

Reading the Findings: Location, Text, Context and Textualism as the ACA Returns to the Court

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Forthcoming 130 Yale L.J.F. (2020)

[unpublished draft version]

“Read the statute! Read the statute! Read the statute!”

-Felix Frankfurter²

Textualism had a big Term this year in the Supreme Court. From major decisions on sexual-orientation discrimination to Indian reservations,³ Justice Scalia’s imprint on the Court endures.

Enter, once more, the Affordable Care Act (ACA). As the one of the most significant statutes of the modern era, it is no surprise that the ACA keeps pulling us into the statutory weeds. This fall, the ACA returns to the Supreme Court for the seventh time,⁴ in *California v. Texas*; it is the second time the Court has been asked to invalidate the *entire* 2,000-page law.⁵ This time, the law’s challengers are trying to use a false textualism to implode it. The challengers’ textualism is not real textualism: it ignores the ACA’s statutory organization, the words of the ACA itself, and Congress’s consistent drafting practices across the U.S. Code. The Court should not take the bait.

In *California*, the Court is being asked what it should do with the rest of the ACA if the Court finds the individual insurance-purchase mandate—the ACA’s requirement that most Americans obtain health insurance—unconstitutional. The question has arisen because Congress included a provision in the 2017 Tax Cuts and Jobs Act amending the ACA in one, single way: Congress reduced the tax penalty for noncompliance with the mandate to zero.⁶ Because the Court, in the first existential challenge to the ACA, *NFIB v. Sebelius*, held that the mandate could be construed as a legitimate exercise of Congress’s taxing power, but not its commerce power,⁷ Texas and 17 other states now argue that without a tax penalty, the mandate can no longer be construed as a tax, and that if it’s not a tax, it therefore becomes an exercise of the commerce power and so

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² Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 202 (1967) (quoting Justice Felix Frankfurter).

³ *See, e.g.*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (textual analysis of Title VII); *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020) (textual analysis of ACA’s promise to pay insurers); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (textual analysis rejecting disestablishment of Indian reservations).

⁴ For the previous ACA cases see *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020); *Trump v. Pennsylvania*, 140 S. Ct. 918 (2020) (mem.); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); and *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

⁵ Brief for Respondent/Cross-Petitioner States at 37, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019); *see Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

⁶ Act of Dec. 22, 2017, Pub L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

⁷ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. at 574-75.

is unconstitutional. But then they go even further and argue that the mandate is so critical to key provisions of the law that if the mandate is unconstitutional, the *entire* 2,000-page law must fall with it. They rely on a “textualist” argument about the statutory findings that is not really textualist at all.

The case should be easy, although nothing ever is with the ACA. For decades, the Court has applied an established, apolitical, and uncontroversial interpretive doctrine: the “severability doctrine” presumes that unless Congress clearly indicates otherwise, Congress intends the remainder of a statute to stand if one provision is held invalid. The Court reaffirmed these “ordinary severability principles” twice this past Term, calling the doctrine “a strong presumption,”⁸ and describing the test:

[W]e try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact. . . . We will presume that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision unless there is strong evidence that Congress intended otherwise.⁹

To use the Court’s analogy, employed most recently by both Chief Justice Roberts and Justice Kavanaugh, the doctrine is a “scalpel rather than a bulldozer.”¹⁰ “The Court’s precedents reflect a decisive preference for surgical severance rather than wholesale destruction, even in the absence of a severability clause.”¹¹

Sometimes the severability doctrine requires the Court to go down uncomfortable pathways of ascertaining hypothetical congressional intent to determine if Congress would have wanted the rest of the statute to stand. That kind of inquiry can be especially uncomfortable for textualists, and is one reason the Court has reaffirmed that it *presumes* Congress intended the statute to survive unless Congress actually indicates otherwise.¹² The ACA case is much easier for textualists because the 2017 Congress itself eliminated the penalty but left the rest of the ACA intact—leaving an explicitly enacted, text-based congressional indication for the rest of the statute to survive, expressed as clearly as it possibly could be by the continued existence of the ACA itself. That should be the end of it.

This Essay devotes little attention to the severability doctrine. My focus instead is on the second-tier argument on which the challengers have now decided to hang their hats—an argument that the Court, knowing the 2017 Congress clearly left the rest of the ACA standing, should never have to reach. The challengers seize on a few words in one subparagraph of the ACA’s statutory findings taken entirely out of their location and context in the law. They now argue those words

⁸ *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S.Ct. 2335, 2350 (2020).

⁹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2209 (2020) (internal quotations, citations and ellipses omitted); *see also Barr*, 140 S.Ct. at 2349 (describing the same test).

¹⁰ *Seila Law*, 140 S.Ct. 2183 (2020); *see also Barr*, 140 S.Ct. at 2351 (“[T]he Court invalidates and severs unconstitutional provisions from the remainder of the law rather than razing whole statutes or Acts of Congress.”).

¹¹ *Barr*, 140 S.Ct. at 2350-2351.

¹² *Barr*, 140 S.Ct. at 2351.

are an explicit “inseverability clause” that applies to the statute as a whole¹³ and trumps the presumption of severability—meaning that if the mandate is eliminated the whole ten-title ACA goes down with it.

The challengers argue this despite the fact that those findings are specific to one subsection, of one Part, in one subtitle, of the ten-title law, and also despite the fact that the language they seize on is boilerplate language that Congress has used in scores of other statutes, not for the purpose of severability, but to justify Congress’s *commerce* power. They argue this even though Congress expressly tells us, in the subsection itself and also in the subsections directly above and below it, that the findings are indeed directed at establishing congressional authority under the Commerce Clause. And, they argue this even though, reading the entire subsection literally as they ostensibly would have us do, it would mean that not only the ACA goes down but also that the nation’s entire pensions and employee benefits regulatory system—the 1974 ERISA statute—goes down too.

And most importantly, they argue that Congress has actually spoken to the issue, even though Congress’s established drafting practices, substantiated by its drafting manuals and examples throughout the U.S. Code, make clear that when Congress actually writes an inseverability clause, it is unmistakably explicit about it and writes with specific language. Congress used none of that language in the ACA.

The Court deploys a “strong presumption” of severability because striking down whole statutes is the most invasive and destructive of all statutory-case remedies. Congress mirrors that presumption by inserting explicit inseverability clauses in only a small number of select statutes; because of course Congress does not generally hope that all of its work-product will be struck down. Inseverability is a nuclear bomb. Congress doesn’t hide it in mouseholes.¹⁴ True textualists wouldn’t go looking for it by implication.

During the first existential challenge to the ACA, *NFIB v. Sebelius*, Justice Scalia compared a cover-to-cover read of the ACA to cruel and unusual punishment, asking: “You really want us to go through these 2,700 pages? And do you really expect the Court to do that?”¹⁵

Well, yes. You’re either a textualist or you’re not. “Honest textualists,”¹⁶ to use another Scalia-ism, look at statutory organization, including provision placement. They look at *all* the words in context. They look at how Congress has drafted similar provisions in other statutes. They look at earlier versions of the statute. They look for evidence that Congress knows how to speak clearly when it wants to make the point in question and that it has done so elsewhere. They

¹³ Brief for Respondent/Cross Petitioner States at 7, 14, 37–38, 46, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019); Brief for the Federal Respondents at 13, 42–43, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019).

¹⁴ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

¹⁵ Transcript of Oral Argument at 38, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Nos. 11-393, 11-400).

¹⁶ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 28 (1997).

look for clear evidence that Congress indeed said what the lawyers claim it was saying. This essay discusses each of those points in turn.

There is a burgeoning movement among legal scholars and jurists of all interpretive stripes to better understand how Congress drafts laws.¹⁷ Those developments, this analysis should make clear, are as relevant, if not more relevant, for textualists as for anyone else.

I. Why are the Findings Even at Issue?

Together with others, including some of the ACA's most prominent former legal opponents,¹⁸ I have detailed the stunning shortcomings of the challengers' application of severability doctrine. It is true that established severability doctrine, textualism notwithstanding, sometimes requires courts to hunt for crumbs of congressional intent—which is what the challengers attempt with the findings—but that is supposed to happen only where Congress has not clearly expressed itself. Here, the Court should not ever need to reach any of the arguments about the findings.

There are serious democracy concerns here. There is no evidence that Congress's penalty repeal was a surreptitious effort to render the entire law unconstitutional and thus implode it. All evidence points to the contrary. And the Court never presumes Congress legislates to destroy; and it always presumes Congress legislates constitutionally.¹⁹ Moreover, to strike down the entire ACA after Congress itself tried and failed more than seventy times to repeal it all and then concluded in 2017 that it could only eliminate the penalty—as Leader McConnell himself said, “we obviously were unable to completely repeal and replace”²⁰—would not just violate

¹⁷ See, e.g., *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782–83 (2018) (Sotomayor, J., concurring); *Yates v. United States*, 574 U.S. 528, 562 (2015) (Kagan, J., dissenting); *Carr v. United States*, 560 U.S. 438, 463 (2010) (Alito, J., dissenting); *Council for Urological Interests v. Burwell*, 790 F.3d 212, 233 (D.C. Cir. 2015) (Henderson, J., dissenting in part); *Loving v. I.R.S.*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (opinion by then-judge Kavanaugh); ROBERT A. KATZMANN, *JUDGING STATUTES* (2014); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Abbe R. Gluck & Jesse M. Cross, *The Congressional Bureaucracy*, 168 U. PA. L. REV. (forthcoming 2020); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012).

¹⁸ Brief for Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, and Ilya Somin as Amici Curiae Supporting Petitioners, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019) (bipartisan brief including the architect of previous major ACA Supreme Court challenge, *King v. Burwell*). For other examples, see Brief of Amicus Curiae States of Ohio and Montana in Support of Neither Party, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019) (brief from two Republican state attorneys general arguing that the mandate is severable from the rest of the Affordable Care Act); Michael F. Cannon, *Obamacare's Enemy No. 1 Says This is the Wrong Way to Kill It*, CATO INST. (Mar. 28, 2019), <https://www.cato.org/publications/commentary/obamacares-enemy-no-1-says-wrong-way-kill-it> [<https://perma.cc/5YXN-CDGG>]; Editorial Board, *Texas ObamaCare Blunder*, WALL ST. J. (Dec. 16, 2018, 4:40 PM EST), <https://www.wsj.com/articles/texas-obamacare-blunder-11544996418> [<https://perma.cc/8WZA-BEEK>] (opposing the challenge even though “[n]o one opposes ObamaCare more than we do”).

¹⁹ See, e.g., *Bond v. United States*, 572 U.S. 844, 856 (2014); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559-60 (2012).

²⁰ Kelsey Snell & Susan Davis, *McConnell Ready to 'Move on' from Obamacare Repeal, Others in GOP Say Not so Fast*, NPR (Dec. 2017), <https://www.npr.org/2017/12/21/572588692/mcconnell-wants-bipartisanship-in-2018-on-entitlements-immigration-and-more> [<https://perma.cc/BE3A-4C7W>] (“[W]e obviously were unable to completely repeal and replace.”).

severability doctrine; it would be a usurpation of the clearly expressed legislative prerogative. It would also retroactively superimpose an inseverability clause on the ACA that the 2017 Congress did not know existed when it amended the law, and clearly assumed otherwise.

Another democracy point: the Court's duty is to give proper effect to Congress's actions in 2017; whatever any earlier Congress said or thought has no relevance now that a later Congress has acted. The Constitution prohibits entrenching the views of an earlier Congress over a later one, and always allows Congress to change its mind.²¹ Textualism claims its legitimacy from the separation of powers.²²

While there is more to be said about severability, including some brewing opposition to aspects of the doctrine among two members of the Court²³ (and also the question whether a penalty-less mandate is still a tax, a point on which this Essay takes no position²⁴), the rest of this Essay focuses on the findings. Given the clear evidence that the ACA can indeed function without an enforced mandate—evidence that the 2017 Congress relied on and that continues to grow since 2017—the challengers have mostly abandoned their earlier arguments that the ACA is unworkable without a mandate, or that the 2017 Congress secretly tried to plant a ticking time bomb in the law (something the Court is not allowed to presume under its textualist canons).²⁵ All that is left is a thin statutory reed—a findings subparagraph in the ACA as originally enacted in 2010 that serves to justify the mandate under the Commerce Clause and that, unlike actual inseverability clauses in the U.S. Code, says nothing explicit about inseverability and uses none of the boilerplate language that Congress uses every single time it writes a real inseverability clause.²⁶

²¹ See *Dorsey v. United States*, 567 U.S. 260, 273-74 (2012); cf. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1665 (2002) (calling the “principle of constitutional law holding that one legislature may not bind the legislative authority of its successors a constitutional axiom” (internal quotation marks omitted)).

²² See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 23–24 (2012); John F. Manning, *Textualism as Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

²³ See *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S.Ct. 2335, 2351 n.8 (2020) (detailing and refuting arguments by Justices Thomas and Gorsuch that courts have no power to sever but rather should “simply enjoin enforcement of a law as applied to the particular plaintiffs in a case”). This theoretical debate may not affect the outcome in *California* because Justice Thomas’ ostensible preference to simply render the provision in question unenforceable against the plaintiffs may point toward the same outcome here; only the mandate would be invalidated.

²⁴ Compare, e.g., Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L.R. 1331, 1337 (2013) (arguing that *NFIB* invalidated the individual mandate), with Opening Brief of Petitioners at 33, *California v. Texas*, 140 S. Ct. 1262 (2020) (No. 18-840).

²⁵ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012) (“And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”); *Whitman*, 531 U.S. at 468.

²⁶ See Brief for Respondent/Cross Petitioner States at 7, 14, 38, 42, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019); Brief for the Federal Respondents at 13, 37, 39–43, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019).

II. Read the Statute, Read the Statute, Read the Statute: Textualists Use Statutory Location and Organization, Words in Context, and Established Drafting Practices Throughout the U.S. Code

The challengers' main argument is that language from the mandate's findings serves as an "inseparability clause." This despite three central tenets of textualism that have applicability far beyond the ACA that I introduce here and which this essay will detail in turn:

1) Location matters:

Our textualist Court puts a heavy premium on statutory organization and provision placement. Sometimes Congress decides a provision's location. Other times the nonpartisan codifiers do so after enactment. The Court has paid scant attention to this difference, but in this case, the placement of the ACA's mandate findings in the statute was decided by Congress and is especially significant.²⁷

The findings are not the kind of general statutory findings that Congress commonly places at the beginning of a law. Rather, the ACA's mandate findings are specific to *one subsection*. They are buried at the end of Title I of the ten-title ACA; they sit in the penultimate of seven *separate subtitles* of Title I and do not even apply to all of that subtitle, the second half of which deals with the entirely separate employer mandate. All of the other private insurance reforms sit in different subtitles before the one containing the findings, and the public insurance reforms, including reforms to Medicare and Medicaid, come after it, in different titles, subtitles, and parts of the law. The findings invoked by the ACA's opponents are sandwiched between two paragraphs that explicitly state that the findings are there to "describe[]" how the mandate is "commercial and economic in nature, and substantially affects interstate commerce."²⁸ The ACA has *two other*, different subsection-specific findings elsewhere in the ten titles, further indicating that each findings subsection is local in its effect. Given this textual structure, no textualist should read the findings as having any operative effect on other sections of the law or beyond its limited descriptive use in the subsection.

2) Words matter:

The words used in the findings have nothing to do with severability; they are specific to Congress's Commerce Clause power. They not only say so explicitly, but are patterned after numerous other findings in the U.S. Code that likewise use the terms "essential to" and "markets"—words the challengers now argue connote inseparability—to justify Congress's authority under the commerce power.

The words in the findings precisely track the instructions in Congress's drafting manuals about when findings should be used and written. The drafting manuals discourage findings in general but note they can be useful to clarify or head off legal disputes and single out *Commerce*

²⁷ The organization comes from the enacted public law, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a), 124 Stat. 119, 242 (2010), and not the post-vote Code-organization process.

²⁸ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119, 242 (2010); *see also id.* at § 1501(a)(3) ("[I]nsurance is interstate commerce subject to Federal regulation.").

Clause findings as the primary example of when they should be used and how they should be drafted.²⁹ The other two findings sections in the ACA are likewise responsive to (different but specific) legal and statutory questions and likewise do not have broader applicability. Of course, any findings about commerce power are moot after *NFIB*, which invalidated Congress's Commerce Clause justification. And the findings never use the words “inseverability,” “invalid,” or any similar term.

Even more eye-opening, the words in the findings themselves say the mandate is essential to Congress's *overall* regulation of insurance, including statutes *outside* the ACA. Read as an actual inseverability directive, under the challengers' argument, the findings therefore would mean that ERISA (the 1974 law that governs *millions* of employer-provided benefit and pension plans) and the Public Health Service Act (which gives HHS public health emergency authority) must also fall with the mandate; an absurd result.

3) Established congressional practice, evidenced by other statutes, matters—Congress knows how to speak clearly about inseverability and does so:

Statutes throughout the U.S. Code make clear that when Congress does speak about inseverability, it is explicit. Congress uses specific words and breaks the point off into a separate section or subsection or paragraph, clearly marked.³⁰ The House and Senate drafting manuals instruct against the inclusion of express severability clauses, citing the Court's own stated presumption in favor of severability. But the manuals specify the need for explicit *inseverability* clauses for the same reason.³¹ They also instruct that inseverability clauses should be explicit about what is not to be severed if partial severability is desired. The inseverability clauses throughout

²⁹ From the drafting manuals: OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 28 (1995) [hereinafter HOUSE DRAFTING MANUAL] (“Discourage clients from including findings and purpose.”); *id.* at 28 n.3 (“Discourage clients from including findings and purpose”); *id.* at 28 n.3 (“[T]here are certain circumstances in which congressional findings may be imperative to establish the constitutional basis for congressional action. This is particularly the case in legislation in which congressional action is based on the effect of an activity in interstate commerce.”).

³⁰ *Id.* at 32–33 (“SEC. 328. SEVERABILITY CLAUSES. The Supreme Court has made it quite clear that invalid portions of statutes are to be severed ‘unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not’. . . . Consequently, a severability clause is unnecessary unless it provides in detail which related provisions are to fall, and which are not to fall, if a specified key provision is held invalid.”); OFFICE OF THE LEGISLATIVE COUNSEL, U.S. SENATE, LEGISLATIVE DRAFTING MANUAL 49–50 (1997) [hereinafter SENATE DRAFTING MANUAL] (“SEC. 131. SEVERABILITY CLAUSES. In GENERAL. The Supreme Court has made it clear that an invalid portion of a statute is to be severed ‘unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not. . . . Consequently, a severability clause is unnecessary. (a) NONSEVERABILITY. (1) IN GENERAL. A nonseverability clause provides that if a specific provision of an Act is declared invalid, the whole Act or some portion of the Act shall be invalid. (2) FORM. The form is as follows: (c) EFFECT OF INVALIDITY ON OTHER PROVISIONS OF 2 ACT. If section 501, 502, or 503 of the Federal Election 3 Campaign Act of 1971 (as added by this section) or any part 4 of those sections is held to be invalid, all provisions of and 5 amendments made by this Act shall be invalid.”).

³¹ HOUSE DRAFTING MANUAL, *supra* note 29, at 32-33; SENATE DRAFTING MANUAL, *supra* note 30, at 49-50.

the U.S. Code follow this direction. All of them, moreover, use the same language—including all using the word “invalid,” itself patterned in the manuals—language entirely absent here.³²

The Court’s textualism jurisprudence has held, over and over—including several times this past Term—that when Congress shows it knows how to say something explicitly, the Court will not imply the same point elsewhere if Congress has not likewise been explicit.³³

It should be emphasized that the challengers are not arguing the ACA is not functional without a mandate. Sometimes, the challengers make severability arguments using unworkability as a proxy for congressional intent. No one is doing that here because they cannot on the facts; the ACA is functioning (indeed, playing a critical role during COVID-19) and Congress had ample evidence before it in 2017 that the statute could function without a mandate. So instead, the challengers must argue that *Congress has spoken; that Congress has said* the mandate cannot be severed and that those words must now be followed, come what may, even if the 2017 Congress did not realize it was destroying the law. So the precise question is whether these findings are really how Congress speaks about inseverability.

Congress does not hide inseverability in haystacks, and does not give courts the power to implode laws with implicit language. Justice Scalia himself once complained that the Court “changes the usual rules of statutory interpretation for the sake of the Affordable Care Act.”³⁴ The point goes both ways.

A. The Findings Subparagraph at Issue and the Arguments Being Made About Them

The ACA has ten titles. Title I alone has seven subtitles, each with multiple parts and subparts. At the end of Title I, in the second to last subtitle, subtitle F, in Part I of two Parts of that subtitle, there is the findings subsection in question, 1501(a). It is important to read that subsection *in full*.³⁵ Highlighted in yellow are express references to the commerce power and effects on markets. Highlighted in green are the provisions on which the challengers rely, with most of their argument and citations focused on subparagraph (I). Subparagraphs H, I and J noted in green, which the challengers cite, also reference commerce effects on the national market.

³² Searches were conducted of both the Westlaw Historical Public Law Database since 1973 and the Office of Law Revision Counsel’s compilation of the U.S. Code for the root terms “inseverab!,” “inseparab!,” “notseverab!,” “nonseparab!,” “not severab!,” “not separab!” and “invalid!” to find statutes with inseverability clauses.

³³ See, e.g., *McGirt v. Oklahoma*, No. 18–9526, 2020 WL 3848063, at *5 (U.S. July 9, 2020) (providing different ways Congress “speak[s]” to the question and “clearly express[es] its intent,” and declaring “[h]istory shows that Congress knows how to withdraw a reservation when it can muster the will”). See also *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (internal citations omitted) (refusing to adopt construction when Congress has shown elsewhere it knows how to make the point “in a much more straightforward way”).

³⁴ *King v. Burwell*, 135 S. Ct. 2480, 2506–07 (2015) (Scalia, J., dissenting).

³⁵ 42 U.S.C. § 18901 (2019), Pub. L. No. 111-148, § 1501(a) *as amended by* Pub. L. No. 111-148, § 10106(a).

Congress makes the following findings:

(1) In general

The individual responsibility requirement provided for in this section (in this section referred to as the “requirement”) is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) Effects on the national economy and interstate commerce

The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from \$2,500,000,000,000, or 17.6 percent of the economy, in 2009 to \$4,700,000,000,000 in 2019. Private health insurance spending is projected to be \$854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

(E) The economy loses up to \$207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost.

(F) The cost of providing uncompensated care to the uninsured was \$43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over \$1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.

(G) 62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(H) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. 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.

(I) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The 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.

(J) Administrative costs for private health insurance, which were \$90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(3) Supreme Court ruling

In United States v. South-Eastern Underwriters Association (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.

The crux of the challengers' argument is that, in subparagraph (a)(2)(I), Congress called the mandate "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." The challengers rely in part on the argument of the Obama-era DOJ in *NFIB*, that that same phrase was evidence that Congress would not want the mandate invalidated without also invalidating two other provisions of the statute, namely, new insurance provisions prohibiting medical underwriting and discrimination based on preexisting conditions (which are laid out in subtitle C, not subtitle F, where these findings are).³⁶ DOJ and Texas now argue that because Congress did not *repeal* the findings section when it rendered the mandate unenforceable in 2017, the 2017 Congress reaffirmed its agreement with what amounts to an implicit "inseverability clause" in the form of this subparagraph enacted in 2010.

As I wrote before *NFIB*, the Obama DOJ was wrong to make this inseverability argument.³⁷ But even the 2012 DOJ position did not say that Congress was *trying to write inseverability into the law* with the mandate's findings. The DOJ position was that, even though Commerce Clause findings are not an actual inseverability clause, the findings helped answer a difficult evidentiary question *back then* as to what Congress would have wanted to do with the rest of the ACA if the mandate had been struck down.

³⁶ See Brief for Respondent/Cross Petitioner States at 7, 38, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019); Brief for the Federal Respondents at 42, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19-840, 19-1019); Brief for Respondents, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Nos. 11-393, 11-400).

³⁷ Abbe R. Gluck & Michael J. Graetz, *The Severability Doctrine*, N.Y. TIMES (Mar. 22, 2012), <https://www.nytimes.com/2012/03/23/opinion/the-severability-doctrine> [<https://perma.cc/4362-293N>]. The Chief Justice also was wrong to cite the findings in *King v. Burwell*, the second major challenge to the ACA to reach the Court, given that his own opinion rejecting the Commerce Clause justification rendered them irrelevant. 135 S. Ct. 2480, 2494 (2015).

The findings were to be used as some evidence of congressional intent in 2012 because the settled severability doctrine asks courts to determine what Congress would have wanted if Congress's views are not clear (one reason Justice Thomas frowns on the doctrine as a "nebulous inquiry into hypothetical congressional intent"³⁸). In 2012, there was some dispute as to what the 2010 Congress would have wanted to do with the ACA without a mandate.

That is not the case now. And that is not the way the challengers are now using the findings. That makes them doubly irrelevant. The 2017 Congress's intent constitutionally supersedes the 2010 Congress's intent. And the 2017 Congress's intent as to the rest of the ACA is clear from Congress's own actions in leaving the ACA standing after it defanged the mandate; there is no need for the atextual inquiry into "hypothetical congressional intent" that some members of the Court have bemoaned in severability cases and that Justice Kavanaugh recently deemed "imaginative reconstruction" and an "analytical dead end."³⁹ Although the Court sometimes turns to a *functionality* inquiry when considering severability, and while the findings may have been illustrative in 2012 for such purposes, that kind of inquiry is only a proxy for congressional intent when Congress does not itself express its view, as the 2017 Congress did, about the continued existence of the law.

Of course, the 2017 Congress was allowed to change its mind from 2010. The 2017 Congress amended the law to neuter the mandate with evidence from the Congressional Budget Office and others that the ACA could function without a mandate,⁴⁰ and the 2017 Congress did not need new findings to do so. The 2017 Congress amended the ACA through its *taxing* power, and the Court has not asked for findings in the context of taxation. Regardless there can be no doubt that the law continues to function.⁴¹

³⁸ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring) (citing *United States v. Booker*, 543 U.S. 220, 320 n.7 (2005) (Thomas, J., dissenting in part)).

³⁹ *Id.*; *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350 (2020) ("But experience shows that this formulation often leads to an analytical dead end. That is because courts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent.").

⁴⁰ *Options for Reducing the Deficit: 2017 to 2026*, CONG. BUDGET OFF. 237 (Dec. 2016) <https://www.cbo.gov/system/files/2018-09/52142-budgetoptions2.pdf> [<https://perma.cc/6YUL-NNNX>] (concluding that adverse selection problems created by repeal of individual mandate would be "mitigated" by premium subsidies, which "would greatly reduce the effect of premium increases on coverage among subsidized enrollees"); see also Timothy Jost, *The Tax Bill and the Individual Mandate: What Happened, and What Does It Mean?*, HEALTH AFF. (Dec. 20, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20171220.323429/full> [<https://perma.cc/R2KF-JC3Y>] ("[R]epeal of the individual mandate penalty will not by any means bring an end to the ACA.").

⁴¹ Rachel Fehr et al., *Individual Insurance Market Performance in 2019*, KFF (May 13, 2020), <https://www.kff.org/private-insurance/issue-brief/individual-insurance-market-performance-in-2019> [<https://perma.cc/VDP9-FT4Y>] (detailing the ACA's exchange stability and profitability); Tami Luhby, *Nearly Half a Million People Flocked to Obamacare After Losing Coverage This Year*, CNN (June 25, 2020, 6:21 PM EST), <https://www.cnn.com/2020/06/25/politics/obamacare-enrollment-jobs-trump> [<https://perma.cc/JXL4-99JF>] (describing spikes in enrollment since the start of the COVID-19 pandemic and noting that eleven states that run their own exchanges launched special enrollment periods to allow anyone to sign up for policies in the wake of the pandemic); Karyn Schwartz, *Coronavirus Response and the Affordable Care Act*, KFF (Mar. 23, 2020) <https://www.kff.org/coronavirus-covid-19/issue-brief/coronavirus-response-and-the-affordable-care-act> [<https://perma.cc/B6NV-6L2Z>] (detailing the ACA's role in COVID-19 response).

But the critical point is that the challengers are not arguing functionality; they are not arguing the ACA is unworkable without a mandate. They are arguing that Congress *actually said*, with this subparagraph, that the entire statute was inseverable from it.

Textualists from Justice Scalia to Dean John Manning have emphasized that honest textualists don't take words out of context;⁴² Justice Scalia wrote there is “no greater interpretative fault than the failure to . . . consider the entire text, in view of its structure and of the physical and logical relation of its many parts”⁴³ When it comes to legal interpretation, as Manning wrote, statutory context importantly includes “specialized conventions and linguistic practices peculiar to the law.”⁴⁴

B. Location, Location, Location

Every Justice on the Court routinely relies on *location*—where a provision is placed relative to other provisions in the statute—as well as on statutory *organization* as aids to interpretation. There are myriad examples. To offer just a few from recent cases, in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*,⁴⁵ a bankruptcy case, Justice Thomas, writing for the Court, relied in part on the location of a stamp tax exemption in a statutory chapter⁴⁶: “We find it informative that Congress placed § 1146(a) in a subchapter entitled, ‘Postconfirmation Matters.’ . . . The placement of § 1146(a) . . . undermines Piccadilly’s view that § 1146(a) covers preconfirmation transfers.”⁴⁷ In *Yates v. United States*,⁴⁸ in which the question was whether a fish was a “tangible object” for purposes of the evidence-destruction provisions of the Sarbanes-Oxley Act,⁴⁹ a textualist plurality opinion by Justice Ginsburg relied on code placement, emphasizing that the provision in question followed provisions specific to the corporate context, not generally-applicable prohibitions.⁵⁰ In another recent case, Justice Alito, in holding that the Wartime Suspension of Limitations Act (WSLA) applies only to criminal, not also civil, charges, the Court relied in part on the placement of WSLA in Title 18 of the U.S. Code,⁵¹ which concerns “Crimes and Criminal Procedure.”⁵²

Cases from just this past Term offer more examples. In *Maine Community Health Options v. United States*, another ACA case, Justice Sotomayor wrote that “Section 1342’s adjacent

⁴² See SCALIA & GARNER, *supra* note 22, at 167; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79–85 (2006).

⁴³ SCALIA & GARNER, *supra* note 22, at 167.

⁴⁴ Manning, *supra* note 42, at 81.

⁴⁵ 554 U.S. 33 (2008).

⁴⁶ *Id.* at 47.

⁴⁷ *Id.* (capitalization altered).

⁴⁸ 574 U.S. 528 (2015).

⁴⁹ *Id.* at 532.

⁵⁰ *Id.* at 540 (arguing that “[s]ection 1519’s position within Chapter 73 of Title 18 further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind. Congress placed § 1519 . . . at the end of [Chapter 73], following immediately after pre-existing [specialized provisions expressly aimed at corporate fraud and financial audits]”).

⁵¹ *Kellogg Brown & Root Servs., Inc. v. United States, ex rel. Carter*, 135 S. Ct. 1970, 1976–77 (2015).

⁵² *Id.* at 1977 (“[W]e have in similar circumstances regarded the placement of a provision as relevant in determining whether its content is civil or criminal in nature.”); see also SCALIA & GARNER, *supra* note 22.

provisions also underscore” the court’s interpretation of the text as requiring insurers to be paid.⁵³ In *Seila Law v CFPB*, the Chief Justice wrote (indeed, of a severability provision there): “The language unmistakably references ‘any provision of this Act.’ 12 U.S.C. §5302. And it appears in a logical and prominent place, immediately following the Act’s title and definitions sections, reinforcing the conclusion that it applies to the entirety of the Act.”⁵⁴

My own work on the legislative process with Jesse Cross has detailed various considerations about utilizing statutory placement in this manner⁵⁵ Sometimes Congress decides where provisions are placed before they are enacted and they remain there. Other times Congress’s nonpartisan codifying office, the Office of Law Revision Counsel, rearranges provisions within the 54 titles of the U.S. Code after they are enacted. There is a plausible argument (the nuances of which Cross and I discuss) that such post-hoc arranging is inferior textualist evidence of congressional meaning compared to the arranging work done prior to enactment by the original drafters of the statute.

The findings subsection of the mandate is one of those instances in which the provision’s location was dictated by Congress before enactment and so provides particularly compelling evidence of the confined reach of its effect.

1. The ACA’s Structure and Organization

Let’s look at the ACA’s *ten* titles. Title I concerns private insurance reforms, including the establishment of the new state insurance marketplaces. Title II is called “the role of public programs,” and largely deals with Medicaid and the Children’s Health Insurance Program. It does not concern private insurance. Title III concerns delivery system reforms, including some new Medicare initiatives. Title IV covers public health. Title V covers health care workforce. Title VI concerns fraud, transparency, and enforcement. Title VII covers access to medicines including biologics. Title VIII is the now defunct “Class Act” for long term care. Title IX is fees and revenue provisions. Title X contains a variety of miscellaneous amendments made to sections throughout the text,⁵⁶

⁵³ *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020).

⁵⁴ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, 2020 WL 3492641, at *20 (U.S. June 29, 2020) (internal notations omitted).

⁵⁵ Abbe R. Gluck & Jesse M. Cross, *The Congressional Bureaucracy*, 168 U. PA. L. REV. (forthcoming 2020).

⁵⁶ The Health Care and Education Reconciliation Act, Pub. L. 111-152, 124 Stat. 1029 (2010), passed one week after the ACA, included other scattered amendments. As it always does, *see* Gluck & Cross, *supra* note 55, the Office of Law Revision Counsel (Congress’s codifiers), for purposes of compilation in the U.S. Code, arranged the sections of the public law across various titles of the U.S. Code after Congress enacted the ACA. ORLC kept the structure of the findings as Congress organized them intact in its arrangement. *See* 42 U.S.C. §18091. It also retained the basic organizational structure of Title I but, per its normal practice, reorganized various provisions of Title I that amended previous acts to keep the amendatory provisions near their targets in the Code. Regardless, OLRC’s arranging work of this sort is not “positive law” because Congress does not vote to approve it. The public law as enacted by Congress is the positive, controlling law, including how the statute is organized. Here, Congress took the unusual step of placing findings within a specific subsection of the statute, and organized the findings to make clear their direction at the Commerce Clause.

The statutory structure provides important information. First, the ACA does not include a general statement of findings at the top of the entire Act, as many statutes do.⁵⁷ Instead, the ACA uses *section-specific* findings embedded within separate subtitles, parts, and subsections of the law.

Title I alone is divided into seven subtitles. The first five concern the private insurance reforms, including increased benefits, subsidies, and the establishment of the new insurance exchanges. Subtitle A is entitled “Immediate Improvements in Health Care Coverage for All Americans” and concerns provisions that took effect quickly, like prohibition on coverage rescissions and extending dependent coverage to adult children up to age 26. Subtitle B is entitled “Immediate Actions to Preserve and Expand Coverage” and includes reinsurance provisions and establishes a temporary, transitional high risk pool until the law’s broader protections take effect. Subtitle C is entitled “Quality Health Insurance Coverage for All Americans PART I” and enacts market reforms, including the ban on discrimination based on preexisting conditions and the requirement that each plan provide essential health benefits. Subtitle D is entitled “Available Coverage Choices for All Americans” and launches the new health insurance marketplaces. Subtitle E is entitled “Affordable Coverage Choices for All Americans” and concerns tax credits and cost-sharing reductions, payments the Act offers to make health insurance more affordable.

It is not until Subtitle F, entitled, Shared Responsibility for Health Care, that we have the findings in question. Part I of that subtitle concerns the individual mandate; and Part II concerns employer responsibilities, including the wholly separate employer insurance mandate. The findings do not even apply to the entire Subtitle, much less the entire Title I. To argue that they somehow apply to all of the sections that come before and after it—*nearly five hundred sections of the law* including Medicare, Medicaid, health workforce, biologic drugs and more, discards Congress’s textual, organizational choices. As members of the Court have repeatedly written, and did so again this term, the “Court generally presumes that when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning.”⁵⁸ And Subtitle G follows, with miscellaneous provisions.⁵⁹

2. How the ACA uses *other* section-specific findings

That the mandate findings do not apply beyond their its limited territory is buttressed by the fact that there are *three separate* “findings” subsections in the ACA. Each is clearly location-specific.

⁵⁷ One rough proxy for the prevalence and relevance of general findings is that a search of all Supreme Court opinions since 1980 that reference findings provisions for any purpose produces only 11 out of 93 that concern section-specific findings; the rest are all generally applicable. The search methodology was a search of “findings /p (section! or subsection! or provision! or part! or support! or title! or subtitle!) DA aft. 01/01/1980” that produced 1200 Supreme Court opinions. Research assistants, in two teams double-checking each another, reviewed the 1200 opinions to determine which references to “findings” were references to congressional findings, producing 93 opinions, which does not include opinions in which a section with combined findings and purposes is referenced but the opinion quotes or cites only the purpose provision.

⁵⁸ *Maine Cmty.*, 140 S. Ct. at 1323 (internal quotation marks omitted).

⁵⁹ Subtitle G, entitled “Miscellaneous Provisions”, includes changes like a prohibition against physician-assisted suicide, and the ACA’s civil rights provision. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1551-1563, 124 Stat. 121, 258-71.

In addition to the findings concerning the mandate⁶⁰, there is another one in Title I, Subtitle G, Section 1563⁶¹, which concerns solvency of the Medicare and the Social Security trust funds. And there is a third in Title II, Subtitle E, Section 2406,⁶² acknowledging that “Congress has never acted” on its 1990 bipartisan study of long-term care needs and has not yet addressed with Medicaid reimbursement reform the Court’s decision in *Olmstead v. L.C.*⁶³ that “individuals with disabilities have the right to choose to receive their long-term services and supports in the community, rather than in an institutional setting.”⁶⁴ The words in each set of respective findings, as discussed next, further confirm that each set of findings is placed in a specific location to make a limited point.

C. Congress’s Words Matter

All *three* of the ACA’s separate section-specific findings—the subsection 1501(a) mandate findings and the other two subsection-specific findings as well—also follow the precise instructions concerning the use and writing of findings contained in the drafting manuals issued by Congress’s nonpartisan drafting offices, the Offices of House and Senate Legislative Counsel. I have previously detailed the centrality of the work of those drafters when it comes to putting statutory words on the page.⁶⁵ Members of the Court—in opinions by Justices Kennedy, Ginsburg, and Alito—have cited these drafting manuals at least three times in recent years.⁶⁶

The House drafting manual “discourage[s]” findings sections entirely.⁶⁷ A footnote notes, however:

[T]here are certain circumstances in which congressional findings may be imperative to establish the constitutional basis for congressional action. *This is particularly the case in legislation in which congressional action is based on the effect of an activity in interstate commerce.* As the Supreme Court recently reaffirmed in its opinion in the case of *United States v. Lopez*, 63 U.S.L.W. 4343, 4347 (U.S. Apr. 26, 1995), “as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce.”⁶⁸

The Senate drafting manual likewise states:

⁶⁰ 42 U.S.C. § 18901 (2019), Pub. L. No. 111-148, § 1501(a) *as amended by* Pub. L. No. 111-148, Title X, § 10106(a).

⁶¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1563, 124 Stat. 119, 270 (2010).

⁶² *Id.* § 2406, 124 Stat. at 305 (2010).

⁶³ 527 U.S. 581 (1999).

⁶⁴ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2406, 124 Stat. 119, 306 (2010). In the original public law, there was one additional findings section, Section 4401, that responded to the statutory rule to score the statute, but this section was struck before the vote. *See* 155 CONG. REC. S13,515 (2009) (proposed amendment Sen. Reid).

⁶⁵ Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 739-47 (2014).

⁶⁶ *See Carr v. United States*, 560 U.S. 438, 463 (2010) (Alito, J., dissenting); *United States v. O’Brien*, 560 U.S. 218, 233-34 (2010); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60-61 (2004).

⁶⁷ HOUSE DRAFTING MANUAL, *supra* note 29, at 28.

⁶⁸ *Id.* at 28 n.3 (emphasis added).

A findings or purposes section may be included in a draft if, for purposes of clarity, *constitutionality concerns*, or other reasons, such a section would aid the draft. See, e.g., *United States v. Lopez*, 115 S.Ct.1624, 1631 (1995) (“[A]s part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on *interstate commerce* . . .”).⁶⁹

Later, the Senate manual refers to findings as provisions that are different from “operative” provisions.⁷⁰ This is not to say that findings are not “law”—the challengers here argue that findings are indeed enacted law, and my own work makes that point.⁷¹ But there is a difference between enacted law that is precatory or descriptive and enacted law directing specific action, such as the intensely powerful remedial action of complete inseverability. That is why the drafting manuals view findings as “nonoperative,” even if they are sometimes illustrative of Congress’s views about policy or its own power. The Court likewise has described findings as nonoperative provisions.⁷²

All three of the ACA’s section-specific findings provisions follow these directives from the drafting manuals.⁷³ The mandate findings exactly track the Offices of Legislative Counsel’s advice to include findings to justify the commerce power. Subsection 1501(a) mentions the commerce power justification explicitly in each of its three paragraphs. (The challengers cite only one of the three, (a)(2), but there are three.) As to the other two findings subsections, as the drafting manuals direct, the fiscal findings are inserted to clarify a point of debate about surpluses from the long-term care and social security funds,⁷⁴ and the long-term care findings respond directly to a Supreme Court case.⁷⁵

1. Congress Could Not Have Been Clearer that the Findings Are About the Commerce Power

As noted, the first paragraph of Subsection 1501(a) makes explicit what the findings are for: not severability, but the Commerce Clause. It begins:

1) IN GENERAL

The individual responsibility requirement provided for in this section (in this section referred to as the “requirement”) is *commercial and economic in nature, and*

⁶⁹ SENATE DRAFTING MANUAL, *supra* note 30, at 19 (emphasis added).

⁷⁰ *Id.* at 80.

⁷¹ See Gluck & Cross, *supra* note 55.

⁷² See, e.g., *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994) (“the quoted statement of congressional findings is a rather thin reed upon which to base a requirement . . . neither expressed nor, we think, fairly implied in the operative sections of the Act”).

⁷³ See 42 U.S.C. § 18091 (2018); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1563, 124 Stat. 119, 270-71 (2010); *Id.* § 2406, 124 Stat. at 305-06; *Id.* § 4401, 124 Stat. at 587.

⁷⁴ See 155 CONG. REC. S11888 (daily ed. Nov. 20, 2009); 155 CONG. REC. 28718-19 (2009); 155 CONG. REC. 28793-94 (2009); 155 CONG. REC. 29049 (2009); 155 CONG. REC. S12300-01 (daily ed. Dec. 3, 2009) (Senate floor debates leading to Senator Whitehouse’s amendment to add Section 1563).

⁷⁵ See *supra* note 63 and accompanying text (citing *Olmstead*); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2406, 124 Stat. at 305-06.

*substantially affects interstate commerce, as a result of the effects described in paragraph (2).*⁷⁶

The text of paragraph 1 makes clear the purpose of the “effects described in paragraph (2)” — namely to document that the mandate is “commercial and economic in nature and substantially affects interstate commerce.” We will come back to paragraph (2) in a moment, but if this were not clear enough, Paragraph 3 makes the point again:

(3) SUPREME COURT RULING

In *United States v. South-Eastern Underwriters Association* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that *insurance is interstate commerce subject to Federal regulation.*⁷⁷

Sandwiched between those paragraphs is the paragraph about the mandate’s significance to the insurance markets, with the subparagraphs therein that the challengers cite. But paragraph (2) makes explicit beyond doubt that the ensuing words about insurance markets are words about the economic impact of the law. The paragraph is *titled* “(2) Effects on the national economy and interstate commerce.”⁷⁸ And the first words of text, which precede the subparagraphs, reinforce that the findings relate to the “effects” referenced in the title, stating “[t]he effects described in this paragraph are the following.”⁷⁹ The highlighted sections set forth earlier in this Essay illustrate the numerous explicit references to commerce in that subsection.

Congress could not have made clearer that the findings are about the commerce power. No words that Congress uses for inseverability—whether “severability,” “separability”, or “invalid”—appear in the findings. As detailed below, “essential to” is not how Congress indicates inseverability; it is how Congress speaks about Commerce.

Of course, findings inserted into the ACA to justify Congress’s Commerce-Clause authority to enact the mandate are null and moot after *NFIB*, where the Court rejected that basis for Congress’s authority.

2. The Findings State the Mandate Is “Essential to” Statutes *Outside* the ACA and Would Pull Those Statutes Down Too on the Challengers’ Argument

The challengers argue that because the findings say the mandate is “essential to” the healthy functioning of insurance markets and also references other parts of the ACA, we should read those words as an explicit inseverability directive. The complete words of the mandate’s findings make clear, however, that this cannot possibly be the case. This is evident because the findings’ words of essentiality *reference laws outside the ACA too.*

⁷⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119, 242 (2010) (emphasis added).

⁷⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(3), 124 Stat. 119, 244 (2010) (emphasis added).

⁷⁸ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(2), 124 Stat. 119, 243 (2010).

⁷⁹ *Id.*

Consider for example, subparagraph (2)(H) as amended, the second sentence of which the challengers cite:⁸⁰

Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. 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.⁸¹

Read as the challengers would read it, striking down the mandate would render ERISA and the Public Health Service act unconstitutional too. Textualists read statutory language *in pari materia*—like sections are read alike. This subparagraph makes clear that the findings are about the economic bases of the ACA’s reforms and their broader connection to the health markets, including other statutes—and not about their indelible link to any particular provision of the ACA itself, or to any other statute.

3. This Is Boilerplate Language for Commerce Clause Findings

The language used in the ACA—that the mandate is “essential to” the “markets”—is common congressional parlance for justifying Congress’s Commerce Clause power.⁸² Reviewing Westlaw’s Public Laws Database of all statutes enacted since 1973, “essential to” is used at least 138 times in findings sections, and in virtually all instances to justify Congress’s constitutional lawmaking power. The majority of those relate to commerce; otherwise, such findings describe a

⁸⁰ See Brief for Respondent/Cross Petitioner States at 13-14.

⁸¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10106, 124 Stat. 119, 908 (codified at 42 U.S.C. § 18091(2)(H) (2018) (amending § 1501(a)(2)(H)).

⁸² In 2011, striking down the mandate but still finding it fully severable from the rest of the ACA, the Eleventh Circuit reached the same conclusion and rejected the same interpretation of (a)(2)(I) the challengers urge here. See *Fla. ex rel. Atty. Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1326 (11th Cir. 2011) (“[T]he findings in § 18091(a)(2) track the language of the Supreme Court’s Commerce Clause decisions.”), *aff’d in part, rev’d in part sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). That court also found the same absurdity with respect to the implications of the construction the challengers advance for ERISA as does this Essay.

current policy problem.⁸³ Language about conditions for healthy markets,⁸⁴ the importance of the regulated activity to the economy,⁸⁵ and references to commerce,⁸⁶ all of which appear in the ACA’s findings, are also common fare for Commerce-Clause findings.

There are countless examples. The Adam Walsh Child Protection and Safety Act of 2006 provides:

Intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate *commerce*. . . Federal control of the intrastate incidents of the production . . . and possession of child pornography, as well as the intrastate transfer of children for the production of child pornography, is *essential* to the effective control of the interstate *market* in child pornography.⁸⁷

The ANCSA Land Bank Protection Act of 1998 states that “*the implementation of the exchange referenced in this subsection is essential to helping Calista utilize its assets to carry out those responsibilities and to realize the benefits of the Alaska Native Claims Settlement Act.*”⁸⁸ The Great Lakes Fish and Wildlife Restoration Act of 1990 states:

The fishery resources of the Great Lakes support recreational fisheries enjoyed by more than 5,000,000 people annually and commercial fisheries providing

⁸³ A search of “essential to” within 255 words of “finding!” in Westlaw’s U.S. Historical Public Laws (a database of all statutes since 1973), together with a search of “interstate commerce” or “commerce clause” within 255 words of “essential to” resulted in 138 congressional findings sections that use the term “essential to” (including the ACA). All but seven of these findings use “essential to” as part of the justification for Congress’s authority to legislate, with the overwhelming majority of them about the Congress’s commerce power, including its power over Indian affairs and foreign relations. A search for findings sections through a search of the same Westlaw database for the term “interstate commerce” produced 108 public laws. A search for “finding!” within 255 words of “commerce” was also conducted. This second search resulted in 515 public laws—314 of which had congressional findings sections (with some large public laws, including omnibus statutes, having multiple findings provisions for different sections or subtitles). The results of these searches reveal the linguistic commonalities described in this section. Congress uses the same menu of language when it writes Commerce Clause findings, often using the same words about the effect (e.g., “significant,” “substantial” or “direct”) of the regulated area on “commerce,” “commercial” activity, “markets,” or the “economy,” or noting the importance of the regulation to facilitate and support markets or commerce.

⁸⁴ See, e.g., Beef Promotion and Research Act of 1985 § 2(a)(4), Pub. L. No. 99-198, § 1601(b), 99 Stat. 1597, 1598 (“[T]he maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation.”); Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102, § 201, 93 Stat. 749, 757 (1979) (“(1) [S]erious disruptions have recently occurred in the gasoline and diesel fuel markets of the United States; (2) it is likely that such disruptions will recur; (3) interstate commerce is significantly affected by those market disruptions; (4) an urgent need exists to provide for emergency conservation and other measures with respect to gasoline, diesel fuel, home heating oil, and other energy sources in potentially short supply in order to cope with market disruptions and protect interstate commerce.”).

⁸⁵ See, e.g., Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(10), 123 Stat. 1776, 1777 (2009) (“The sale, distribution, marketing, advertising, and use of tobacco products are activities in and substantially affecting interstate commerce because they are sold, marketed, advertised, and distributed in interstate commerce on a nationwide basis, and have a substantial effect on the Nation’s economy.”).

⁸⁶ See, e.g., Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702(6), 123 Stat. 2835, 2835 (2009) (“Such violence substantially affects interstate commerce in many ways, including . . .”); Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2(15), 117 Stat. 972, 974 (“The high incidence of prison rape has a significant effect on interstate commerce because it increases substantially . . .”).

⁸⁷ Pub. L. No. 109-248, § 501, 120 Stat. 587, 623-24 (2006) (emphasis added).

⁸⁸ Pub. L. No. 105-333, § 6(a)(3), 112 Stat. 3129, 3131 (1998) (emphasis added).

approximately 9,000 jobs. Together, these fisheries generate *economic activity worth* more than \$4,400,000,000 annually to the United States. (3) The availability of a suitable forage base *is essential* to lake trout, walleye, yellow perch, and other recreational and *commercially valuable* fishery resources of the Great Lakes Basin.⁸⁹

Members of the Court have referenced findings in at least 100 opinions since 1980—the dawn of textualism. The majority are findings, like these, related to commerce. It does not appear that Court has ever held over this 40 year period that such Commerce Clause findings do double duty as an explicit inseverability clause.⁹⁰

C. Congress’s Consistent Drafting Practices: Other Sections Across the U.S. Code Make Clear This Is *Not* Boilerplate for Inseverability

Just this term, Justice Kavanaugh wrote:

When interpreting statutes, as the Court has often said, we “usually presume differences in language” convey “differences in meaning.” When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress’s careful handiwork. As Justice Scalia explained for the Court, “it is not our function” to “treat alike subjects that different Congresses have chosen to treat differently.” And the Court has likewise stressed that we may not read “a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify that concept.”⁹¹

When Congress does include an explicit inseverability clause, it does so with different language and is unmistakably direct. A search of both the Westlaw Historical Public Laws Database and the Office of Law Revision Counsel’s compilation of the U.S. Code for the root terms “inseverab!,” “inseparab!,” “notseverab!,” “nonseparab!,” “not severab!,” “not separab!” and “invalid!” produced nine statutes.⁹² Each sets out the inseverability clause, broken out by a separate section, subsection or paragraph.

⁸⁹ Pub. L. No. 101-537, § 1002, 104 Stat. 2370, 2370 (1990) (emphasis added).

⁹⁰ See *supra* note 57 describing the search. An additional search of all Supreme Court opinions since 1980 that reference “finding!” and (“interstate commerce” or “commerce clause”) and (“severab! separab! Inseverab! inseparab! nonseparab!”) revealed not a single case in which the Court relied on an express Commerce Clause finding for severability analysis, apart from the joint dissent in *NFIB*.

⁹¹ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1829 (2020) (Kavanaugh, J., dissenting) (internal citations omitted).

⁹² See Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, § 3, 130 Stat. 549, 550 (2016) (“SEVERABILITY. (a) IN GENERAL.—Except as provided in subsection (b), if any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby, *provided that title III is not severable* from titles I and II, and *titles I and II are not severable* from title III.” (emphasis added)); American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, § 9, 118 Stat. 1773, 1810 (2004) (“SEVERABILITY. If any provision of this Act or of any amendment made by this Act, or the application of any such provision to any person or circumstance, is held to be invalid for any reason, the remainder of this Act and of amendments made by this Act, and the application of the provisions and of the amendments made by this Act to

Each statute uses the same boilerplate language. As noted, while the House and Senate drafting manuals state that severability clauses are not necessary, they both do suggest explicit *nonseverability* clauses, or clauses providing that a statute is severable and inseverable in part, and so specifying which parts fall into each category.⁹³

any other person or circumstance shall not be affected by such holding, except that each of subclauses (II), (III), and (IV) of section 205(d)(2)(I)(i) is deemed to be inseverable from the other 2, such that if any 1 of those 3 subclauses is held to be invalid for any reason, neither of the other 2 of such subclauses shall be given effect.”); Mobile Telecommunications Sourcing Act, Pub. L. No. 106-252, § 125, 114 Stat. 626, 632 (2000) (“Nonseverability “If a court of competent jurisdiction enters a final judgment on the merits that— “(1) is based on Federal law; “(2) is no longer subject to appeal; and “(3) substantially limits or impairs the essential elements of sections 116 through 126 of this title, then sections 116 through 126 of this title are invalid and have no legal effect as of the date of entry of such judgment.”); Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 322, 401, 105 Stat. 1071, 1098-99 (“SEVERABILITY. Notwithstanding section 401 of this Act, if any provision of section 309 or 320(a)(3) [found under “Title III— Government Employee Rights] is invalidated, both sections 309 and 320(a)(3) shall have no force and effect. . . . SEVERABILITY. If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.”); Drug Export Amendments Act of 1986, Pub. L. No. 99-660, § 322, 100 Stat. 3743, 3783 (“NONSEVERABILITY. If any provision of this title or the application of any provision of this title to any person or circumstance is held invalid by reason of a violation of the Constitution, the entire title shall be considered invalid.”); Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, § 11, 97 Stat. 851, 856 (1983) (“INSEPARABILITY Sec. 11. In the event that any provision of section 4 of this Act is held invalid, it is the intent of Congress that the entire Act be invalidated. In the event that any other section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections of this Act shall continue in full force and effect.”); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 15, 94 Stat. 1785, 1797 (1980) (codified at 24 U.S.C. 1734 (2019)) (“INSEPARABILITY Sec. 15. In the event that any provision of section 4 of this Act is held invalid, it is the intent of Congress that the entire Act be invalidated. In the event that any other section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections of this Act shall continue in full force and effect.”). The following two compacts with inseverability clauses set them off in subsections about construction. *See* Kansas and Missouri Metropolitan Culture District Compact, Pub. L. No. 103-390, art. X, 108 Stat. 4085, 4092 (1994) (“CONSTRUCTION AND SEVERABILITY. The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of either of the party states or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of either of the states party thereto, the compact shall thereby be nullified and voided and of no further force or effect.”); An Act to grant the consent of the Congress to the Tahoe Regional Planning Compact, Pub. L. No. 96-551, art. X, 94 Stat. 3233, 3252 (1980) (“Article X.—Miscellaneous (a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. Except as provided in subdivision (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining State and in full force and effect as to the State affected as to all severable matters. (b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the legislature of either State concurred in by the legislature of the other. (c) A State party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other State and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.”).

⁹³ See *supra* note 29.

Every single one of the enacted inseverability clauses in the U.S. Code uses the word “invalid.” That word appears nowhere in the ACA findings. And when only partial inseverability is desired, Congress is very specific (as the drafting manuals themselves direct). Here are examples of the consistent ways Congress speaks about inseverability:

- “NONSEVERABILITY. If any provision of this title or the application of any provision of this title to any person or circumstance is held invalid by reason of a violation of the Constitution, the entire title shall be considered invalid.”⁹⁴
- “SEVERABILITY. If any provision of this Act or of any amendment made by this Act, or the application of any such provision to any person or circumstance, is held to be invalid for any reason, the remainder of this Act and of amendments made by this Act, and the application of the provisions and of the amendments made by this Act to any other person or circumstance shall not be affected by such holding, except that each of subclauses (II), (III), and (IV) of section 205(d)(2)(I)(i) is deemed to be inseverable from the other 2, such that if any 1 of those 3 subclauses is held to be invalid for any reason, neither of the other 2 such subclauses shall be given effect.”⁹⁵
- “INSEPARABILITY. In the event that any provision of section 4 of this Act is held invalid, it is the intent of Congress that the entire Act be invalidated. In the event that any other section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections of this Act shall continue in full force and effect.”⁹⁶

Congress has shown it knows how to be, and in fact is, explicit, about inseverability. This is not a surprising result given the extraordinary remedial power an inseverability clause gives to a court. The Court (and especially its textualists) does not imply what Congress has shown elsewhere it knows how to say expressly.

Justice Thomas wrote just this Term, citing the Scalia and Garner treatise on statutory interpretation: “It is a fundamental principle of statutory interpretation that ‘absent provision[s] cannot be supplied by the courts.’”⁹⁷ As then-Judge Kavanaugh wrote, in another health-care case in 2017: “We must respect Congress’s use of different language and its establishment of different . . . requirements in [two different statutes] . . . A material variation in terms suggests a variation in meaning.”⁹⁸ Justice Gorsuch’s affirming opinion for the Court in that case in 2019 noted that Congress had shown its ability to speak directly elsewhere and so rejected “the doubtful proposition that Congress sought to accomplish in a ‘surpassingly strange manner’ what it could have accomplished in a much more straightforward way. . . . When legislators did not adopt

⁹⁴ Drug Export Amendments Act of 1986, Pub. L. No. 99-660, § 322, 100 Stat 3743, 3783.

⁹⁵ American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, § 9, 118 Stat. 1773, 1810.

⁹⁶ Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, § 11, 97 Stat. 851, 856 (1983).

⁹⁷ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-1431, 2020 WL 3808424, at *9 (U.S. July 8, 2020) (quoting *Rotkiske v. Klemm*, 140 S. Ct. 335, 360–61 (2019) (quoting SCALIA & GARNER, *supra* note 22, at 94)); *see also* *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226–27 (2008) (concluding Congress knew how to limit applicability to customs officers in previous sections of the statute so the phrase “any other law enforcement offer” would not be construed with such limitation).

⁹⁸ *Allina Health Servs. v. Price*, 863 F.3d 937, 944 (D.C. Cir. 2017), *aff’d sub nom.* *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (internal citations and quotation marks omitted).

‘obvious alternative’ language, ‘the natural implication is that they did not intend’ the alternative.”⁹⁹

III. Statutory history

Finally, textualists sometimes look at previous versions of a law—so called “statutory history”—to divine its meaning as it changes through Congress, even though many will not look to floor statements and committee reports (“legislative history”). The statutory history of the ACA adds further support to the conclusion that the findings provisions were added to address only Commerce Clause concerns and not severability.

The bill that became the ACA, as has been chronicled elsewhere, is an amalgam of the Senate Finance Committee¹⁰⁰ and Senate HELP Committee¹⁰¹ drafts. The House draft was ultimately not utilized at all.¹⁰² Both Senate committee bills’ individual-responsibility sections established the requirement by amending the Internal Revenue Code. The HELP Committee bill refers to the penalty for not complying with the mandate as a “payment” while the Finance draft explicitly called it a “tax.” The findings section did not appear in either bill.

After both bills passed out of committee, Senate Majority Leader Harry Reid produced a combined version.¹⁰³ The text of the amalgam bill’s insurance-purchase requirement closely tracks that of the Finance Committee bill in language and organization¹⁰⁴ but makes two noticeable changes. First, it deletes the Finance Committee’s language that had explicitly referred to the penalty as a “tax.”¹⁰⁵ Second, it added for the first time a findings subsection to the mandate’s section, specifying the Commerce Power as the basis for Congress’s authority.¹⁰⁶ This statutory history makes clear that the purpose of the amendment was to address the Commerce Clause. Severability had no relevance or role.

Legislative history confirms further that the findings were added, as the manuals direct, to anticipate a constitutional claim. Some senators were concerned that a tax would be politically

⁹⁹ *Azar*, 139 S. Ct. at 1813 (internal citations and quotation marks omitted).

¹⁰⁰ America’s Healthy Future Act, S. 1796, 111th Cong. (2009) [hereinafter Senate Finance Bill], <https://www.congress.gov/111/bills/s/1796/BILLS-111s1796pcs.pdf> [<https://perma.cc/6JNY-KD4L>].

¹⁰¹ Affordable Health Choices Act, S. 1679, 111th Cong. (2009) [hereinafter Senate HELP Bill], <https://www.congress.gov/111/bills/s/1679/BILLS-111s1679pcs.pdf> [<https://perma.cc/UQJ4-DEKV>].

¹⁰² See Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 78 (2015) (describing how Senator Kennedy’s death and subsequent replacement by Republican Scott Brown “depriv[ed] the Democrats of their critical sixtieth vote in support of the ACA,” forcing Democrats to “accept the Senate draft as final”).

¹⁰³ Compare Senate Finance Bill, and Senate HELP Bill, with 155 CONG. REC. S11,607-816 (daily ed. Nov. 19, 2009), <https://www.congress.gov/111/crec/2009/11/19/CREC-2009-11-19-pt1-PgS11607-3.pdf> [<https://perma.cc/B78A-DLUM>] (combined Senate leadership bill with findings).

¹⁰⁴ Compare Senate Finance Bill § 1301 (“Excise tax on individuals without essential health benefits coverage”), with Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5000A, 124 Stat. 119, 244 (2010) (“Requirement to maintain minimum essential health coverage”) (codified at 26 U.S.C. § 5000A (2019)).

¹⁰⁵ 155 CONG. REC. at S11,642 (combined Senate leadership bill with findings).

¹⁰⁶ *Id.*

unpopular;¹⁰⁷ other senators were concerned that the mandate might be unconstitutional if not a tax. Debate on the Senate floor on December 22 and 23, 2009, indeed raised a constitutional point of order specifically about the mandate.¹⁰⁸ Several Republican senators argued that the individual mandate was not permissible under the Commerce Clause.¹⁰⁹ Among exhibits put in the record was a memo from the Conservative Action Project that directly referenced the findings: “The Commerce Clause requires an actual economic effect, not merely a congressional finding of an economic effect. . . . Therefore the various interstate-commerce findings in the Senate version of the ‘Obamacare’ legislation do not make the bill constitutional.”¹¹⁰ Senator Patrick Leahy, then-Chairman of the Senate Judiciary Committee, explicitly countered these objections and argued, among other things, “A requirement that all Americans have health insurance—like requirements to be vaccinated or to have car insurance or to register for the draft or to pay taxes—is within congressional power if Congress determines it to be *essential* to controlling spiraling health care costs.”¹¹¹

Conclusion

Recall Justice Scalia’s question about the ACA: “You really want us to go through these 2,700 pages”?¹¹²

Textualists cannot have their proverbial cake and feast on it too. Congress’s intent to maintain the ACA is crystal clear from its own 2017 actions. That should be enough for severability. But if the Court has any doubt, “textualist” arguments that ignore the location, words and context of the findings, as well as how Congress usually speaks when it does talk about inseverability have no place.

In *NFIB*, ACA opponents told the Court to give no weight to Congress’s Commerce Clause findings. Now they are saying Congress’s findings deserve some kind of hyper-deference for what they do not even say—including a secret order to destroy the law. In *NFIB*, it is also worth noting, the Court invalidated the requirement that states expand Medicaid, a far bigger change to the ACA than invalidating a mandate that has never been fully enforced.¹¹³ The majority there wrote: “The

¹⁰⁷ See, e.g., Chris Frates & Mike Allen, *Bill Says ‘Tax’ When Obama Said ‘Not’*, POLITICO (Sept. 21, 2009, 1:47 PM EST), <https://www.politico.com/story/2009/09/bill-says-tax-when-obama-said-not-027384> [<https://perma.cc/E4YD-2QA4>].

¹⁰⁸ See 155 CONG. REC. S13,796-866 (daily ed. Dec. 23, 2009), <https://www.congress.gov/111/crec/2009/12/23/CREC-2009-12-23-pt2-PgS13796-4.pdf> [<https://perma.cc/G7QJ-L85X>]; 155 CONG. REC. S13,714-44, S13,751-78 (daily ed. Dec. 22, 2009), <https://www.congress.gov/111/crec/2009/12/22/CREC-2009-12-22.pdf> [<https://perma.cc/8ZS9-5YCP>].

¹⁰⁹ See, e.g., 155 CONG. REC. at S13,821-23, S13,832 (statements of Sen. Hutchison).

¹¹⁰ 155 CONG. REC. at S13,728 (memorandum by Conservative Action Project); see also *id.* (“When the Court struck down the Violence Against Women Act in *United States v. Morrison* (2000), the Court noted that although the statute made numerous findings regarding the link between such violence and interstate commerce, it held that those findings did not actually establish an economic effect.”).

¹¹¹ 155 CONG. REC. at S13,753 (statement of Sen. Leahy) (emphasis added).

¹¹² Transcript of Oral Argument at 38, *NFIB v. Sebelius*, 567 U.S. 519 (2012) (Nos. 11-393, 11-400).

¹¹³ Brianna Ehley & Aaron Lorenzo, *Trump Still Enforcing Obamacare Mandate*, POLITICO (May 3, 2017, 2:14 PM EST), <https://www.politico.com/story/2017/05/03/trump-obamacare-mandate-enforcement-237937> [<https://perma.cc/3DFA-999T>] (describing light enforcement under both Obama and Trump).

question here is whether Congress would have wanted the rest of the Act to stand Unless it is ‘evident’ that the answer is no, we must leave the rest of the Act intact.”¹¹⁴

False textualism, as Thomas Merrill warned in 1994, risks turning the serious legal work of statutory interpretation into nothing more than clever, empty game,¹¹⁵ casting a shadow of illegitimacy on the Court itself. Justice Kavanaugh, himself a noted textualist, warned just this Term that “constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute.”¹¹⁶

Respecting Congress means understanding Congress, and reading what Congress actually wrote and how it wrote it.

¹¹⁴ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 587 (2012) (quoting *Champlin Refining Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932)).

¹¹⁵ Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994); cf. Gluck, *supra* note 102, at 63 (arguing *King v. Burwell* was initially framed as a test of textualist principles).

¹¹⁶ Barr v. Am. Ass’n of Political Consultants, Inc., 140 S. Ct. 2335, 2351 (2020).