"Salvage" over "demolition"[1]: Saving the ACA Post Ruth Bader Ginsburg

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ABSTRACT

The death of Ruth Bader Ginsburg brings up uncertainty over many issues that depend on Supreme Court decisions. This paper explores the impact of the Court on the ACA and the ability of millions of Americans to access quality healthcare. Specifically, the issues before the Court concern the survival of the mandate in the absence of the tax penalty that was repealed in 2017, the ability of the ACA to survive without the mandate, and in the worst case scenario, the limitation of the remedy to the states opposed to the ACA's survival. This paper argues that judicial restraint and consistency, both conservative ideals, should save the ACA. Regardless of the toothless mandate, the ACA is operational and many aspects of it, including the Medicaid expansions, have little or nothing to do with the mandate.

Keywords: ACA, Affordable Care Act, Supreme Court, SCOTUS, Ruth Bader Ginsburg, health insurance mandate, severability

INTRODUCTION

The ACA[2] is at the mercy of a changing and politicized US Supreme Court. The replacement for Ruth Bader Ginsburg could be outcome determinative for *California v. Texas*[3] with oral arguments scheduled for November 10, 2020, a week after the presidential election. The justices applying judicial consistency, common sense, and ethical reasoning may save the ACA. Regardless of the Court, a legislative change could be outcome determinative depending on congressional majorities. In the moments since the death of Ruth Bader Ginsburg, the media has suggested the ACA is doomed.[4] If conservative justices would behave with judicial restraint, the chances of keeping the law intact would improve.

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The ACA provided access to care to many people who did not have healthcare coverage. The ethical basis for the ACA was coverage while its primary goals also included cost containment: a financially workable system to provide universal healthcare coverage. Through the ACA, many people who were not eligible for Medicaid became eligible through the Medicaid expansions.[5] Employer-based and private insurance were held to higher standards of coverage eliminating skeleton plans. Those with preexisting conditions and those wanting coverage for adult offspring benefit from provisions in the ACA as well. Other legislation like the Sunshine Act providing transparency in industry payments to doctors are also part of the ACA.[6] In addition to the expected ethical goals of ensuring that more people have access to care, the ACA included the mandate, a provision designed for universal coverage, insurance industry buy-in, and to negate the free riding that occurs when people use emergency rooms without the ability to pay.[7] The ACA's broad ethical basis ranged from liberal ideas surrounding universal healthcare to conservative ideas like taking responsibility, paying one's own way instead of free riding, and using market forces rather than implementing a single payer plan. With ethical goals of justice and access to care, the ACA succeeded in decreasing the rate of uninsured which remains under 9 percent.[8]

I. Background

In *NFIB v. Sebelius,* the Court held that the ACA individual mandate[9] was enforceable within congressional tax power.[10] The 2017 Tax Cuts and Jobs Act repealed the tax penalty for remaining uninsured.[11] While it is odd, and seemingly unbelievable, a Texas federal court later decided that the repeal of the financial penalty for failing to purchase insurance invalidates the mandate.[12] The Fifth Circuit effectively held that the threat that one must buy insurance or nothing will happen was less acceptable than the seemingly harsher threat that one must buy insurance or pay a penalty. The Fifth Circuit remanded the case to the District Court to decide on the issue of severability when the Supreme Court decided to review.

II. The mandate absent the tax penalty

NFIB, the 2012 case, came to an odd conclusion: the mandate is not coercive or required; it is a choice to buy insurance or pay the penalty. Rather than upholding the mandated aspect outright (the coercive aspect that insurance is required), the Court muddied the water by holding the mandate was not appropriate to regulate interstate commerce. While the fine operated as a tax and a penalty, the legislation itself was not dependent on the tax and it should not be vulnerable to a tax repeal. By honoring the tax argument and denying the argument that a mandate to purchase insurance simply is constitutional, the Court placed the mandate on shaky ground. Now, four of the five justices that upheld the mandate as a use of tax power remain on the Court.[13] A new justice appointed immediately could mean the law's destruction; a new moderate or progressive justice appointed after the presidential election could save the law ensuring millions of Americans continued access to healthcare.

In *Texas v. US*, the case brought after the tax repeal,[14] the Fifth Circuit majority opinion suggested that the mandate could snowball into more coercive requirements like mandating healthy food. The problem with that part of the opinion is that it exposes an anti-ACA bias and an underlying judicial motive. The Fifth Circuit ignored *NFIB* by presenting in dicta an objection to the ACA mandate that has nothing to do with the amount or value of the tax. There are signs of judicial activism behind the Fifth Circuit majority: the judges disliked the premise of the law which may have sparked the judges in the majority to agree that the tax repeal should invalidate it.

The core issue the Supreme Court now agrees to resolve (if the parties have standing) is whether the repeal of the tax did sink the mandate. (The Texas District Court and the Fifth Circuit concluded that it did.) There is

no precedent for a court rewriting a law because the fine or tax penalty fails to bring in government revenue. (If parking tickets in a community were set at $0 with a system that issues warnings instead, would that mean everyone can park anywhere—that the illegal spots become legal by lack of a price tag on the ticket?) In *Hill v. Wallace* an old case about a tax and interstate commerce, the Court held the law unconstitutional rather than evaluating its value without the tax.[15] In *Hill*, the tax was hefty and designed to control market behavior in the grain market; it was not a mere penalty but a larger market interference. Also, the *Hill* Court objected primarily to the magnitude of the tax, not the ability to regulate interstate commerce. The tax was the meat of the law, not a mere small section. The premise that government revenue is required for the validity of any law accompanied by a tax penalty is incorrect. If it were true, it would follow that the myriad of laws on the books that do not result in fines would also be void. For example, many federal property liens are on the books. If the government has not brought in tax revenue that way, the underlying law would be invalid under the Fifth Circuit logic and language. A local level analogy would be that if restaurants in a jurisdiction fail inspections but are not fined, the regulation requiring standards could become void. Laws should not depend on their remedies leading to tax revenue even if the remedy and law were instituted under the power of Congress to tax.

Implementing a law that on its face serves a public good but is truly designed only to raise tax revenue through punishments is an unacceptable use of legislative power. For example, the motives behind parking and speeding ticket quotas are questionable. "Addicted to Fines" points out how many counties rely on fines to supplant revenue – fines are a huge problem contrary to the libertarian ideals that many of the conservative justices value.[16] Generally, fines are hardly relevant to whether the underlying laws can or cannot exist.

III. Severability

If the Supreme Court agrees with the Fifth Circuit and holds the mandate invalid absent the tax, it could also hold that without the mandate the whole law is invalid (the severability issue) hurting the ability of millions of Americans to access healthcare. Severability, the ability of a law's unconstitutional portion to be struck while the rest remains, is the subject of a messy inconsistent three-pronged test that asks whether the law can work without the unconstitutional clause (independence), whether Congress would have passed the law absent the unconstitutional provision, and the newer prong that asks whether the remaining law would be consistent with congressional intent.[17] In *Murphy v. NCAA*, Justice Alito passed up severability in favor of invalidating an entire law arguing the issue be sent back to Congress to make a better law.[18] Justice Ginsburg believed in "salvage" over "demolition."[19] The idea of severability would be consistent with conservative views that suggest opposition to judicial overreach, a preference for restraint, and analyzing laws as written without as much concern for legislative intent and context. Severability maintains the actual text, not just the congressional intent or any debatable aspect. Yet, conservative justices tend to oppose severability, possibly due to an opposition to legislation seen as impacting freedom. The liberal justices sometimes favor severability either because of respect for the power of other branches of government, but possibly because liberal ideology is behind the underlying law. Severability cannot be equated with judicial activism—striking down an entire law demonstrates activism more. In *NFIB*, the Court decided against severability when it held the mandatory aspect of the Medicaid expansions were unconstitutional although the majority did not speak to the severability in the context of the mandate because it saved the mandate. The majority opinion and the dissent were predictably divided along partisan lines regarding severability. Contrary to popular belief about conservative justices avoiding legislating from the bench, the dissent was described as "more like a policy brief than a judicial opinion, and the oral argument on severability often resembled a legislative committee hearing on insurance regulation."[20]

The history of severability in the Supreme Court has been confusing, partisan, and activist.[21] A presumption of severability is important to prevent judicial trouncing of congressional action. *Alaska Airlines v. Brock* affirmed a two-pronged test to determine severability but added congressional intent. The Court looked to whether the legislature would have enacted the law without the provision and whether the law can function without the stricken section. The Court added a glimpse into legislative intent by asking whether the same legislative intent is fulfilled by the law as it would operate without the stricken clause or provision. In *Alaska Airlines* the Court did not invalidate any more of a law than necessary and all nine justices agreed on the severability of the unconstitutional provisions. One article aptly suggests that the Court should not "bring down a giant by its toe."[22] In *US v. Booker*, Breyer wrote for the majority striking down a mandatory minimum law (the mandatory use of Federal Sentencing Guidelines) while maintaining the bulk of the Sentencing Reform Act.[23] The three recent severability cases are suspicious: In *NFIB* and *Booker*, the Court severed the unconstitutional provision from the law but in *Murphy*, it seems Ginsburg was right to suggest that a political preference for legalized betting and for states' rights governed the decision to strike down the entire federal law.

Normally, there is an ideological split under which liberal justices look to congressional intent more than conservative ones. However, Justice Scalia, now replaced with Justice Gorsuch, was more lenient toward his conservative colleague's use of congressional intent than the liberal justices' use of it evidencing a lapse in judicial restraint.[24] His decisions indicated an arbitrary analysis of severability that leads to results based on the merits of the underlying legislation. Gorsuch did agree with the majority in the *Murphy* case indicating a willingness to strike down an entire law.

Justice Thomas has had some severability oddities—in a case where he did agree with Ginsburg on severability, one of his contentions in a concurrence was that the court should never review an entire statute when a plaintiff brings a controversy over one part.[25] To adhere to Thomas' *Murphy* dicta, Texas would need to establish standing to challenge any and all other provisions. Thomas' *Murphy* language also turned on a preference for statutory interpretation over congressional intent; he was especially critical of the concept of looking into whether Congress would have passed the law without the unconstitutional section. Yet in *NFIB,* Thomas sided with the dissent finding the mandate and the Medicaid expansion mandate were both integral to the entire law.[26]

I assert the severability issue has essentially solved itself. All three prongs point to a healthy ACA that is accomplishing many of the myriad of intended goals. The ACA has been chugging along without mandate enforcement since the tax repeal demonstrating that the law works without the mandate. The Medicaid expansions not only remain intact, but more states have accepted them. The web of federal and state infrastructure supporting the ACA remains intact. Through individual insurance markets and the employer-based markets, individuals have been hurt by executive orders watering down the ACA, but the markets are operational. While the mandate over time likely would have created a more robust market, the markets are surviving. The Medicaid expansions, the requirements concerning preexisting conditions, or children under 26 remaining on the parents' insurance, do not rely on the mandate. The latter two requirements arguably should always have existed as a measure of insurance industry corporate responsibility without any need for the mandate as a bargaining chip for the government to entice the insurance industry.

Both a congressional intent test and a hypothetical question asking whether congress would have adopted the law without the mandate should be rephrased. If conservative justices were to ignore congress' mindset and to operate with judicial restraint, the mandate if found unacceptable would be severed and the remainder of the ACA salvaged. To apply the second and third prongs, if congress had known the ACA would work without it, I assert it would have passed the law without the mandate. It should be a hindsight test, not a search of

what Congress knew at the time. Really, the big picture was that the ACA legislature wanted more people to have insurance and they do. Avoiding congressional intent with a stronger presumption in favor of severability (when the rest of the law is constitutional) would be more consistent with the roles of the three branches of government and would limit the Court's participation in writing laws. Voters choose legislators making it a key to the Democratic process.

The justices cannot willy-nilly invoke severability when they want to save a law and deny severability when they want to strike it down in its entirety. If the severability approach is to depend on legislative intent, justices will find many laws salvageable. If severability reflected conservative judicial restraint, clauses would be severed and bodies of law would continue as written, something that does not coexist with the conservative justices' decision-making history.

IV. Enforceability

If both the mandate and the severability are decided in favor of Texas invalidating the entire law, one possible saving grace is that the Court agreed to further review enforceability. If the entire ACA is invalid, the Court could still decide that the law can be enforced where it does not injure the party seeking relief. That issue before the Court specifically means that the Court could find Texas and the other 17 states that are plaintiffs would not be hurt by the continuation of ACA provisions in California and the 16 states aligned with California. Even conservative justice Clarence Thomas has supported targeted relief for the party claiming damages, here Texas, et al.[27]

CONCLUSION

There is hope for many reasons. For now, there are eight justices and it would take one conservative to side with Roberts and the more liberal-leaning justices. Their record on judicial overreach should at least lead to a finding of severability. Beyond both the mandate and the severability, conservative leaning justices do not like expansive remedies that overreach the ask. Texas wants to strike down the law but if it is not damaged by the continuation of provisions in other states, it has no basis to receive grandiose remedies that affect so many outside the plaintiff states. Because simply adding a small penalty would suit the *NFIB* ruling and bring this farce to an end, a legislative change to the Tax Act[28] may matter more for access to healthcare than the appointment of a new Supreme Court justice. Congress should simply reinstate the tax penalty.

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[1] *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) In dissent, Ruth Bader Ginsburg suggests precedent for "a salvage rather than a demolition operation." See also Michael C. Dorf, "Whither Severability After Murphy v NCAA?" Dorf on Law. May 17, 2018 http://www.dorfonlaw.org/2018/05/whither-severability-after-murphy-v-ncaa.html

[2] Patient Protection and Affordable Care Act, 42 USC § 18001 et seq. (2010)

[3] *California, et al., Petitioners v. Texas, et al.,* US Supreme Court Docket: "The motions of the Solicitor General for divided argument and of the U.S. House of Representatives for enlargement of time for oral argument and for divided argument are granted, and the time is allotted as follows: 30 minutes for California, et al., 10 minutes for the U.S. House of Representatives, 20 minutes for the Solicitor General, and 20 minutes for Texas, et al. The motion of Ohio and Montana for leave to participate in oral argument as amici curiae, for enlargement of time for oral argument, and for divided argument is denied. VIDED." https://www.supremecourt.gov/docket/docketfiles/html/public/19-840.html

[4] https://www.vox.com/21446256/ruth-bader-ginsburg-death-supreme-court-obamacare-case

[5] 42 USC § 1396 et seq.

[6] 42 USC § 6002.

[7] EMTALA is the law allowing people to use emergency rooms. It is a government mandate to hospitals to provide care regardless of insurance status. Often, the hospitals do not recoup the cost from the patient – the cost ends up societally divided. The ACA

mandate whether through subsidized healthcare, Medicaid expansions, or the mandate decreased the free rider problem. Emergency Medical Treatment and Labor Act, 42 US Code § 1395dd (1986)

[8] Kaiser Family Foundation. https://www.kff.org/uninsured/state-indicator/rate-by-age/?dataView=1&currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D Rates have changed from 18 percent in 2010 (approx. 47 million people) to a low around 7.9 percent (27 million people), and now slightly up as executive orders have weakened the ACA.

[9] 26 USC §5000A (the mandate); §5000A (b)(1) (the shared responsibility) and §§5000A(c), (g)(1) (the provision specifying collecting the penalty like a tax)

[10] *National Federation of Independent Business v. Sebelius* 567 US 519 (2012) The Court held the mandate was an unconstitutional limitation on interstate commerce but could remain effective as a tax penalty. Rather than a coercive measure, it is a choice to purchase or pay the penalty.

[11] Tax Cuts and Jobs Act S. 2254 — 115th Congress: Tax Cuts and Jobs Act." www.GovTrack.us. 2017. September 20, 2020 https://www.govtrack.us/congress/bills/115/s2254

[12] *Texas v. United States*, 340 F. Supp. 3rd 579 (N.D. Texas 2018); *Texas v. United States*, (5th Cir Dec 18 2019) https://www.ca5.uscourts.gov/opinions/pub/19/19-10011-CV0.pdf

[13] In *NFIB v Sebelius*, Justices Roberts, Ginsburg, Breyer, Sotomayor, and Kagan were in the majority. Justices Scalia and Kennedy, now replaced by Kavanagh and Gorsuch, as well as Alito and Thomas dissented.

[14] Tax Cuts and Jobs Act S. 2254 — 115th Congress: Tax Cuts and Jobs Act." www.GovTrack.us. 2017. September 20, 2020 https://www.govtrack.us/congress/bills/115/s2254

[15] *Hill v. Wallace*, 259 U.S. 44 (1922)

[16] Mike Maciag, "Addicted to Fines," Governing: The Future of States and Localities, September 2019. https://www.governing.com/topics/finance/gov-addicted-to-fines.html

[17] *Alaska Airlines, Inc. v. Brock* 480 U.S. 678 (1987) added the legislative intent.

[18] *Murphy v. NCAA*, 138 S. Ct. 1461 (2018)

[19] Eric Fish, Severability as Conditionality, Emory Law Journal Vol 64, Issue 5. Fish argues in favor of a presumption of severability. https://law.emory.edu/elj/content/volume-64/issue-5/articles/severability-as-conditionality.html#:~:text=The%20Supreme%20Court's%20first%20severability,175%E2%80%9376%20(1803).

[20] Fish

[21] John C. Nagle, "Severability," 72 N.C. L. Rev. 203 (1993-1994). Nagle argues that a law should be assumed severable absent a severability clause and he criticizes the question of whether Congress would have passed the law without the unconstitutional clause in favor of a more traditional legislative intent question which is increasingly part of the severability question. Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/153

[22] Fish.

[23] US v Booker

[24] Brudney, James J., and Corey Ditslear. "Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect." *Berkeley Journal of Employment and Labor Law* 29, no. 1 (2008): 117-73. Accessed September 22, 2020. http://www.jstor.org/stable/24052420.

[25] *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) In a concurrence, Justice Thomas argues in favor of a new severability test that would avoid a debate over legislative intent.

[26] *National Federation of Independent Business v. Sebelius*, Oyez, https://www.oyez.org/cases/2011/11-393 (last visited Sep 21, 2020).

[27] Susannah Luthi, "Ginsburg's Death Leaves Obamacare in Greater Danger Than Ever," *Politico*, September 19, 2020. https://www.politico.com/news/2020/09/19/what-happens-to-obamacare-ginsburg-418406

[28] Tax Cuts and Jobs Act S. 2254 — 115th Congress: Tax Cuts and Jobs Act." www.GovTrack.us. 2017. September 20, 2020 https://www.govtrack.us/congress/bills/115/s2254