Severing Unconstitutional Amendments

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INTRODUCTION

Imagine that Congress has passed a comprehensive statutory scheme that includes a tax provision. Suppose further that a later Congress amends the scheme to repeal the tax, but that the repeal renders other parts of the law unconstitutional. Severability doctrine says that courts should prefer "partial, rather than facial, invalidation,"[1] but it also says that the "touchstone" of such a decision is "legislative intent."[2] And so there's a tension: on the one hand, it seems that Congress wants to curtail the statute's scope and effect by getting rid of the tax; on the other, the Supreme Court disfavors facial challenges. Should the Court strike down the other parts of the scheme, or should it reinstate the tax?

On February 26th, twenty states filed a lawsuit against the United States that raises just this question.[3] The states allege that the Patient Protection and Affordable Care Act[4] (ACA) is unconstitutional because the statute's individual mandate exceeds Congress's powers under the Commerce and Taxing Clauses. Of course, six years ago the Supreme Court upheld the very same mandate under the Taxing Clause.[5] But since that decision, there has been one important revision to the ACA. On December 22, 2017, President Donald Trump signed the Tax Cuts and Jobs Act of 2017[6] (Tax Cuts Act), which eliminates the

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[1] *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 508 (2010), quoting *Brockett v Spokane Arcades, Inc*, 472 US 491, 504 (1985).

[2] *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 330 (2006).

[3] See generally Complaint, *Texas v United States*, Docket No 4:18-cv-00167-O (ND Tex filed Feb 26, 2018) ("Complaint").

[4] Pub L No 111-148, 124 Stat 119 (2010).

[5] *National Federation of Independent Business v Sebelius*, 567 US 519, 588 (2012).

[6] Pub L No 115-97, 131 Stat 2054.

tax penalty underlying the individual mandate.[7] Based on this change, the latest lawsuit argues that the individual mandate can no longer be construed as a tax, and therefore the mandate—and perhaps the entire ACA—must be struck down.[8] Commentators have already noted a number of procedural and substantive problems facing the suit.[9] But these same commentators have also conceded that a victory for the challengers is not out of the question.[10]

This Article argues that, even if a court rules for the plaintiffs on the merits, it should not strike down the individual mandate—let alone the entire ACA.[11] Instead, the appropriate remedy is (perhaps ironically) to strike down the repeal of the tax penalty. Or in other words, to reinstate the tax. In making this argument, this Article explores a broader question about severability doctrine in cases where statutory amendments render

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7 Tax Cuts Act § 11081, 131 Stat at 2092.

8 See Complaint at *32 (cited in note 3).

9 See Nicholas Bagley, *A Feeble Constitutional Challenge to the ACA*, Yale J Reg: Notice & Comment (Mar 5, 2018), archived at http://perma.cc/XP5S-LKU8 (noting problems with the severability argument); Katie Keith, *State Lawsuit Claims That Individual Mandate Penalty Repeal Should Topple Entire ACA* (Health Affairs, Feb 28, 2018), archived at http://perma.cc/L8NQ-8GAF (describing severability and res judicata problems); Sarah Kliff, *20 States File a New Lawsuit Arguing Obamacare Is Illegal* (Vox, Feb 28, 2018), archived at http://perma.cc/D46J-EH68 (noting problems with severability and standing arguments); Ian Millhiser, *Obamacare Repeal Is Back, and It's Dumber Than Ever* (Think Progress, Feb 28, 2018), archived at http://perma.cc/H9AL-CDC8 (noting problems with the severability argument); Ilya Somin, *Thoughts on the New Constitutional Case Against Obamacare* (Volokh Conspiracy, Feb 28, 2018), archived at http://perma.cc/E6Q8-3GE6 (noting problems with the severability argument); Jennifer Haberkorn, *Another Legal Cloud for Obamacare?* (Politico, Feb 27, 2018), archived at http://perma.cc/R3SF-4VBY (quoting commentators skeptical of the severability argument); Jeff Overley, *Latest ACA Assault Has Fighting Chance Despite Clear Flaws* (Law360, Feb 27, 2018), archived at http://perma.cc/JVN5-HXJR (noting problems with severability and taxing power arguments).

10 See Millhiser, *Obamacare Repeal is Back* (cited in note 9) ("[A]s anyone familiar with Obamacare's history will recognize, the fact that *Texas v United States* relies on a baffling legal argument provides no shield from partisan judges."); Somin, *Thoughts on the New Constitutional Case* (cited in note 9) ("The plaintiffs are absolutely right [that the mandate can no longer be considered a tax]."); Haberkorn, *Another Legal Cloud* (cited in note 9) ("[P]roponents of Obamacare have notoriously underestimated the stream of legal challenges against the Affordable Care Act."); Kliff, *20 States* (cited in note 9) ("[I]f you know anything about Obamacare lawsuits, you *definitely* know that we've seen multiple cases initially written off by experts as frivolous eventually reach the Supreme Court."); Overley, *Latest ACA Assault* (cited in note 9) ("The latest legal effort to demolish the Affordable Care Act by targeting the law's individual mandate has realistic odds of gaining traction despite some likely problems with its arguments.").

11 We do not address whether the plaintiffs have standing or whether they should win on the merits. This Article addresses only the remedial question presented by the suit.

a previously permissible statutory scheme unconstitutional. We believe that both theory and doctrine give the same answer. Courts should presumptively restore the pre-amendment status quo and sever the latest amendment—even if that amendment repealed a law.

This Article proceeds as follows. Part I describes the latest challenge to the ACA. Part II describes the Supreme Court's current approach to severability—often called "imaginative reconstruction"[12]—and describes some complications with unconstitutional statutory amendments under the current approach. Part III first presents a proposal for resolving severability cases involving statutory amendments: a presumption of restoring the law to its pre-amendment status quo. It then explains why this presumption makes particular sense with respect to the latest challenge to the ACA and responds to possible objections.

I. THE LATEST CHALLENGE TO THE ACA

As is well known, back in 2010 Congress enacted the ACA. A key provision of the ACA was the individual mandate, which required Americans to purchase health insurance and penalized those who failed to comply.[13] Almost immediately, the ACA was challenged on various constitutional grounds, the most important of which was that the individual mandate exceeded Congress's powers under the Commerce Clause. In 2012, a majority of the Supreme Court in *National Federation of Independent Businesses v Sebelius*[14] ("*NFIB*") agreed with the challengers that Congress could not enact the individual mandate under its powers to regulate interstate commerce.[15] But a separate five-justice majority ultimately upheld the individual mandate and its accompanying penalty by construing the mandate as a tax and thus as falling within Congress's powers to lay and collect taxes.[16]

In December of 2017, Congress enacted the Tax Cuts Act. Among other things, the Tax Cuts Act zeros out the individual mandate penalty beginning in 2019.[17] But importantly, the Act

12 Caleb Nelson, *What Is Textualism?*, 91 Va L Rev 347, 404–05 (2005).
13 26 USC § 5000A.
14 567 US 519 (2012).
15 See id at 552–58.
16 See id at 561–74.
17 Tax Cuts Act § 11081, 131 Stat at 2092.

does not eliminate the individual mandate itself,[18] contrary to popular press reporting.[19] Indeed, Congress could not have eliminated the individual mandate in the Tax Cuts Act because, in order to avoid a filibuster, it passed the law through a budget procedure known as reconciliation.[20] Under what's known as the Byrd Rule, a provision repealing the individual mandate would have been blocked during reconciliation because it would not have been germane to the budget process.[21] As a result, the ACA as it now stands requires individuals to purchase health insurance but does not impose any penalty for their failing to do so.

Yet this structure poses an important constitutional question: Can the mandate without the penalty still be upheld as a tax?[22] Twenty states have recently filed a lawsuit in the Northern District of Texas arguing that it cannot. Because the individual mandate raises no revenue, they argue, it cannot be

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[18] See Timothy Jost, *The Tax Bill and the Individual Mandate: What Happened, and What Does It Mean?* (Health Affairs, Dec 20, 2017), archived at http://perma.cc/6LTX-CSMZ.

[19] See, for example, Dylan Scott, *Trump's State of the Union Claims about Obamacare's Individual Mandate, Fact-Checked* (Vox, Jan 30, 2018), archived at http://perma.cc/J2YZ-K5GK; J. Mario Molina, *Trump Didn't Kill Obamacare by Repealing the Individual Mandate* (Newsweek, Dec 28, 2017), archived at http://perma.cc/N25S-DDW6.

[20] For an explanation of the reconciliation process, see generally Megan S. Lynch and James V. Saturno, *The Budget Reconciliation Process: Stages of Consideration* (Congressional Research Service, Jan 4, 2017), archived at http://perma.cc/79WX-MSF4.

[21] See Amber Phillips, *The Budget Rule You've Never Heard of That Ties Republicans' Hands on Obamacare* (Wash Post, Mar 9, 2017), archived at http://perma.cc/W8DH-SD5Y.

[22] Perhaps surprisingly, commentators disagree about the answer to this seemingly simple question. Compare Overley, *Latest ACA Assault* (cited in note 9) ("It's also not a fait accompli that the taxing power argument is off the table."), with Somin, *Thoughts on the New Constitutional* (cited in note 9) ("The plaintiffs are absolutely right [in their taxing power analysis]."). The traditional scholarly consensus is that Congress's taxing power is nearly plenary and that the Constitution's few limitations on the taxing power "do not prohibit Congress from enacting any particular kind of tax." Erik M. Jensen, *The Taxing Power: A Reference Guide to the Constitution* 5 (Greenwood 2005). Indeed, since the New Deal, the Supreme Court has been highly deferential to Congress's characterization of a law as a tax. See id at 180–83 (discussing the distinction between taxes and regulations). That said, it does not appear that the justices have ever addressed whether a law that raises no revenue can still be characterized as a tax; but there are reasons to think that it might not. See id at 163 (noting that "a court might characterize a measure intended to raise little or no revenue as something other than a 'tax or duty'"); id at 213 n 332 (noting that "the Supreme Court has generally deferred to Congress's characterization of a purported levy as a tax, at least as long as some minimum revenue is raised"). But again, this Article takes no position on the merits of the case.

construed as a tax. It therefore exceeds Congress's powers under *both* the Commerce and Taxing Clauses.[23] Just as importantly, the states argue that the appropriate remedy is to invalidate at least the individual mandate, if not the ACA more broadly.[24] This Article counters this latter argument. We argue, instead, that the appropriate remedy in this case is not to strike down the individual mandate but to invalidate the repeal of the tax penalty.[25] Simply put, the appropriate remedy is to reinstate the tax.

II. SEVERABILITY AS IMAGINATIVE RECONSTRUCTION

This Part begins by describing the Supreme Court's current approach to severability doctrine—often called "imaginative reconstruction." It then discusses some complications with this approach, especially in cases in which Congress amends a statutory scheme in an unconstitutional way.

A. Imaginative Reconstruction

When the Supreme Court declares a statute unconstitutional, it engages in "imaginative reconstruction" to determine the remedy, asking how a stylized "enacting Congress would have answered a question that it did not actually face."[26] Put another way, the Court attempts to create a second-best statute, the one that Congress would have enacted if it had realized the constitutional problem.[27] At this stage of the

[23] See Complaint at *2–4, *27–28 (cited in note 3).

[24] See id at *4–5, *32.

[25] We use the term "remedy" to describe severability—just as the Supreme Court and many scholars do. But we do not take a position on whether the remedial view is the correct way to characterize severability. See generally John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo Wash L Rev 56 (2014) (describing a different view of severability based on ordinary principles of statutory interpretation).

[26] Nelson, 91 Va L Rev at 404–05 (cited in note 12). Other scholars agree that the "imaginative reconstruction" best describes current severability doctrine. See, for example, Lisa Marshall Manheim, *Beyond Severability*, 101 Iowa L Rev 1833, 1839–40 (2016); Eric S. Fish, *Severability as Conditionality*, 64 Emory L J 1293, 1322–23 (2015); Kevin C. Walsh, *Partial Unconstitutionality*, 85 NYU L Rev 738, 788 (2010); John Copeland Nagle, *Severability*, 72 NC L Rev 203, 229 (1993).

[27] Importantly, the Court does not confine itself to the plaintiff's requested relief. See, for example, *Sessions v Morales-Santana*, 137 S Ct 1678, 1698–1701 (2017) (invalidating a provision of the Immigration and Nationality Act but adopting the "remedial course Congress likely would have chosen" and not the relief the respondent had sought); *Levin v Commerce Energy, Inc*, 560 US 413, 427 (2010) ("On finding [a constitutional violation] . . . courts may attempt, within the bounds of their institutional

analysis, even staunch textualists will consider legislative intent.[28] But because legislative intent is often difficult to determine, the Court has adopted a default rule that "partial, rather than facial, invalidation is the required course."[29] It generally severs unconstitutional provisions, in other words, because it assumes that Congress would rather have some of its law than none at all.

This emphasis on what Congress would have done makes good sense both as a matter of interpretive theory and quasi-constitutional law. Most people agree that courts, when interpreting statutes, should be faithful agents of Congress.[30] When the Constitution forbids the straightforward application of the statute, the imaginative reconstruction approach, if properly applied, respects Congress's primacy over federal statutes. This deference, in turn, serves separation-of-powers values by keeping both Congress and the judiciary in their rightful spheres. Judges are not supposed to rewrite statutes based on their own personal policy preferences.[31] And relatedly, requiring courts to stick to what Congress would have done can encourage judicial restraint.[32] Indeed, "one of severability's animating principles" is "that courts confronting a constitutional flaw in a statute should respond by minimizing the disruption to that statute."[33]

B. Problems with Reconstructing Intent

Sometimes it's simple to apply the imaginative reconstruction approach. For instance, Congress can include an explicit fallback provision that instructs courts on how to proceed if a law is found unconstitutional. Statutes often include

competence, to implement what the legislature would have willed had it been apprised of the constitutional infirmity. . . . The relief the complaining party requests does not circumscribe this inquiry.").

[28] See Manheim, 101 Iowa L Rev at 1840 (cited in note 26) (noting that Justice Antonin Scalia, a self-avowed textualist, recognized "the central role that legislative intent plays in severability analysis").

[29] *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 508 (2010), quoting *Brockett v Spokane Arcades, Inc*, 472 US 491, 504 (1985).

[30] See, for example, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 BU L Rev 109, 112–17 (2010); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum L Rev 70, 96 (2006).

[31] See Manheim, 101 Iowa L Rev at 1846 (cited in note 26); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 Ga L Rev 41, 57–58, 80 (1995).

[32] See Manheim, 101 Iowa L Rev at 1836, 1845–50 (cited in note 26).

[33] Id at 1838.

severability clauses, which affirmatively tell courts to sever any provisions that are found unconstitutional.[34] These provisions can be conceived of as conditions precedent or conditions subsequent that govern the law's meaning: *if* a court determines that it's unconstitutional, *then* the alternative meaning takes place. Put simply, a fallback provision allows Congress to write the second-best statute into the statute itself. And even without a codified fallback provision, Congress's hypothetical intent can be clear. A statute might, for example, include just a single, minor unconstitutional provision that Congress would have most likely omitted in order to save the rest of the statute.

But other factors can complicate this analysis. First, sometimes Congress enacts a single statute that includes two or more elements that *together* violate the Constitution.[35] For instance, Congress might pass a statute that (1) extends benefits but (2) limits them to a single class of beneficiaries in violation of the Equal Protection Clause.[36] These convergent constitutional violations make the analysis more complicated. With equal protection challenges, the Court has to determine whether to extend the benefit to the excluded class or to withdraw it from the included one. Yet it is often difficult to know which way Congress would have legislated. Relatedly, sometimes Congress amends a prior statute in a way that renders the broader statutory scheme unconstitutional. For example, *Free Enterprise Fund v Public Company Accounting Oversight Board*,[37] raised such an issue. The President could only fire members of the Securities and Exchange Commission (SEC) "for good cause," and the SEC, in turn, faced similar restrictions on firing members of the Public Company Accounting Oversight Board.[38] Neither for-cause removal protection violated the Constitution on its own, but the "multilevel protection" violated "Article II's vesting of the executive power in the President."[39] Put simply, two different

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[34] See, for example, Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv J Legis 227, 229 (2004) (describing the severability clause in McCain-Feingold).

[35] See Brian Charles Lea, *Situational Severability*, 103 Va L Rev 735, 776–82 (2017) (discussing such "statutory convergences").

[36] See, for example, *Morales-Santana*, 137 S Ct at 1698–1700. See also Lea, 103 Va L Rev at 783–88 (cited in note 35) (discussing this issue).

[37] 561 US 477 (2010).

[38] Id at 486–87.

[39] Id at 484.

statutes enacted by two different Congresses—one in the Securities Exchange Act[40] and the other in the Sarbanes-Oxley Act[41]—together created the unconstitutional convergence.[42] In such cases, the Court must effect the latter Congress's intent without disregarding the pre-existing laws on the books. And indeed, often these two complications—convergences and amendments—will work together to complicate severability analysis to an even greater extent.

With respect to the latest ACA challenge, the Tax Cuts Act implicates both of these complications. Before the amendment, the ACA, according to Chief Justice John Roberts's majority opinion in *NFIB*, was constitutional under the Taxing Clause.[43] When Congress repealed the tax penalty, it created a convergent constitutional violation. The Tax Cut Act left the ACA's individual mandate still on the books, but it repealed the tax that had rendered it constitutional. So the ACA's individual mandate and the provision repealing the tax penalty, together, create the convergent constitutional violation.[44] The difficult question, then, is what would Congress have enacted if it had recognized this constitutional violation?

Of course, the Republicans campaigned relentlessly on the promise to repeal and replace the ACA,[45] so at first glance it seems obvious that Congress would rather lose the individual mandate than regain the tax penalty. But here, as elsewhere, what Congress would have wanted might not be what Congress could have enacted. Even though severability doctrine sometimes refers to subjective legislative intent, the inquiry should turn on the objective possibility of passage. So even if a majority of Congress would have wanted to repeal the individual mandate, the current congressional procedures (namely, the

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[40] Securities Exchange Act of 1934, Pub L No 73-291, 48 Stat 881, codified as amended at 15 USC § 78a et seq.

[41] Sarbanes-Oxley Act of 2002, Pub L No 107-204, 116 Stat 745.

[42] See *Free Enterprise Fund*, 561 US at 484–87. But see generally Note, *The SEC Is Not an Independent Agency*, 126 Harv L Rev 781 (2013) (arguing that the SEC's organic statute does not include a for-cause removal protection).

[43] US Const Art I, § 8, cl 1.

[44] Repeals can generate convergent constitutional violations just like any other statute. Suppose that Congress creates some benefits scheme that extends equally to men and women, then a later Congress repeals those benefits for just one class. The original statute and the partial repeal could together violate the Equal Protection Clause.

[45] See Rachel Roubein, *Timeline: The GOP's Failed Effort to Repeal Obamacare* (The Hill, Sept 26, 2017), archived at http://perma.cc/K5HM-KNAE.

Byrd Rule and the filibuster) would have prevented them from doing so. What's more, these specific roadblocks suggest a broader problem in cases of amendment or repeal. Congress often, for any number of reasons, passes statutes that fall well short of what the law's most strident supporters would prefer.[46] When courts interpret statutes, they hold Congress to what it managed to pass, and they also preserve the handiwork of past Congresses by disfavoring implied repeal.[47] Likewise, severability doctrine should not create the bizarre result of giving Congress what "it" wanted but didn't have the votes to enact.[48]

In this light, repeals and other amendments raise a unique problem for severability doctrine. A narrow focus on what this Congress would have wanted, rather than what past Congresses managed to make into law, might tilt the scales against the past—and perhaps against stability in the law more broadly. Therefore, the Court needs rules to govern cases in which the imaginative reconstruction approach begins to break down. The next Part articulates such an approach.

III. SEVERABILITY AND THE PRE-AMENDMENT STATUS QUO

If the individual mandate and the repeal of the tax penalty together create a convergent constitutional violation, how should a court remedy the problem? Under the challengers' theory, the court should strike not just the individual mandate, but the entire ACA.[49] Rejecting that argument, this Part makes two basic claims. First, doctrine and theory support a default rule in cases of unconstitutional statutory amendments that courts should favor restoration to the status quo ante. Second, this default rule, applied here, counsels that the court should strike

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46 See generally John F. Manning, *Textualism and Legislative Intent*, 91 Va L Rev 419 (2005) (discussing the textualists' view of the relationship between legislative compromise and statutory interpretation).

47 See *Morton v Mancari*, 417 US 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.").

48 Another reason to focus on objective rather than subjective congressional intent—what Congress would have done rather than what a supposed majority wanted—is that it may be impossible to identify Congress's collective intent. This insight is captured by Professor Kenneth Shepsle's often-invoked phrase, "Congress is a 'They,' not an 'It.'" See generally Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Intl Rev L & Econ 239 (1992).

49 See Complaint at *2 (cited in note 3).

the repeal of the tax penalty in the Tax Cuts Act. This Part concludes by responding to potential objections to our proposal.

A. Defaulting to the Status Quo

When Congress enacts an amendment that renders a broader statutory scheme unconstitutional, the default rule should be to strike down the amendment and restore the law to the pre-amendment status quo. This default should apply even if the amendment is a repeal and even if the repeal eliminated a tax. Our proposed rule derives support from long-standing judicial practice and from the broader values animating severability doctrine.

Courts have long refused to give effect to amendments that render an existing statute unconstitutional. In *Frost v Corporation Commission of Oklahoma*,[50] for example, the Supreme Court explained:

> [I]t is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, that statute must stand as the only valid expression of the legislative intent.[51]

Put simply, an impermissible amendment cannot alter the permissible statute's original meaning. The *Frost* Court's analysis draws support from the reasoning of Chief Justice John Marshall in *Marbury v Madison*[52] that "a legislative act contrary to the constitution is not law."[53] Because an unconstitutional amendment is "not law," the Constitution itself precludes it from altering the current statutory scheme.[54] This sound reasoning led Courts to follow the *Frost* rule throughout the nineteenth

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50 278 US 515 (1928).

51 Id at 526–27.

52 5 US (1 Cranch) 137 (1803).

53 Id at 177. See also Harrison, 83 Geo Wash L Rev at 85–87 (cited in note 25).

54 See *Marbury*, 5 US (1 Cranch) at 177; Harrison, 83 Geo Wash L Rev at 87 (cited in note 25) ("Constitutional invalidity of federal statutes thus is produced by the Constitution itself, not by the order of a court.").

and twentieth centuries,[55] most notably in cases involving impermissible legislative vetoes.[56]

Besides its fit with doctrine, the status quo presumption also serves the broader purposes of severability. First, it furthers the separation of powers by helping courts avoid legislative decisions. In most severability cases, courts must ask difficult questions about what Congress *would* have done; they must imaginatively reconstruct legislation that Congress never passed. By contrast, the status quo presumption reinstates legislation that a previous Congress *did* pass—that is, the original law. Second, the status quo presumption furthers the value of judicial restraint. In the absence of evidence to the contrary, courts should attempt to preserve as much of a properly enacted statute as possible.[57]

Still, it's important to note that the status quo rule is just a presumption. Legislatures may provide for a different "fallback" rule.[58] For example, a legislature could write that, if the amendment is unconstitutional, then the rest of the statutory scheme should also be held unconstitutional—what is often called an "inseverability clause."[59] After all, if Congress includes that language in the statute, then it's just as much a part of the legislative bargain as the first-order statutory language. And even if the initial amendment is an unconstitutional "nullity," the fallback provision can itself be a constitutional revision to the law. In these two ways, legislatively adopted fallback rules do not undermine the separation-of-powers and judicial-restraint values that underlie severability doctrine.

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[55] See, for example, *Reitz v Mealey*, 314 US 33, 38–39 (1941), revd in part on other grounds by *Perez v Campbell*, 402 US 637 (1971); *Waters-Pierce Oil Co v Texas*, 177 US 28, 47 (1900); *American Library Association, Inc v United States*, 201 F Supp 2d 401, 495 (ED Pa 2002), revd on other grounds, 539 US 194 (2003); *State v Mills*, 133 SW 22, 24 (Mo 1910); *People v Butler Street Foundry & Iron Co*, 66 NE 349, 356 (Ill 1903); *Carr v State*, 26 NE 778, 781 (Ind 1891); *McAllister v Hamlin*, 23 P 357, 358 (Cal 1890); *Campau v City of Detroit*, 14 Mich 276, 286 (1866).

[56] See Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 Harv L Rev 1182, 1186–87 (1984).

[57] In fact, the Supreme Court has often gone even further to save statutes, interpreting them in ways that conflict with Congress's supposed intent in order to render them constitutional. See generally Eric S. Fish, *Constitutional Avoidance as Interpretation and Remedy*, 114 Mich L Rev 1275 (2016).

[58] See generally Michael C. Dorf, *Fallback Law*, 107 Colum L Rev 303 (2007).

[59] Shumsky, 41 Harv J Legis at 229 (cited in note 34).

B. Application to the Latest Challenge to the ACA

Consider again the pending ACA lawsuit. Under the theory advanced in this Article, the remedy sought by the challengers undermines the values protected by severability analysis. First, the challengers have asked the court to invalidate the individual mandate and thereby create a statutory scheme—the ACA without the individual mandate—that no Congress has ever enacted. Worse, this new scheme is one that Congress *could not* have enacted. Congress repealed the tax penalty through reconciliation because the Senate could not muster sixty votes to overcome a filibuster.[60] At the same time, the Byrd Rule prohibited repeal of the individual mandate itself, so Congress's only option was to zero out the tax.[61] What's more, striking the individual mandate would be broader than the challengers suggest. The individual mandate is intertwined with the ACA in complicated ways.[62] Of course, a court could perhaps "blue-pencil a sufficient number" of changes to render the statutory scheme coherent, but typically courts leave "such editorial freedom . . . to the Legislature, not the Judiciary."[63]

The challengers' broader remedy—striking down the ACA in its entirety—raises these same problems to an even greater extent. Congress has repeatedly tried and failed to repeal and replace the ACA,[64] so it had to settle on zeroing out the tax penalty. In 2010, Congress passed the ACA, and the President signed it. That bill became a law. The Tax Cuts Act went through this same process but did not and could not repeal the entire ACA. Both law and common sense counsel that courts should not create outcomes that Congress could not achieve through the ordinary legislative process.[65] "If a statute needs

60 See Tara Golshan, *The Republican Tax Reform Bill Will Live and Die by This Obscure Senate Rule* (Vox, Nov 14, 2017), archived at https://perma.cc/LT3Q-EE9U.

61 See NWC, *20 States Launch New Lawsuit to Take Obamacare Down, and This Time They Are Likely to Win*, (Sparta Report, Feb 27, 2018), archived at http://perma.cc/H6VQ-DXXX.

62 See Jost, *The Tax Bill and The Individual Mandate* (cited in note 18).

63 *Free Enterprise Fund*, 561 US at 509–10.

64 See Roubein, *Timeline* (cited in note 45).

65 See Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 Nw U L Rev 285, 327 (2015) (noting that "leav[ing] in place a new version of the statute that Congress never would have enacted . . . harms the separation of powers"); Keith, *State Lawsuit* (cited in note 9) ("The idea that the states could accomplish what Congress repeatedly failed to do through a lawsuit over a small amendment seems far-fetched, to say the least.").

repair," as Justice Neil Gorsuch has recently observed, "there's a constitutionally prescribed way to do it. It's called legislation."[66]

C. Objections

Put simply, our proposed remedy is that a court should invalidate the repeal of the individual mandate's penalty, thus rendering the mandate a permissible tax. This solution remedies the broader constitutional problem, fits with the Supreme Court's current severability doctrine, and better accommodates the underlying values of severability. Still, the argument might seem counterintuitive because it would require a judge to effectively reinstate a tax. This Section responds to three potential objections: (1) severability doctrine does or should have a libertarian baseline, and so judges should tend to construe unconstitutional statutes to restrict rather than expand government power; (2) courts should never impose (or, more precisely, re-impose) a tax; and (3) courts should not consider internal congressional procedures—such as the filibuster or the Byrd Rule—when conducting severability analysis. None of these objections should preclude our proposed remedy.

1. Libertarian baselines.

It might seem absurd to strike a statutory provision and thereby reintroduce a tax that Congress just repealed. From this perspective, courts should not be in the business of reintroducing substantive regulations of primary conduct; that's Congress's role. Therefore, the Supreme Court's default rule should not be to return to the status quo, the argument goes, but to default to some sort of "libertarian baseline." This baseline would suggest that "statutory interpreters should be more willing to err by construing statutes too narrowly than too broadly."[67]

But this libertarian baseline has little basis in the Court's severability jurisprudence. For example, the default rule is

[66] *Perry v Merit Systems Protection Board*, 137 S Ct 1975, 1990 (2017) (Gorsuch dissenting).

[67] William N. Eskridge Jr, *All about Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 Colum L Rev 990, 1103 (2001), citing Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 BU L Rev 767, 791–92 (1991).

"partial, rather than facial, invalidation."[68] This presumption already reflects a substantive preference for regulation in severability analysis. Similarly, the Court sometimes confronts convergent provisions that extend benefits to two different classes in a way that violates the Equal Protection Clause. When faced with these sorts of violations, the Court's default rule is to extend benefits to the excluded class rather than eliminate benefits altogether.[69] And in *Truax v Corrigan*,[70] the Court's holding implicitly rejected a libertarian baseline. The case concerned an amendment to a long-standing statute that empowered state judges to issues injunctions.[71] The amendment had withdrawn the power to issue injunctions in cases involving employment disputes.[72] The Court first found that the statute violated the Equal Protection Clause and then considered whether it should simply sever the unconstitutional amendment or also invalidate the entire law.[73] Because it could not assure itself that the state legislature would have repealed the entire injunction statute, the Court concluded that "the original law stands without the amendatory exception."[74]

2. Judicial taxings.

A related objection is that it might be especially problematic for a court to effectively impose a tax. This objection has a constitutional basis: Article I gives Congress, not the federal courts, the power "to lay and collect [t]axes."[75] And in any event, giving judges such a power would undermine the values of judicial restraint and congressional supremacy that undergird severability analysis. Nevertheless, both forms of this objection fail.

First, the Court has already determined that the Article III judicial power includes the authority to order local governments to levy taxes. In *Missouri v Jenkins*,[76] for example, the Court

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68 *Free Enterprise Fund*, 561 US at 508, quoting *Brockett v Spokane Arcades, Inc*, 472 US 491, 504 (1985).

69 See, for example, *Califano v Westcott,* 443 US 76, 89 (1979); Manheim, 101 Iowa L Rev at 1852–53 (cited in note 26).

70 257 US 312 (1921).

71 Id at 331, 341.

72 Id at 322.

73 Id at 331–39, 341.

74 *Truax*, 257 US at 342.

75 US Const Art I, § 8, cl 1.

76 495 US 33 (1990).

addressed the federal courts' remedial authority to address racially segregated public schools. The majority observed that "a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court."[77] Of course, this taxation ruling has been controversial from the start. In *Jenkins* itself, four Justices dissented from the majority's taxation "dictum."[78] And since the decision, members of Congress[79] and scholars[80] have raised concerns about the majority's broad understanding of the judicial taxing power.

But all nine Justices in *Jenkins* recognized a narrower judicial power to *re-impose* taxes.[81] In a series of cases dating back to the 1860s, the Supreme Court has repeatedly re-imposed taxes when a legislature's repeal of a taxing authority itself created a constitutional violation.[82] These cases share a common fact pattern: A state would authorize a municipality to issue bonds and to levy a tax to fund those bonds. When the state subsequently repealed the taxing authority, the bondholders would file a suit alleging a violation of the Contracts Clause.[83] Because the Supreme Court in these cases "held the subsequent limitation [on the taxing authority] itself unconstitutional," only "the original specific grant of authority remained."[84] In effect, the Court would reinstate a tax.

These century-old bond cases help to resolve the objections to re-imposing the individual mandate's tax penalty. Just as in

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[77] Id at 55.

[78] Id at 58 (Kennedy concurring in part and concurring in the judgment).

[79] See Judicial Mandate and Remedy Clarification Act, HR 3182, 105th Cong, 2d Sess (Feb 11, 1998), in 144 Cong Rec H445 ("A Bill [t]o limit the authority of Federal courts to fashion remedies that require local jurisdictions to assess, levy, or collect taxes or to implement spending measures, and for other purposes."); Fairness in Judicial Taxation Act of 1996, S 1817, 104th Cong, 2d Sess (May 23, 1996), in 142 Cong Rec S5567 (same).

[80] See, for example, Janice C. Griffith, *Judicial Funding and Taxation Mandates: Will* Missouri v. Jenkins *Survive under the New Federalism Restraints?*, 61 Ohio St L J 483, 584–633 (2000); Douglas J. Brocker, Note, *Taxation without Representation: The Judicial Usurpation of the Power to Tax in* Missouri v. Jenkins, 69 NC L Rev 741, 760–64 (1991); Paul J. Collins, Note, *Taxation by Judicial Decree:* Missouri v. Jenkins, 44 Tax Law 1141, 1148–51 (1991); Roger Pilon, *Judicial Taxation* (Cato Inst, Sept 19, 1996), archived at http://perma.cc/VMB3-ZAZ8.

[81] See *Jenkins*, 495 US at 55–56; id at 72–73 (Kennedy concurring in part and concurring in the judgment).

[82] See *Louisiana v Mayor and Council of the City of New Orleans*, 215 US 170, 181 (1909); *Graham v Folsom*, 200 US 248, 253 (1906); *Wolff v New Orleans*, 103 US 358, 368–69 (1881); *Von Hoffman v City of Quincy*, 71 US (4 Wall) 535, 555 (1867).

[83] See US Const Art I, § 10, cl 1.

[84] *Jenkins*, 495 US at 72 (Kennedy concurring in part and concurring in the judgment).

the bond cases, the Court would be reinstating a tax that a legislature had unconstitutionally repealed. This narrow judicial taxing power also seems less problematic with respect to the separation of powers. It is not a freewheeling power to lay and collect a tax of any amount. Rather, it is a narrow power to restore all the parties to the pre-amendment status quo.[85] In other words, such a court order does nothing more than put Congress and the states "back in the same position [they] occupied" before the unconstitutional amendment.[86] And according to *Frost*'s application of *Marbury*'s reasoning, this original position reflects "the only valid expression of the legislative intent."[87]

3. Congressional procedures.

A final question is whether courts should feel bound by internal congressional procedures when conducting severability analysis. For instance, should a judge take into account the filibuster or the Byrd Rule in assessing what Congress could have done? Should it matter that a simple majority of the Senate could have repealed these rules?[88]

A full defense of the relevance of internal congressional rules in judicial interpretation is beyond the scope of this Article. But there are a number of reasons to think that courts should recognize these rules for the purpose of severability analysis. For one thing, the Constitution expressly empowers each House to "determine the [r]ules of its [p]roceedings."[89] In light of this specific textual grant, it seems appropriate for courts to view these internal rules deferentially—that is, judges should accept the rules as they are, not as they could be. Second, this deference makes particular sense in light of the value of judicial restraint animating severability doctrine. A doctrine that allowed courts to freely disregard congressional rules would aggrandize rather than restrain the judiciary. Third, practically

85 For an extended defense of the judicial taxing power as a means of enforcing judgments, see generally D. Bruce La Pierre, *Enforcement of Judgments against States and Local Governments: Judicial Control over the Power to Tax*, 61 Geo Wash L Rev 299 (1993).

86 Griffith, 61 Ohio St L J at 550 (cited in note 80).

87 *Frost*, 278 US at 527.

88 See Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* 361–69 (Basic Books 2012) (arguing that the Senate can repeal the filibuster by majority vote).

89 US Const Art I, § 5, cl 2.

speaking, the fact that Congress has not yet abandoned an internal rule seems to be as good evidence as any that Congress would not have abandoned the rule even in the counterfactual alternative. In other words, if courts engaging in severability analysis are supposed to ask what Congress would have done, courts should presumptively follow what they actually did—in this case, follow the internal rule.

Finally, and perhaps most importantly, the Supreme Court has in past cases already taken into account internal congressional rules. For example, in *National Labor Relations Board v Noel Canning*,[90] the Supreme Court held that, "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."[91] Significantly, the Court explained this ruling in part by noting that courts "must give great weight to the Senate's own determination of when it is and when it is not in session."[92] Even more aptly, in *King v Burwell*,[93] the Supreme Court considered the role of congressional rules when interpreting the ACA. The Court observed that "Congress passed much of the Act using a complicated budgetary procedure known as 'reconciliation,'"—the same procedure at issue in the most recent ACA litigation—"which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement."[94] And in light of these procedures, the Court interpreted the ACA more purposefully on the view that the Act did "not reflect the type of care and deliberation that one might expect of such significant legislation."[95]

This brief discussion does not mean to take a stand on much broader and more complicated debates about statutory interpretation. It makes a much more modest point: that under existing practice, it makes sense for courts to take into account congressional rules when engaging in severability analysis.

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90 134 S Ct 2550 (2014).

91 Id at 2574.

92 Id at 2575.

93 135 S Ct 2480 (2015).

94 Id at 2492.

95 Id. See also Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 Harv L Rev 62, 96–109 (2015) (discussing the relationship between the modern, "unorthodox" legislative process and statutory interpretation).

CONCLUSION

This Article uses the most recent challenge to the ACA's constitutionality to explore an important facet of severability doctrine. We take no stand on broader questions about the ACA's constitutionality (or its desirability as policy, for that matter). But we do argue that the remedy requested by the challengers violates both long-standing severability doctrine and the quasi-constitutional justifications that have shaped the doctrine's development. Instead, both doctrine and theory support a default rule that, in cases of unconstitutional statutory amendments, courts should favor restoration of the status quo. Therefore, if a court rules for plaintiffs on the merits, the appropriate relief is to invalidate the Tax Cuts Act's repeal of the individual mandate penalty and restore the individual mandate to its pre-amendment form.