, with Barrett on the Court, it is likely that the newly 6-3 Court would have effectively written the legislative intent element out of the severability analysis consistent with Scalia's dissent in *NFIB*.[117] Without a specific intent question applied to *California*, the Court would have needed to decide whether the newly revised § 5000A is necessary to the functioning of the statutory scheme as a whole.

B. Applying the Test to *California*

In *California*, the district court's reasoning for why § 5000A was inseverable from the rest of the ACA was persuasive but incomplete. Their analysis began with the plain text of the ACA, pointing to the fact that the codified language states on three separate occasions that § 5000A is "essential" to the rest of the ACA.[118] For example, in 42 U.S.C. § 18091(2)(H), Congress stated: "The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market."[119] Congress went further to say that "[t]he requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."[120] The district court took these passages together with thirteen other times that Congress stated in the statutory text that the Individual Mandate was "the keystone of the ACA" to be plain evidence that the ACA's operation depended upon § 5000A.[121] To wit, if "the plain language of the enacted text is the best indicator of intent,"[122] then an ACA absent the Individual Mandate would not operate in the manner Congress intended. The court further concluded that "the Individual Mandate 'is so interwoven with [the ACA's] regulations that they cannot be separated. None of them can stand.'"[123]

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[115] Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 82 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)).
[116] *Id.* at 82 n.59.
[117] *See NFIB*, 567 U.S. at 691 (joint dissent).
[118] *Texas III* at 609.
[119] *Id.* at 608 (emphasis removed).
[120] *Id.* at 609 (emphasis removed) (citing 42 U.S.C. § 18091(2)(I)).
[121] *Id.*
[122] Nixon v. United States, 506 U.S. 224, 232 (1993).
[123] *Texas III* at 615 (citing Hill v. Wallace, 259 U.S. 44, 70 (1922)).

Without calling out the elements of the severability test directly, the district court's analysis demonstrated that the Individual Mandate was *essential* to Congress' intended operation of the ACA based on the enacted text. Given this finding along with the court's assertion that Congress never intended to drastically increase health insurance costs market-wide, they further determined that Congress would not have enacted the surviving provisions absent the Individual Mandate.[124] But while the district court alluded to the increased costs to both insureds and insurers that in their view motivated Congress to pass the ACA in 2010, it is important to remember that the severability analysis in *California* focused on the intent of the 2017 Congress. Put differently, the severability issue in *California* asked whether the 2017 Congress would have wanted the rest of the ACA to remain in place if it had known that the newly reset shared responsibility tax was unconstitutional. To be sure, full repeal of the ACA had been considered by all Congresses between 2010 and 2017 but never achieved majority support. If one takes this to mean that Congress wished to keep the ACA in place, then it seems clear that they would have voted to do so even if they knew that the amended § 5000A was unconstitutional; thus, the section *is* severable under the traditional severability test. However, if the Supreme Court effectuated the originalist view that the statutory functionality test, as determined by the statute's text and historical context, is the foremost indicator of severability, this question may be much closer.

Assuming that the 2017 Congress shared the 2010 Congress' goal of not drastically increasing healthcare costs, a review of the historical context of the Individual Mandate is necessary. As briefly described above, the Individual Mandate was used by the Obama administration as a bargaining chip to curry favor with the insurers' powerful lobbying arm, AHIP. Before the Individual Mandate replaced the public option, AHIP's President and CEO Karen Ignagni had signed a letter to President Obama "offering to reduce insurance prices and costs voluntarily."[125] Perhaps not surprisingly, Ignagni was intimately familiar with how the machinations of government must be navigated from her time as a staffer on Capitol Hill and at AFL-CIO.[126] Roughly six months after the delivery of that letter, the Senate Finance Committee not only rejected the public option but also adopted 48 amendments that addressed various complaints raised by the insurance industry.[127] This made way for the development of the Individual Mandate and secured the cooperation (and to a lesser degree, the support) of one of the largest foes to the 1994 Clinton health reform. Indeed, President Obama was nothing if not a student of his predecessors' failures.

To be sure, the Individual Mandate was a "profit-generating dream" for the insurance industry.[128] As insurers were no longer able to discriminate based on pre-existing conditions, health status, or other factors that might predict the use of health services, the costs and taxes imposed by the ACA on the insurance industry were estimated at the time to equal $700 billion over 10 years.[129] However, this $700 billion price tag was offset in

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[124] *Id.* at 616.
[125] *Supra* note 19 at 72.
[126] *Id*. at 72 n.25.
[127] *Id.* at 72.
[128] *Id.*
[129] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 698 (2012) (joint dissent).

its entirety by the increased revenues to the industry resulting from both the Individual Mandate and the Medicaid Expansion provision.[130] Furthermore, in April 2010, the CBO estimated that 4 million uninsured, nonelderly residents would pay the shared responsibility payment and generate an additional $4 billion in 2016 and $5 billion per year over the 2017–2022 period to reduce the impact to the federal deficit.[131] This is particularly important since one of the primary goals of the Obama health reform was to reduce long-term Federal health spending.[132] In fact, one of the pivotal moments in the development of the ACA came during a July 2009 Senate Budget Committee hearing when CBO Director Doug Elmendorf testified that the legislation in its then-current form would push costs in the wrong direction and "significantly expand[] the Federal responsibility for health care costs."[133] The Individual Mandate was announced two months later.

It is impossible to say whether the Obama administration's efforts in health reform would have been successful had it not courted AHIP, the insurance industry, and other major stakeholders early on. History tells us that the reform would have befallen the same fate as the 1994 Clinton reform. However, the significance of the Individual Mandate to the insurers as well as the overall cost to the Federal budget makes it clear that it was the linchpin of the ACA. The appointment of Peter Orzag as the Director of the OMB and the deference accorded by the Obama administration to the CBO[134] demonstrates that the budgetary impact of the health reform was always a key factor in passing the ACA. Without the Individual Mandate, the negative impact to the long-term cost curve would have been augmented by $350 billion over 10 years, due in large part to the cost shifting that would have occurred by those who would choose to forgo insurance.[135] Moreover, "[w]ithout the Individual Mandate . . . the [ACA's] insurance regulations and insurance taxes [would have] impose[d] risks on insurance companies and their customers . . . [which] would [have] undermine[d] Congress' scheme of 'shared responsibility.'"[136] This risk extended to the prescription drug insurance companies as well: "Unless the government mandated that everybody, sick or well, must buy insurance against the possibility that they might someday need it, the drug insurance market would [have] fail[ed] due to adverse selection."[137]

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[130] *Id.* (noting that both the Individual Mandate and the Medicaid Expansion provision were estimated to increase revenues to the insurance industry by $350 billion each over a 10-year period).

[131] Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act, September 2012, at 1 (noting that the estimates for the number of uninsured residents who will pay the penalty increased, following *NFIB*, to 6 million people and will generate $7 billion in 2016 and $8 billion per year from 2017–2022).

[132] PHILIP G. JOYCE, THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING 188 (2011).

[133] *Id.* (citing Senate Committee on the Budget, *Concurrent Resolution on the Budget FY2010*, 111th Cong., 1st sess., July 16, 2009, at 859).

[134] President Obama made it clear during the initial drafting stages of the ACA that any proposed legislation must be budget-neutral, as determined by the CBO. As one congressional staffer put it: "[Obama] 'handed CBO the keys because no policy was going to be acceptable if it didn't meet the CBO test.'" *Supra* note 132 at 209.

[135] *Supra* text in note 130.

[136] *NFIB*, 567 U.S. at 698 (joint dissent).

[137] *Supra* note 16 at 347. Interestingly, this argument has its roots in the fight to include prescription drug coverage under Medicare, which ultimately succeeded with the Medicare Modernization Act of 2003.

In light of the historical origins of the Individual Mandate just described, as well as its function as a means to budget-neutral health reform, would the Court have found that the unenforceable mandate remained the linchpin to the ACA and moreover was critical to the statutory scheme intended by the 2017 Congress? Here, the Court might have been inclined to accept the argument set forth by the individual plaintiffs that the Individual Mandate, though unenforceable through the $0 tax, nevertheless remained binding law and thus created a moral obligation for Americans to comply.[138] Indeed, the moral obligation speaks to the fact that the mere existence of the order makes a person more likely to buy insurance, and is further demonstrated by the absence of a wave of insureds dropping coverage following the TCJA.[139] Furthermore, the Individual Mandate also serves as a prophylactic against moral hazard. With the pre-existing condition provision of the ACA, healthy people could theoretically forgo health insurance until the moment it is needed because they would no longer worry about denial of coverage. The Individual Mandate, though, seeks to encourage healthy people to purchase health insurance before they need it in order to decrease the percentage of total insureds receiving benefit proceeds under their policies at any given time. This in turn manifests as decreased insurance premiums market-wide. It follows that severing the Individual Mandate from the ACA would perpetuate this moral hazard, resulting in an increase in health insurance costs that could "price out" the very same Americans the ACA sought to protect.

Therefore, because § 5000A is inextricably linked to the novel framework of the ACA, a truncated version of the act would cease to function in a manner consistent with the intent of Congress."[140] Indeed, severing the Individual Mandate would "impose risks unintended by Congress" and would "produce legislation Congress may have lacked the support to enact."[141] Furthermore, the 2017 Congress would not have voted to retain the other provisions of the ACA if they knew their solution to defray the economic impact of those provisions was unconstitutional. Thus, through a review of the severability of § 5000A under the modern test, the Supreme Court would have likely found it to be inseverable from the rest of the ACA for the reasons illustrated above. The result would have been a complete invalidation of the ACA in the face of favorable consensus public opinion.

VI. PUBLIC OPINION OF THE ACA

Public opinion of the ACA has fluctuated since it was passed in 2010. At the time of its passage, "46 percent of U.S. adults had a favorable opinion regarding the ACA, while 45 percent said the same six years later in October 2016."[142] Unsurprisingly, opinions on the ACA are typically divided along party lines. However, beginning in 2017, public opinion began to favor the ACA and sustained through today where 55 percent of U.S.

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[138] *See Texas I* at 677.
[139] Katherine Keisler-Starkey and Lisa N. Bunch, U.S. Census Bureau, Current Population Reports, P60-278, Health Insurance Coverage in the United States: 2021, U.S. Government Publishing Office, Washington, DC, September 2022, at 25 (finding that there was "no statistically significant change in the private coverage rate between 2017 and 2018").
[140] *NFIB*, 567 U.S. at 692 (joint dissent).
[141] *Id.* at 705.
[142] *Supra* note 49.

adults now view it favorably.[143] Generally speaking, "[t]hose who view the ACA favorably usually reason that the bill will increase health care and insurance access, while the opposition often mentions that [] health costs may increase and that the law is too expensive."[144] This shift in consensus opinion over the past 12 years begs inquiry into what has changed. One likely explanation for the change of opinion is that people simply needed to experience the impact of the reform to understand both its positive and negative aspects. While the ACA was one of the largest health reforms in American history, its benefits to patients "came primarily through an expansion of the basic systems already in place[] and did not radically overhaul the nation's overarching approach to health care."[145] But major reform still makes an indelible impact upon those who benefit the most, and conversely those same people are the ones most significantly affected when benefits are taken away.

A. Who Benefitted From the ACA?

In its report on the Reconciliation Act component of the ACA, the CBO estimated that by 2019, the number of nonelderly residents who were uninsured would have been reduced by approximately 32 million.[146] Furthermore, the percentage of nonelderly residents with health insurance was predicted to increase from 83 percent to 94 percent by 2019.[147] Actual results have been slightly more modest, with the U.S. Census Bureau reporting that 91.7 percent of people had health insurance in 2021.[148] Interestingly, this was an increase from 91.4 percent in 2020 despite the Individual Mandate being unenforceable; however, this is likely attributable in part to the COVID-19 pandemic.

The Census Bureau also reported that as of January 1, 2021, 36 states and the District of Columbia have expanded Medicaid eligibility requirements to people whose income-to-poverty ratio falls below a certain threshold pursuant to the ACA's option to do so.[149] In the first year that the ACA was effective, only 24 states and the District of Columbia had expanded eligibility thresholds for Medicaid.[150] The ACA also provided for several augmentations to Medicare including the reduction of prescription drug costs, free preventative services, and protection against abuse of seniors by family members and care providers.[151] Moreover, young adults may now qualify for Medicaid if their annual income is below a certain threshold in addition to other protections afforded to those who are just entering the job market or completing their post-secondary education.[152] Regardless of whether they choose to attend college, young-adult children may also remain on their family insurance plan until age 26.[153] These augmentations to both Medicare and Medicaid

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[143] *Id.*
[144] *Id.*
[145] DANIEL SKINNER, MEDICAL NECESSITY: HEALTH CARE ACCESS AND THE POLITICS OF DECISION MAKING 6 (2019).
[146] Congressional Budget Office, *H.R. 4872, Reconciliation Act of 2010 (Final Health Care Legislation)*, March 20, 2010, at 9.
[147] *Id.*
[148] *Supra* note 139 at 2.
[149] *Id.* at 7.
[150] *Id.* at 23.
[151] *Supra* note 19 at 124-25.
[152] *Id.* at 126.
[153] *Id.*

help ease the burden of healthcare that is often disproportionately felt by impoverished persons and young adults alike.

One of the more historic provisions of the ACA encompassed the recognition of mental illness and substance abuse as "illnesses" along with the requirement that insurance policies provide coverage for treatment.[154] The ACA's mental health parity provisions expounded upon the Mental Health Parity and Addiction Equity Act of 2008.[155] By mandating that all plans sold on ACA marketplaces include coverage for both mental health and addiction services, "these provisions advance the cause of bridging historical gaps between access to care for somatic conditions and mental and behavioral health needs."[156] This also dovetails with the well-known discrimination against patients with one or more pre-existing conditions. Historically, people with pre-existing conditions were often denied coverage or charged additional insurance premiums, which in turn contributed to rising health care costs for those patients and increased mental anguish over their healthcare.[157] The estimated rate of denial of individual market applications for pre-existing conditions before the ACA took effect was 18%, although this is likely an underestimation because many patients with a pre-existing condition simply did not apply.[158] The ACA guaranteed coverage for these individuals, leading to a 17.8% decline in severe mental distress among those with pre-existing physical conditions.[159] Remarkably, the pre-existing condition provision also resulted in a 15.7% decrease in the likelihood that these individuals have unpaid medical bills.[160] Not surprisingly, these effects of the provision have been observed almost exclusively in women.[161] Yet a macrolevel observation of the pre-existing condition provision's effects reveals that "27% of adult Americans under the age of 65 have health conditions that would likely leave them uninsurable if they applied for individual market coverage under pre-ACA underwriting practices."[162]

B. The ACA's Greatest Contribution

There are numerous other benefits of the ACA beyond those listed above, affecting nearly every American in some form.[163] But a theme that is pervasive throughout much of the ACA reform is the bridging of gaps and the abatement of historical disparities. Arguably, these improvements in health equity have led to the majority of U.S. adults

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[154] *Id.* at 132.
[155] *Supra* note 145 at 116.
[156] *Id.*
[157] Matt Hampton & Otto Lenhart, *Access to health care and mental health—Evidence from the ACA preexisting conditions provision*, 31 HEALTH ECON. 760, 761 (2022).
[158] GARY CLAXTON ET AL., THE HENRY J. KAISER FAM. FOUND., PRE-EXISTING CONDITIONS AND MEDICAL UNDERWRITING IN THE INDIVIDUAL INSURANCE MARKET PRIOR TO THE ACA 2 (2016), https://nationaldisabilitynavigator.org/wp-content/uploads/news-items/KFF_Pre-existing-Conditions-and-Medical-Underwriting-Prior-to-the-ACA_Dec-2016.pdf.
[159] *Supra* note 157 (showing a reduction of 1.44 percentage points from a baseline mean of 8.09%).
[160] *Id.* (showing a reduction of 3.09 percentage points from a baseline mean of 19.67%).
[161] *Id.*
[162] *Supra* note 158 at 1. *See also* Nathalie Huguet et al., *Prevalence of Pre-existing Conditions Among Community Health Center Patients Before and After the Affordable Care Act*, 32 J. AM. BD. FAM. MED. 883 (2020).
[163] *See* JACOBS & SKOCPOL at 121 (providing a summary overview of how the reform affects different social and economic groups and impacts the U.S. economy itself).

viewing the ACA favorably over the past five years. It is also these improvements that would have been the single greatest loss if the Court had repealed the ACA in its entirety. While health reform has been the predominant political football in the past 20 years, the ACA addresses certain aspects of health disparity that have largely gone unrecognized in mainstream talking points since its passage. This is likely because the core of its impact is found at the confluence of social justice and epidemiology; a vertex that most American politicians, as members of the aristocracy, have never been near.

Epidemiologist John Cassel famously wrote that "the most 'feasible' and promising interventions to reduce disease will be 'to improve and strengthen the social supports'" available to certain social groups who are unduly burdened by health disparities.[164] This suggestion was based on his hypothesis that one's vulnerability to disease is affected not just by physical and biological factors but also their "'social environment,' comprised of physical factors generated by human interaction."[165] Cassel's psychosocial theory gave rise to an important subdiscipline of epidemiology, calling on the medical community to address the health disparities experienced by certain social groups by focusing on "responses to stress and on stressed people in need of psychosocial resources."[166] Indeed, the ACA did just that by recognizing mental health and providing much needed support to combat these psychosocial factors through its mental health parity provisions, noted above.

Following Cassel's theory, another social stressor is found in the problem of "job-lock," where employees are bound to their employer out of need for health insurance.[167] To be sure, access to such a critical benefit as health coverage, if it is unavailable outside of the workplace, has the potential to create an indentured servitude that can only be severed at grave personal risk. This dominance hierarchy, devoid of any autonomy of the worker, creates the very social environment described by Cassel. Moreover, it perpetuates another facet of health disparity insofar as it locks the worker into a power relation from which it is impossible to escape. The worker's ability to protect themselves from occupational hazards, insufficient pay, and discriminatory treatment is significantly impeded in exchange for access to healthcare that would otherwise be unobtainable.[168] The ACA's federally subsidized health plan restored workers' autonomy and furthermore gave part-time and contract workers the option to purchase benefits for themselves. By providing the option of a private health insurance plan in lieu of an employer-sponsored plan, the ACA took steps toward combating certain social stressors that often perpetuate health disparity.

The ACA also thwarted disparities commonly found in determinations of medical necessity. Anyone who has undergone a medical procedure is likely familiar with the

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[164] Nancy Krieger, *Theories for Social Epidemiology in the Twenty-First Century: An Ecosocial Perspective*, *in* HEALTH AND SOCIAL JUSTICE: POLITICS, IDEOLOGY, AND INEQUITY IN THE DISTRIBUTION OF DISEASE 428, 432 (Richard Hofrichter ed.).
[165] *Id*. at 431.
[166] *Id.* at 432.
[167] Sarah Kuhn & John Wooding, *The Changing Structure of Work in the United States: Implications for Health and Welfare*, *in* HEALTH AND SOCIAL JUSTICE: POLITICS, IDEOLOGY, AND INEQUITY IN THE DISTRIBUTION OF DISEASE 251, 258 (Richard Hofrichter ed.).
[168] *Supra* note 164 at 434.

arduous process of convincing their health insurance provider that the care is "necessary." If an insurer denies coverage and deems the care to not be medically necessary, patients may appeal that determination through a written process. While the majority of states provide for a formal appeals process, "the ACA established a patient right for the appeal of insurance decisions and put forth standards for internal and external reviews."[169] Moreover, the ACA established federal consumer protection standards that these states' appeals processes must meet or otherwise surrender the appeals to a federally-administered external review process.[170] While this may sound like a purely ministerial process, the vicissitudes of state legislatures sometimes lead to discrimination in medical necessity determinations. Indeed, the ACA has also been criticized for not going far enough to mandate federal standards for medical necessity determinations at the onset and instead giving discretion to state governments and insurers.[171] For example, health insurance policies "that do not specify the means by which benefits can be accessed may leave women worse off than they were, or at least in a less predictable situation."[172] It should come as little surprise that medical procedures such as abortions are often fraught with issues of medical necessity, even in a post-ACA world. Nevertheless, to lose the standards and rights promulgated by the ACA would have been a major setback resulting from a full repeal of the reform and might have led to a resurgence in health disparities that we had just recently overcome.

C. Contravening Consensus Opinion Results in an Antidemocratic Outcome

The benefits realized by Medicare participants, young adults, middle Americans, and economically vulnerable patients are likely the key drivers of majority opinion favoring the ACA. With the public in favor of the reform, the people have spoken: the ACA must remain. If the Court would have reached the merits in *California*, and if their findings on the merits resolved as illustrated above, then the repeal of the ACA would have been contrary to majority public opinion and thus antidemocratic. Some commentators consider the Supreme Court itself to be the leading purveyor of antidemocracy.[173] Certainly, the conversation around antidemocracy and the Court has amplified tenfold in the years following the overturn of *Roe v. Wade*[174] in *Dobbs v. Jackson Women's Health Org*.[175] But while the Court unquestioningly has the responsibility to determine the constitutional validity of a statute ever since *Marbury v. Madison*[176]—itself an antidemocratic decision in establishing the doctrine of judicial review—do they in some sense preserve their own legitimacy when their analysis falls on the same side as consensus opinion?

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[169] *Supra* note 145 at 41.
[170] *Id.*
[171] *Id.* at 94.
[172] *Id.*
[173] *See, e.g.* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160 (2021); David A. Love, *The courts have served as an anti-democratic force for much of U.S. history*, THE WASHINGTON POST (Nov. 3, 2021, 9:00 AM), https://www.washingtonpost.com/outlook/2021/11/03/courts-have-served-an-anti-democratic-force-much-us-history/.
[174] 410 U.S. 113 (1973).
[175] 142 S. Ct. 2228 (2022).
[176] 5 U.S. 137 (1803).

At first blush, the answer to this question likely depends on whether one believes the Supreme Court justices, or any judges, pay attention to or are even aware of consensus opinion. Following the Supreme Court's well-reasoned analysis in *California*, it would be easy to rebuff the district court and Fifth Circuit's treatment of jurisdiction and the merits as "political."[177] However, the reality is likely more nuanced. It is undeniable that the debate around the ACA was and still is one of the most partisan flashpoints of modern politics. Such bias will inevitably hang over any wholesale policy change like a sword of Damocles. Furthermore, it is also true that politics does not simply end once judges don their robes. By definition, every judge's understanding of the law is not only cognition, but a *recognition*: an interpretation built from prior experiences, impressions, and intellection. As a participant in government and in society generally, those prior experiences and impressions are necessarily political. Thus, we should not feign surprise when the opinions of courts appear to be rooted in politics. Arguably, however, this also tells us that the Court is more likely than not to follow consensus opinion simply because its justices are participants in society. This is not to say that the Court is doomed to succumb to partisanship or to follow the public majority at the expense of objective reasoning, and decisions like *Dobbs* demonstrate that public consensus does not always win the day. But democracy, at the least, should be made the "core of constitutional thought" if the People are to have a voice in their own government.[178]

The tension between consensus public opinion and judicial review has been explored most notably through Alexander Bickel's theory of the countermajoritarian difficulty. Through his criticism of judicial review, Bickel posits that if a majority of the citizenry wants a particular outcome from the legislative process, then it is injudicious to have an unelected institution getting in the way.[179] To wit, "[j]udicial review expresses . . . a form of distrust of the legislature"[180] when considering that "the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the [democratic] system."[181] In *California*, the Supreme Court acted in a *pro*-majoritarian way by punting on the merits, as discussed in Section VI-A. By doing so, the Court used one of the several procedural devices at its disposal to avoid making decisions on the merits in politically contentious cases.[182] These devices of "not doing," or "passive virtues" as Bickel labels them somewhat benevolently,[183] ensure that the judiciary

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[177] *See, e.g.* Jonathan Gruber, *They Call Me an Architect of Obamacare. I Can't Stand By as Activist Judges Threaten American Lives*, NEWSWEEK (Dec. 20, 2019, 4:48 PM), https://www.newsweek.com/they-call-me-architect-obamacare-i-cant-stand-activist-judges-threaten-american-lives-1478559; Colby Itkowitz, *1 in every 4 circuit court judges is now a Trump appointee*, THE WASHINGTON POST (Dec. 21, 2019, 7:32 PM), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html.

[178] Richard H. Pildes, *Democracy, Anti-democracy, and the Canon*, 17 CONSTITUTIONAL COMMENTARY 295, 296 (2000).

[179] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18-21 (2nd ed. 1986).

[180] *Id.* at 21.

[181] *Id.* at 19.

[182] *Id.* at 169.

[183] *Id.*

is involved in the least disruptive way possible.[184] Thus, Bickel might say that the Court indeed preserved its own legitimacy and that of the democratic system by allowing the will of representative institutions to remain in force.

The year that the TCJA was passed was the same year that majority opinion turned positive on the ACA. In the years following the reset of the shared responsibility payment to zero, healthy people did not exit the insurance market in droves; in fact, enrollment through the ACA exchanges remained relatively stable.[185] This reinforces the idea that those who purchased health insurance were those who also wanted it. It is important to remember that during the drafting stages, the Democrats capitulated to the Republicans and weakened the Individual Mandate from its original form.[186] As a result, some analysts believed at the time that the penalty was too low to actually drive healthy people into the marketplace.[187] Nevertheless, what resulted was major health reform that expanded the basic programs already in place and provided millions of U.S. adults access to affordable coverage. The majority of people view the reform favorably, and the Court's decision in *California* ensured a democratic outcome.

VII. CONCLUSION

If the Supreme Court would have reached the merits in *California*, the result would have contravened majority public opinion and thus been antidemocratic. On the merits, the Court would have found § 5000A no longer meets the requirements to be classified as a tax under *Sonzinsky* and under the rule relied on in *NFIB*. As such, the Individual Mandate would no longer fit the saving construction in *NFIB* and in turn would be violative of the Commerce Clause as previously held. Moreover, a thorough review of the historical context of the ACA's passage would reveal the substantial role that the Individual Mandate plays in the functioning of the omnibus statute on top of the clear textual indications of its essentiality. Therefore, the provision would have been found to be inseverable from the Act. The result would have been the full repeal of a reform that the majority of U.S. adults view favorably and wish to remain in place.

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[184] *See also* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 24-42 (1999) (extrapolating from Bickel's countermajoritarian difficulty an argument in favor of judicial minimalism, whereby the judiciary should build case law little by little rather than by sweeping decisions).
[185] Rachel Fehr et al., *Data Note: Changes in Enrollment in the Individual Health Insurance Market through Early 2019*, KFF (Aug. 21, 2019), https://www.kff.org/private-insurance/issue-brief/data-note-changes-in-enrollment-in-the-individual-health-insurance-market-through-early-2019/.
[186] *Supra* note 19 at 73.
[187] Peter Sullivan, *ObamaCare penalty could be too low, analysis finds*, THE HILL (Apr. 24, 2015, 3:35 PM), https://thehill.com/policy/healthcare/240006-obamacare-penalty-could-be-too-low-analysis-finds/.