

---

---

## COMMENTS

### IMPERFECT STATUTES, IMPERFECT COURTS: UNDERSTANDING CONGRESS'S PLAN IN THE ERA OF UNORTHODOX LAWMAKING

*Abbe R. Gluck\**

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined — “to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.

— *King v. Burwell*, Chief Justice Roberts’s opinion for the Court<sup>1</sup>

Statutory interpretation often seems like a doctrinal and jurisprudential abyss. We didn’t need “Obamacare” to show us that, but it sure helped. The Court’s statutory cases over the past decades have had the feeling of being “one-offs”: the Court seems to careen from case to case, wielding literally hundreds of interpretive presumptions that have no hierarchy among them, no link to Congress, and that seek to impose a coherence and simplicity on modern statutes that those statutes cannot bear. It is nearly impossible to predict which of these presumptions — the so-called canons of construction — will control the next case. The Court’s dominant theorists, its textualists, defend these doctrines on the ground that Congress is incomprehensible and so these rules and a laser focus on text are the best that courts can do. And yet no modern court is going to read a thousand-page statute cover-to-cover. Sometimes the cases focus on a single word; it can feel like a game even though the stakes are incredibly high.

---

\* Professor of Law and Faculty Director, Solomon Center for Health Law and Policy, Yale Law School. For their insights and support, I am indebted to Bruce Ackerman, Bill Eskridge, Heather Gerken, Tim Jost, Brett Kavanaugh, Si Lazarus, John Manning, John McDonough, Thomas Merrill, Henry Monaghan, Jon Newman, Anne Joseph O’Connell, Nick Parrillo, Richard Posner, Mark Regan, Judith Resnik, Roberta Romano, Scott Shapiro, Reva Siegel, Peter Strauss, John Witt, the terrific editors at the *Harvard Law Review*, a team of wonderful Yale students — Jack Boeglin, Jeff Chen, Lucas Croslow, Becca Lee, Noah Lindell, Victoria Black, Liz Dervan, Ariel Dobkin, Grace Heusner, Brian Highsmith, Emma Roth, David Simins, and Rachel Tuchman — and participants at faculty workshops at the University of Michigan and Yale Law Schools. I was co-counsel on a brief in the case, *see* Brief for Professors Thomas W. Merrill et al. as Amici Curiae Supporting Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-1114); the views in this Comment are mine alone.

<sup>1</sup> *King*, 135 S. Ct. at 2496.

These moves have been grounded in a spectacular lack of theory about the role that courts should play in the legislative process itself — which is, after all, the fundamental constitutional question of the Court–Congress relationship in statutory cases.<sup>2</sup> Should courts try to understand how Congress works, or is Congress too complex to understand? Should courts be “tough” on Congress, perhaps to incentivize Congress to draft better the next time, or should courts cut Congress some slack, and even correct enacted imperfections? Perhaps courts are best conceived as guardians of the U.S. Code, obligated to shape increasingly imperfect statutes into a more coherent product for the public, no matter how disconnected that result may be from Congress’s own intentions. The Court has long resisted definitively answering these basic questions, even as the most difficult statutory cases turn on them.

Into this gulf came *King v. Burwell*,<sup>3</sup> the challenge to the Affordable Care Act<sup>4</sup> (ACA) that teed up like no other case the questions of the Court’s role, capacity, and vision of Congress in an increasingly complicated statutory landscape. *King* required the Court to consider a potentially fatal imperfection in a 2700-page statute that passed after years of debate but used an unorthodox pathway through Congress that deprived the Act of its expected opportunity for cleanup. The case was viewed as a major test for textualism, and both parties briefed it using that interpretive framework. Both argued that text and canons of construction supported their respective positions — even as those doctrines rest on an unstated and, for the ACA, inappropriate model of how Congress functions: they assume that Congress drafts to perfection and follows the “textbook” legislative process.

But make no mistake: *King* was also the challengers’ attempt to *use* the Court’s preference for this text-and-canon approach, with its associated reluctance to delve into legislative complexity, to make the Court a pawn in a game of rough politics. The case’s architects sought, as they put it, to “exploit[]” four isolated words in a 2700-page “monster” filled with “contradictions and incongruities” to work a do-over of their failed 2012 constitutional challenge.<sup>5</sup> It was an effort to

---

<sup>2</sup> Cf. Jerry L. Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (“Any theory of statutory interpretation is at base a theory about constitutional law.”).

<sup>3</sup> 135 S. Ct. 2480.

<sup>4</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>5</sup> Am. Enter. Inst., *Who’s in Charge? More Legal Challenges to the Patient Protection and Affordable Care Act* at 1:33:00, YOUTUBE (Mar. 11, 2014), <http://www.youtube.com/watch?&v=C7nRpJURvE4> (remarks of Michael Greve at a Dec. 6, 2010 panel to discuss legal challenges to the ACA); cf. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012) (failing constitutional challenge to the ACA individual mandate).

pull the statute apart by concentrating on “bits and pieces of the law,”<sup>6</sup> the instantiation of what Professor Thomas Merrill wrote in 1994 was the then–newly ascendant theory of textualism’s greatest risk: converting the Court’s role to answering a clever puzzle, masking in neutral-sounding interpretive presumptions a deeply unforgiving view of Congress.<sup>7</sup>

The Court did not take the bait. It did not conclude that the ACA was too difficult to understand, and so decide that the best that it could do was to enforce the contested text in isolation or use a convenient shortcut — such as a canon or deference to the agency — to avoid a trip deep into the statutory weeds. Instead, *King* gives us an opinion written by the Chief Justice of the United States that rejects *Chevron* deference for the agency; holds that the assumptions of perfection underlying the canons are unrealistic as applied to the ACA;<sup>8</sup> cites Justice Felix Frankfurter (twice!) for the proposition that “fair adjudication” requires the Court to try to understand “Congress’s plan”;<sup>9</sup> and concludes by invoking *Marbury v. Madison*,<sup>10</sup> the case that signals like no other that the Court has the authority and duty to get in the game.<sup>11</sup>

*King* is the Court’s most explicit recognition ever of modern statutory complexity. At the same time, it is the Court’s most optimistic characterization of both its own and Congress’s abilities in years. Whereas the Court’s recent statutory interpretation jurisprudence has been marked by a targeted focus on a few contested words, *King* responds by looking at the full picture, at Congress’s “plan” — a term that itself sends a strong message about Congress’s rationality and the inherent purposiveness and functionality of legislation. And just as *Marbury*’s famous deferral to a coordinate branch was simultaneously an aggrandizement of the Court’s own power, *King*’s holding that judges must try to understand the legislative plan simultaneously ele-

<sup>6</sup> Am. Enter. Inst., *supra* note 5, at 1:31:45.

<sup>7</sup> Thomas W. Merrill, Essay, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994) (arguing this view of textualism treats statutory interpretation like a “puzzle” that “places a great premium on cleverness”).

<sup>8</sup> *King*, 135 S. Ct. at 2489.

<sup>9</sup> *Id.* at 2492 (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947)); *id.* at 2495–96 (citing Justice Frankfurter’s opinion in *Palmer v. Massachusetts*, 308 U.S. 79 (1939), for the proposition that “[r]eliance on context and structure in statutory interpretation is a subtle business,” *King*, 135 S. Ct. at 2495 (quoting *Palmer*, 308 U.S. at 83)).

<sup>10</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>11</sup> *King*, 135 S. Ct. at 2496; cf. Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 520–21 (2004) (“[W]hen *Marbury* is quoted in a modern Supreme Court opinion, you can be pretty sure it is going to be a duesy — outlawing a controversial type of social legislation, remaking the ground rules of the political system, or perhaps even deciding an election.”).

vates the importance of the Court in statutory cases. The opinion begins with five pages illustrating the Court's deep understanding of the ACA's scheme,<sup>12</sup> and then it pushes the agency — whose help the Court does not need (even as it affirms the agency's reading) — out of the picture.

Underlying the opinion is the big question of how the Court's role should evolve in response to our changing legislative landscape. My own work has grappled with this question for some time, illustrating how the Court has vacillated among views of the relevance of the empirical realities of modern lawmaking to the doctrines of statutory interpretation, and how far off the Court is from accurately approximating Congress even when it tries.<sup>13</sup> Embedded in this question is the even larger jurisprudential question of what exactly the doctrines of the field, and so what exactly judges themselves, are supposed to *do*. Reflect Congress? Improve Congress? Ignore Congress? The Court has steadfastly avoided addressing these matters. *King* is the most direct attempt to do so and thus, whether it is a fork in the road or another one-off for a special case, it is an important moment.

One response to the modern-legislative-complexity problem is formalism. A second-best response to a Congress that courts can never understand is to devise clear legal doctrines that further rule-of-law values like predictability or coherence. But the canons have mostly failed to play that role, although most textualists argue they are supposed to. A different answer is *Chevron* deference: the increasing difficulty of modern legislation may be all the more reason to give this terrain to agencies. But *King* was only the latest in a series of opinions, several last Term alone, that call *Chevron*'s future into question. Both formalism and *Chevron* aim to *minimize* the role of courts in a landscape dominated by statutory law. *King*, in contrast, reveals that a contingent of the Court may be interested in reversing that course, in destabilizing what were declared in this journal just a year ago to be settled institutional positions — a textualist Court uninterested in how Congress works and a robust *Chevron* doctrine to handle Congress's messes.<sup>14</sup> This Court seems to want the big questions for itself.

---

<sup>12</sup> *King*, 135 S. Ct. at 2485–89.

<sup>13</sup> 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) [hereinafter Gluck & Bressman I]; 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 (2014) [hereinafter Gluck & Bressman II].

<sup>14</sup> See John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 29–30 (2014) (noting the Court's “fundamental shift . . . toward textualism” and the influence of *Chevron* on many interpretive questions).

Justice Scalia's dissent decries these moves as an activist departure from "the normal rules of interpretation."<sup>15</sup> But imposing perfection on an imperfect statute, as the canons would have, would itself have been a kind of aggressive judicial legislation. Nor does *King's* emphasis on the "plan" mean a resort to legislative history or other subjective factors maligned by textualists. The opinion derives its understanding of the ACA's scheme from its text, structure, and the statute's own, codified "stated purposes"<sup>16</sup> (not legislative history). Even *King's* concept of "plan" has appeared before, both in a long (but perhaps forgotten) tradition in the pre-textualist era and also in textualist opinions themselves. Textualism is chock full of rules that emphasize holistic interpretation — rules that sit in some tension with other textualist rules that advance a laser focus. One way to understand *King* is that the Chief Justice chooses the holistic side of textualism, one that has always shared with purposivism the assumption that Congress legislates rationally, with means to an end.

The dissent was also wrong to adopt the challengers' framing and portray the case as a text-versus-purpose showdown. As an initial matter, it was the challengers who, from the beginning, adopted an aggressive story of the ACA's purpose, supported by legislative history: they argued that Congress intended the statute to read as they claimed, and the *King* dissent essentially adopted that understanding. But more importantly, to ask whether textualism or purposivism "won" in *King* is to miss the real divide across the opinions.

The real divide is over how a Court that unanimously agrees on the priority of text-focused interpretation sees its *own role* in relation to Congress's written plans. The majority concludes that it wants a central role, and to have one it must show that it is up to the challenge of understanding Congress's work, warts and all. This is why the opinion begins with a detailed explanation of the ACA's interlocking statutory (textual) provisions. And this is where the majority unquestionably also aligns itself with the Legal Process tradition, noted for its assumption that Congress is reasonable and its belief in the judicial duty to try to understand it. That this return to an earlier moment of optimism about the Court–Congress relationship — from six Justices, almost all of whom came of age during Legal Process's heyday at Harvard — comes now in the context of one of the most complex and unorthodoxly enacted pieces of legislation in history makes it all the more remarkable.

---

<sup>15</sup> *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting).

<sup>16</sup> *Id.* at 2493 (majority opinion) (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 420 (1973)).

This Comment begins with an overview of the politics of the litigation, the opinions, and the ACA's legislative process. Part II explores the Court's varying reactions to the problem of legislative complexity and how *King's* vision of the Congress–Court relationship differs from, and builds upon, both the textualism and the purposivism that came before. Part III details *King's* innovative observations about modern “unorthodox lawmaking”<sup>17</sup> and also the instability the opinion creates by leaving many aspects of the modern legislative context unaddressed. Perhaps most importantly, the Court skirts hard questions about how exactly interpretive doctrine should change to more accurately reflect Congress, and the opinion says nothing explicit about what the Court is to do when there is a statutory *mistake* — the enormous elephant that neither party dared mention throughout the litigation.

In the end, we return to *Marbury*. We have been watching the Roberts Court working out its relationship to Congress across all areas of the federal-courts canon for some time. *King* adds statutory interpretation explicitly to that effort. The Roberts Court has cited *Marbury* in only eleven statutory interpretation or administrative-deference opinions (majority or dissent) — six of which, including *King*, came last Term.<sup>18</sup> Something may be afoot. Like *Marbury*, *King's* most important contribution may be in what it says about the Court's own plan: it is an opinion staking out the Court's place in an evolving, increasingly complex, imperfect, and dominantly statutory, legal landscape.

### I. *KING'S* BEGINNINGS: LITIGATION POLITICS, LEGISLATIVE POLITICS

Although politics underlies almost every challenge to a major federal law, and although health policy has always been particularly contested, the politics of the ACA has been unusually raw. The ACA's legislative process was extremely intense, lengthy, and complex. The House of Representatives has unsuccessfully attempted to repeal the statute

---

<sup>17</sup> The term “unorthodox lawmaking” is from Barbara Sinclair, who has chronicled the increase in deviations from conventional legislative process for the past twenty years, since *UNORTHODOX LAWMAKING* (1st ed. 1997).

<sup>18</sup> Two were opinions from Justice Thomas criticizing *Chevron*. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring); see also *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015) (Alito, J., concurring in part and dissenting in part) (interpreting federal threat statute); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring) (considering whether Amtrak is a governmental entity in a challenge to a statutory delegation); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 851 (2015) (Thomas, J., dissenting) (standard of review for patent claim construction).

more than fifty times;<sup>19</sup> an effort to withhold funding from the statute's appropriated functions resulted in a government shutdown that ultimately ended in the Administration's favor;<sup>20</sup> the statute survived its major constitutional challenge in 2012 in *National Federation of Independent Business v. Sebelius*<sup>21</sup> (*NFIB*), and the President was reelected after that. In developing an account of most major controversial statutes, Professors Bruce Ackerman, William Eskridge, and John Ferejohn have illustrated how such a sequence of events typically results in an equilibrium, and statutory entrenchment of the "landmark" or "super" statute.<sup>22</sup> The ACA has defied this account, at least until the next election cycle.<sup>23</sup>

The *King* litigation itself was as highly politicized as the context around it. The point is not about the merits of the ACA as a matter of health policy, something about which reasonable minds will certainly disagree. The point, rather, is about using the courts and, in particular, seizing on weaknesses in both interpretive methodology and the legislative process for ends that have nothing to do with any enduring legal principle. From the beginning, the case was more about destroying the ACA than about any rule of law: it was described by its own proponents as a highly "technical" argument that could be "exploited" to do what the 2012 constitutional challenge failed to.<sup>24</sup> The strategy was to take advantage of the current Court's intolerance for statutory complexity — and the ACA's particularly complicated text and legislative process — to use the Court to succeed where both politics and constitutional law had failed. Although aggressively framed as a choice between the ACA's text and its purpose — an effective strategy that built momentum given the text-centric approach that now dominates the federal courts — along the way, the challengers quietly injected their own purposive narrative into the case, replete with legisla-

---

<sup>19</sup> Cristina Marcos & Sarah Ferris, *House Votes to Repeal ObamaCare*, THE HILL (Feb. 3, 2015, 5:07 PM), <http://thehill.com/policy/healthcare/231638-house-votes-to-repeal-obamacare> [<http://perma.cc/C7FH-LV65>].

<sup>20</sup> See Manu Raju, John Bresnahan, Jake Sherman & Carrie Budoff Brown, *Anatomy of a Shutdown*, POLITICO (Oct. 18, 2013, 12:29 AM), <http://www.politico.com/story/2013/10/anatomy-of-a-shutdown-98518.html> [<http://perma.cc/37LL-J8FA>].

<sup>21</sup> 132 S. Ct. 2566 (2012).

<sup>22</sup> 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES (2010); cf. David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873, 893–94 (2014) (noting that the ACA's fate remains contested).

<sup>23</sup> As this Comment went to press, another challenge — this one by the House of Representatives over the appropriation of different ACA funds — survived its first hurdle. See *U.S. House of Representatives v. Burwell*, No. 14-1967, 2015 WL 5294762 (D.D.C. Sept. 9, 2015) (holding the House had standing to sue).

<sup>24</sup> Am. Enter. Inst., *supra* note 5; see Linda Greenhouse, Op-Ed., *Law in the Raw*, N.Y. TIMES (Nov. 12, 2014), <http://www.nytimes.com/2014/11/13/opinion/law-in-the-raw.html>.

tive history. This transformation of litigation strategy went unnoticed by most observers, but actually made the case a fight about the ACA's overarching scheme from the start.

The Court resisted being manipulated, but the opinion still inserts the Court into this battle, in ways that make it look different from what came before. Most importantly, the Court assumes direct responsibility for its final conclusion, rather than relying on an interpretive presumption or another crutch. It may be no coincidence that it was Justice Frankfurter who also wrote, in the same article cited in *King*: “Nor can canons of construction save us from the anguish of judgment.”<sup>25</sup>

A. *A Strategy Aimed at “Bits and Pieces” of a Law  
“that No One Understands”*

What appears to be the first public mention of the question in *King* occurred in December 2010, during a panel discussion at the conservative think tank, the American Enterprise Institute (AEI).<sup>26</sup> Thomas Christina, an attorney from South Carolina, told the audience that he “noticed something peculiar about the tax credit” provisions of the ACA — specifically, that the subsidies necessary to sustain the Act's central insurance reforms appeared limited by the statutory text to those states that had chosen to operate their own health-insurance exchanges.<sup>27</sup>

The ACA gives the states the right of first refusal to run their own exchanges, but requires the federal government to step in and do so if a state declines or fails.<sup>28</sup> This state-default option was insisted upon by states' rights proponents during the ACA's drafting process, and the assumption was that most Republican-dominated states would operate their own exchanges to prevent a full-scale federal takeover of state insurance markets.<sup>29</sup> The political resistance to the ACA, however, was much deeper than anticipated, and, as a result, nearly three dozen states ultimately decided not to support the statute in any way, includ-

---

<sup>25</sup> Frankfurter, *supra* note 9, at 544 (emphasis added).

<sup>26</sup> Am. Enter. Inst., *supra* note 5.

<sup>27</sup> Adam Liptak, *Lawyer Put Health Act in Peril by Pointing Out 4 Little Words*, N.Y. TIMES (Mar. 2, 2015), <http://www.nytimes.com/2015/03/03/us/politics/in-four-word-phrase-challenger-spied-health-care-laws-vulnerability.html>; Sarah Kliff, *The Accidental Case Against Obamacare: How a Lawyer, a Law Professor, and a Libertarian Found the Affordable Care Act's Secret Weakness*, VOX (May 26, 2015), <http://www.vox.com/2015/3/2/8129539/king-burwell-history> [<http://perma.cc/VXP9-JM4X>].

<sup>28</sup> 42 U.S.C. § 18041 (2012).

<sup>29</sup> See, e.g., Douglas Holtz-Eakin, *Yes to State Exchanges*, NAT'L REV. ONLINE (Dec. 6, 2012, 12:00 PM), <http://www.nationalreview.com/article/334956/yes-state-exchanges-douglas-holtz-eakin> [<http://perma.cc/RTH8-XADF>] (calling federal exchanges the ACA's “single-payer Trojan Horse”).



ing by establishing exchanges.<sup>30</sup> This made Christina's observation important because it meant that the subsidies — more than \$25 billion going to more than 7.5 million Americans<sup>31</sup> — would not be available on most exchanges. This loss, health economists made clear, would be devastating to the ACA's insurance reforms: the infamous insurance-purchase mandate broadens the marketplace for insurers and so makes the ACA's new requirements that insurers accept all applicants, even the sick, economically viable.<sup>32</sup> Without the subsidies, the mandate would be unaffordable, the healthiest customers would leave the marketplace, and the insurance markets in affected states would collapse.<sup>33</sup>

The focus of the 2010 AEI meeting was on alternative routes of attack alongside *NFIB*, which already was underway. To that end, following Christina was Professor Michael Greve, who made the following remarks, from which *King* was the direct result:

This bastard has to be killed as a matter of political hygiene. I do not care how this is done, whether it's dismembered, whether we drive a stake through its heart, whether we tar and feather it and drive it out of town, whether we strangle it. I don't care who does it, whether it's some court, some place, or the United States Congress. Any which way, any dollar spent on that goal is worth spending, any brief filed towards that end is worth filing, any speech or panel contribution toward that end is of service to the United States, and I thank the contributors on this panel for having made a terrific start . . . I want to sort of preliminarily say I think this is the right way to go, to concentrate on bits and pieces of this law beyond the [insurance] mandate . . .

I mean, this was a committee. This was a staff draft. It changed intermittently as this monster made its way through Congress. Very, very poorly written. There are all sorts of contradictions and incongruities in the statute. That, too, is something to be exploited . . .<sup>34</sup>

Fast forward five years to the briefing of *King* at the Court. The challengers' briefing contested the Government's claim that their read-

<sup>30</sup> *The Affordable Care Act's Health Insurance Marketplaces by Type*, COMMONWEALTH FUND, <http://www.commonwealthfund.org/interactives-and-data/maps-and-data/state-exchange-map> (last visited Sept. 27, 2015) [<http://perma.cc/8QSS-9TWQ>].

<sup>31</sup> Linda J. Blumberg, Matthew Buettgens & John Holahan, URBAN INST., *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums* (Jan. 2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000062-The-Implications-King-vs-Burwell.pdf> [<http://perma.cc/2K4W-P7HT>].

<sup>32</sup> Brief Amici Curiae for Bipartisan Economic Scholars in Support of Respondents at 2–5, *King*, 135 S. Ct. 2480 (No. 14-114).

<sup>33</sup> See *id.* at 16–27; Brief of the American Hospital Ass'n et al. as Amici Curiae in Support of Respondents, *King*, 135 S. Ct. 2480 (No. 14-114). The ACA allows an individual to exempt herself from the mandate if the cost of insurance exceeds eight percent of her income, 26 U.S.C. § 5000A(e)(1)(A) (2012), which is why the subsidies are critical to sustain the mandate.

<sup>34</sup> Only a YouTube recording of the remarks is available. Am. Enter. Inst., *supra* note 5, at 1:30:55–1:33:16.

ing produced “anomalies” throughout the ACA and argued that a literal approach to the text in isolation was the best that the Court could do: “The Government has thus unwittingly illustrated why it is a fool’s errand to search for a construction that eliminates any conceivable tension in every part of this gargantuan law — one that Congress was told, infamously, that it had to pass to find out its content.”<sup>35</sup> Instead, they argued, “‘the haste and confusion attendant upon the passage of this massive bill’ are ‘all the more reason . . . to hew to the statutory text.’”<sup>36</sup>

Three years earlier, at oral argument in *NFIB*, Justice Scalia had quipped that it would be cruel and unusual punishment — in violation of “the Eighth Amendment” — to make anyone read the entire statute.<sup>37</sup>

1. *Textual “Glitch” or Intended Consequence? The Transformation of the Case.* — The litigation strategy centered around the four words Christina identified, which sit in the tax provisions of the ACA that are directed at individuals. Specifically, section 1401 directs individuals to calculate their subsidies for tax purposes based on a calculation involving “the monthly premiums for such month . . . the taxpayer [was] enrolled in through an Exchange established by the State under [section] 1311.”<sup>38</sup> Because section 1311 of the ACA establishes the state-run exchanges, the challengers argued that section 1401 denies the subsidies on federally run exchanges. The briefing focused on “plain meaning” (“Congress could not have chosen clearer language to express its intent to limit subsidies to state Exchanges”<sup>39</sup>); other textual rules, such as the presumption that Congress uses the same statutory term consistently and that Congress does not use redundant language;<sup>40</sup> and several policy-based canons of construction that presume that deductions from the tax code are clearly expressed.<sup>41</sup>

The Government countered by looking at other provisions of the statute. It noted that the state exchanges are established in a different part of the ACA — one directed at the states themselves and the choices they must make. The state-directed part, which is titled “State

<sup>35</sup> Reply Brief at 13, *King*, 135 S. Ct. 2480 (No. 14-114).

<sup>36</sup> *Id.* (omission in original) (quoting *Engine Mfrs. Ass’n v. U.S. EPA*, 88 F.3d 1075, 1092 (D.C. Cir. 1996)).

<sup>37</sup> See Transcript of Oral Argument at 38, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-393) (“JUSTICE SCALIA: [W]hat happened to the Eighth Amendment? You really want us to go through these 2,700 pages? . . . [D]o you really expect the Court to do that? Or do you expect us to give this function to our law clerks?”).

<sup>38</sup> 26 U.S.C. § 36B(b)(2)(A) (2012).

<sup>39</sup> Brief for Petitioners at 20, *King*, 135 S. Ct. 2480 (No. 14-114).

<sup>40</sup> *Id.* (arguing also that “no one has been able to explain why it would have used this language absent such intent”); see also *id.* at 28, 49.

<sup>41</sup> *Id.* at 54; see, e.g., *Helvering v. Nw. Steel Rolling Mills, Inc.*, 311 U.S. 46, 49 (1940).

Flexibility Relating to Exchanges,”<sup>42</sup> has a section, 1321, titled “Failure to Establish Exchange or Implement Requirements,”<sup>43</sup> which sets forth consequences to states that do not run their own exchanges but mentions no subsidy deprivation.<sup>44</sup> The Government noted that the ACA nowhere defines — or even includes — the term “federal exchange.”<sup>45</sup> Instead, the Act defines “Exchange,” with a capital E, only as an exchange “established by a State” and an exchange “under section 1311.”<sup>46</sup> In section 1321, the Secretary of Health and Human Services (HHS) is directed to establish “such [a capital E] Exchange” if a state chooses not to operate its own.<sup>47</sup> The Government argued that HHS was thus directed to establish a “state exchange.”<sup>48</sup> As the Government detailed, several other provisions of the Act, including one that requires section 1321 exchanges to report all distributed subsidies to the IRS,<sup>49</sup> make no sense if the subsidies are not read to issue from section 1321 (the federally operated) exchanges. The Government invoked numerous canons of statutory interpretation of its own, including the presumption in favor of contextual interpretation;<sup>50</sup> the presumption of consistent usage;<sup>51</sup> the presumption that Congress does not hide “elephants-in-mouseholes” (bury major changes in ancillary provisions);<sup>52</sup> the presumption that Congress does not impose drastic consequences on states without a clear statement (federalism);<sup>53</sup> and *Chevron* deference for the IRS.<sup>54</sup>

*King*’s architects initially described the language in section 1401 as a “glitch”<sup>55</sup> — an unfortunate drafting error. By the time the case was briefed, however, neither party was willing to mention drafting errors to the Court. (More on this important twist in Part III; statutory mistakes are inevitable in the modern legislative context.) Instead, the challengers transformed their theory of the case into a new argument — that Congress had actually *intended* the statute to read as petitioners urged. Notably, the challengers’ briefs repeatedly invoked

<sup>42</sup> 42 U.S.C. ch. 157, subch. III, pt. C (2012).

<sup>43</sup> *Id.* § 18041(c).

<sup>44</sup> *See id.*

<sup>45</sup> *See* Brief for the Respondents at 23, *King*, 135 S. Ct. 2480 (No. 14-114).

<sup>46</sup> 42 U.S.C. §§ 300gg-91(d)(21), 18031(b)(1), 18031(d)(1).

<sup>47</sup> *Id.* § 18041(c)(1).

<sup>48</sup> Brief for the Respondents, *supra* note 45, at 46–49.

<sup>49</sup> 26 U.S.C. § 36B(f)(3) (2012).

<sup>50</sup> Brief for the Respondents, *supra* note 45, at 21.

<sup>51</sup> *Id.* at 27.

<sup>52</sup> *Id.* at 39 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

<sup>53</sup> *Id.* at 40.

<sup>54</sup> *Id.* at 55.

<sup>55</sup> Jonathan H. Adler & Michael F. Cannon, *Another ObamaCare Glitch*, WALL ST. J. (Nov. 16, 2011), <http://www.wsj.com/articles/SB10001424052970203687504577006322431330662>; Am. Enter. Inst., *supra* note 5, at 1:18:45–1:19:50 (calling it “an unintended consequence”).

legislative history and numerous extratextual statements from policy-makers<sup>56</sup> to argue that “there is ample evidence that Congress meant exactly what it said”;<sup>57</sup> that “nobody in Congress anywhere articulated a purpose to extend subsidies outside state-established Exchanges”;<sup>58</sup> that “the ‘scant legislative history’ that exists for the ACA . . . supports the proposition that Congress conditioned subsidies on state creation of Exchanges to induce states to act.”<sup>59</sup> This transformation of the case happened simultaneously with an aggressive and highly effective media strategy that pitted the case as a showdown between plain text, on the challengers’ side, and wishful thinking and loose purposes on the Government’s. The challengers’ own frequent invocation of purpose — indeed their very introduction of it into the case in the first place — went mostly overlooked by commentators.

2. *At the Court.* — Complementing the canon fire in the briefing, which supported both sides, talk of two oft-used canons, federalism and constitutional avoidance, permeated oral argument. If the Court wished to rule for the Government, these two canons seemed poised to provide uncomplicated ways out.<sup>60</sup> There was no reason to assume that the *King* opinion would be doctrinally different from what came before.

Every major recent statutory opinion, from every Justice on the Court, has relied heavily on interpretive canons to decide cases; their rise derives from textualism’s impact on the tools — text and presumptions, not legislative history and purpose — that virtually all judges now use to interpret statutes. For a recent example, consider *Yates v.*

---

<sup>56</sup> See, e.g., Brief for Petitioners, *supra* note 39, at 4–6 (citing views of Senator Ben Nelson of Nebraska; ACA “key architect” Jonathan Gruber; several legislative history reports, including SENATE DEMOCRATIC POLICY COMM., FACT CHECK: RESPONDING TO OPPONENTS OF HEALTH INSURANCE REFORM (Sept. 21, 2009), <http://dpc.senate.gov/reform/reform-factcheck-092109.pdf> [<http://perma.cc/MLS8-NM7P>]; and HOUSE COMM. ON OVERSIGHT & GOV’T REFORM AND HOUSE COMM. ON WAYS & MEANS, 113TH CONG., ADMINISTRATION CONDUCTED INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW’S TAXES AND SUBSIDIES 4 (2014)); *id.* at 16 (citing a “pre-debate proposal by an influential expert” and a “draft Senate bill”); *id.* at 37 (referring to President Barack Obama, Remarks by the President on the Affordable Care Act (Sept. 26, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/26/remarks-president-affordable-care-act> [<http://perma.cc/P232-SL3T>]); *id.* at 19 (discussing legislative history).

<sup>57</sup> *Id.* at 16.

<sup>58</sup> *Id.* at 35.

<sup>59</sup> *Id.* at 40 (quoting *Halbig v. Burwell*, 758 F.3d 390, 407 (D.C. Cir. 2014)). Two leading scholars who crafted the theory of the case argued likewise. See, e.g., Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae in Support of Petitioners at 4, *King*, 135 S. Ct. 2480 (No. 14-1114) (“[T]he rule actually *subverts* congressional intent by altering the balance Congress struck between the Act’s competing goals.”).

<sup>60</sup> See Transcript of Oral Argument at 16–17, 55–57, 75, 77, 79–80, *King*, 135 S. Ct. 2480 (No. 14-1114) (raising questions related to the federalism canon); *id.* at 15–16, 49–50, 75, 79–80 (raising constitutional avoidance issues).

*United States*,<sup>61</sup> a case decided last Term that considered the application of the evidence-destruction prohibitions of the Sarbanes-Oxley Act, which were enacted after the Enron scandal, to illegally caught fish.<sup>62</sup> The case was a veritable linguistic-canon tennis match between two only moderate textualists, Justices Ginsburg and Kagan, each wielding Latin presumptions to her advantage.<sup>63</sup> The prior Term's prominent statutory cases were no different. The last three major statutory decisions of the 2013 Term were wars of canonical interpretation over the rule of lenity,<sup>64</sup> a conflict among "competing maxims,"<sup>65</sup> and the federalism canon.<sup>66</sup> Many similarly expected that the Court would use a canon as a punt or an otherwise clean exit strategy,<sup>67</sup> as some viewed the Chief Justice's use of the constitutional avoidance canon to save the ACA in *NFIB*,<sup>68</sup> or his use of the federalism canon in 2014 to prevent the application of a chemical weapons statute to a domestic love triangle.<sup>69</sup>

Instead, we got something different. Chief Justice Roberts's opinion begins with five pages of detail showcasing the Court's understanding of the "interlocking" and "intertwined" reforms in the ACA;<sup>70</sup> cites the ACA's own codified statement of purposes (without mentioning legislative history);<sup>71</sup> and concludes that the surrounding provisions of the statute support the Government and so render the meaning of section 1401 ambiguous.<sup>72</sup> Explaining that the Court cannot interpret statutes to "negate their own stated purposes,"<sup>73</sup> the Court finds the

<sup>61</sup> 135 S. Ct. 1074 (2015).

<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g., id.* at 1085 (plurality opinion); *id.* at 1097–98 (Kagan, J., dissenting).

<sup>64</sup> Compare *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014), *with id.* at 2280–81 (Scalia, J., dissenting).

<sup>65</sup> *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236–37 (2014) (describing potential conflict between the implied repeals canon and the presumption of full effect).

<sup>66</sup> Compare *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014), *with id.* at 2095–96 (Scalia, J., concurring in the judgment) (disputing when the federalism canon applies).

<sup>67</sup> *See, e.g.,* Michael C. Dorf, *Did Federalism Rescue Obamacare?*, JUSTIA: VERDICT (Mar. 11, 2015), <http://verdict.justia.com/2015/03/11/federalism-rescue-obamacare> [<http://perma.cc/V8Z9-UYDH>].

<sup>68</sup> 132 S. Ct. 2566, 2594 (2012) (opinion of Roberts, C.J.) (accepting the Government's invitation to "interpret the mandate as imposing a tax, if it would otherwise violate the Constitution").

<sup>69</sup> *Bond*, 134 S. Ct. at 2085–86, 2090; *see also* Josh Blackman, *Bond Dissolves with Federalism*, JOSH BLACKMAN'S BLOG (June 2, 2014), <http://joshblackman.com/blog/2014/06/02/bond-dissolves-with-federalism> [<http://perma.cc/UR4A-VJML>] (comparing the exit strategy used in *NFIB* and *Bond*); James R. Copland, *Bond v. U.S.*, POINTOFLAW.COM (June 4, 2014, 11:32 AM), <http://www.pointoflaw.com/archives/2014/06/bond-v-us.php> [<http://perma.cc/4FED-HL7S>] (same).

<sup>70</sup> *King*, 135 S. Ct. at 2485–87.

<sup>71</sup> *Id.* at 2486–87, 2492–93 (citing the statement of purposes related to the individual mandate).

<sup>72</sup> *Id.* at 2492–93.

<sup>73</sup> *Id.* at 2493 (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973)).

challengers' reading "untenable"<sup>74</sup> and inconsistent with "Congress's plan."<sup>75</sup>

Along the way, the Court mentions just three presumptions, all of which — unlike many textual canons — center more, not less, power in the Court and resist the idea of legislative perfection: the Court holds that the question at issue was too significant to assume that Congress delegated it to the agency (the "major questions" canon),<sup>76</sup> that Congress would not have buried such a central point in "the ultimate ancillary provision" (the "no-elephants-in-mouseholes" rule),<sup>77</sup> and that statutory language must be interpreted in its broader context (*read*: "plan").<sup>78</sup> With respect to the other text-based presumptions that permeated the briefing, the Court holds that the ACA's unorthodox legislative process and "inartful drafting" make those commonly deployed presumptions inapplicable.<sup>79</sup> Dissenting for himself and Justices Thomas and Alito, Justice Scalia charges the Court with playing "favorites"<sup>80</sup> and disregarding "all the usual rules of interpretation"<sup>81</sup> in favor of "consulting statutory purpose"<sup>82</sup> to "save" the ACA.<sup>83</sup>

The original story of the language at issue as a "glitch" or mistake went unpressed by any party. The *King* majority itself uses the phrase "inartful drafting" but says nothing more.<sup>84</sup> Justice Scalia's dissent affirmatively rejects any kind of mistake theory.<sup>85</sup> Instead, his dissent, like the challengers' argument, grounds its reading in a story of plausible statutory purpose — that its reading of the ACA is consistent with Congress's "goals" and so consistent with what Congress might have intended: "the Congress that wrote the Affordable Care Act knew how to equate two different types of Exchanges when it wanted to do so,"<sup>86</sup> and there were good reasons why Congress would have made the distinction here.<sup>87</sup>

---

<sup>74</sup> *Id.* at 2495 (quoting *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 343 (1994)).

<sup>75</sup> *Id.* at 2496.

<sup>76</sup> *Id.* at 2488–89.

<sup>77</sup> *Id.* at 2495.

<sup>78</sup> *Id.* at 2489.

<sup>79</sup> *Id.* at 2492, 2493 n.3.

<sup>80</sup> *Id.* at 2507 (Scalia, J., dissenting).

<sup>81</sup> *Id.* at 2497.

<sup>82</sup> *Id.* at 2503.

<sup>83</sup> *Id.* at 2506.

<sup>84</sup> *Id.* at 2492 (majority opinion).

<sup>85</sup> *Id.* at 2505 (Scalia, J., dissenting).

<sup>86</sup> *Id.* at 2499.

<sup>87</sup> *Id.* at 2497–99.

*B. The ACA's Unorthodox Lawmaking: How Those Four Little Words Got There*

As detailed in Part III, the ACA is a textbook example of the modern trend toward nontextbook, or “unorthodox,” lawmaking, and *King* stakes out new ground by recognizing the special challenges that trend poses for the Court. Nevertheless, the Court does not actually discuss where the four words at issue came from. Nor did either party, even as the challengers charged that no one had offered any explanation for why the four words in question were in the law if they were not there to limit the tax credits.<sup>88</sup> The specifics of the challengers’ counterstory of congressional intention were aggressively rebutted on numerous fronts,<sup>89</sup> and I will not rehearse those arguments here. My goal instead is to explain the origin of the contested language to frame the broader questions of whether courts can understand such complex legislative pathways and what courts should do about imperfections that may result from them.

The issue in *King* comes from the merger of committee drafts of the ACA. Two committees in the Senate — the Finance Committee and the Health, Education, Labor and Pensions Committee (HELP) — shared primary jurisdiction over most of the subject matter and so each drafted a version of the ACA. The final version used the Finance

<sup>88</sup> Brief for Petitioners, *supra* note 39, at 20.

<sup>89</sup> Among these responses were rebuttals from federal and state officials, *see, e.g.*, Brief of the Commonwealths of Virginia et al. as Amici Curiae in Support of Affirmance at 16–17, *King*, 135 S. Ct. 2480 (No. 14-114) (arguing the states had always understood the subsidies would be available on both types of exchanges); Brief of Members of Congress and State Legislatures as Amici Curiae in Support of Respondents at 3–4, 11–15, *King*, 135 S. Ct. 2480 (No. 14-114); Tom Harkin, Ron Wyden, Sander M. Levin, George Miller & Henry A. Waxman, *Affordable Care Act Opponents Are Cherry-Picking Their History*, WASH. POST (Oct. 30, 2014), [http://www.washingtonpost.com/opinions/affordable-care-act-opponents-are-cherry-picking-their-history/2014/10/30/2199a04e-5fac-11e4-91f7-5d89b5e8c251\\_story.html](http://www.washingtonpost.com/opinions/affordable-care-act-opponents-are-cherry-picking-their-history/2014/10/30/2199a04e-5fac-11e4-91f7-5d89b5e8c251_story.html) [<http://perma.cc/337G-ZPQH>]; Robert Pear, *Four Words that Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. TIMES (May 25, 2015), <http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html> (summarizing author’s interviews with more than two dozen Democrats and Republicans involved in writing the law); Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Rep. Darrell E. Issa, Chairman, House Comm. on Oversight and Gov’t Reform (Dec. 6, 2012); Letter from Sen. Benjamin Nelson to Sen. Robert P. Casey, Jr. (Jan. 27, 2015), [http://theconstitution.org/sites/default/files/briefs/Senator\\_Casey\\_re\\_King\\_v\\_Burwell-27\\_JAN\\_2015.pdf](http://theconstitution.org/sites/default/files/briefs/Senator_Casey_re_King_v_Burwell-27_JAN_2015.pdf) [<http://perma.cc/7ZP6-GVHP>] (“I *always* believed that tax credits should be available in all 50 states regardless of who built the exchange, and the final law also reflects that belief as well.”), and reporters who covered the ACA’s enactment, *see, e.g.*, Steven Brill, *The Supreme Court Hears an Obamacare Fairytale*, REUTERS (Mar. 2, 2015), <http://blogs.reuters.com/great-debate/2015/03/02/the-supreme-court-hears-an-obamacare-fairytale> [<http://perma.cc/QV97-Q8AQ>]; Ezra Klein, *The Weirdest Obamacare Theory Yet*, VOX (July 28, 2014, 8:00 AM), <http://www.vox.com/2014/7/28/5942933/Obamacare-Halbig-Gruber> [<http://perma.cc/R3J3-Y68J>]; Sarah Kliff, *Congress Had Lots of Obamacare Fights. Ending Some Subsidies Wasn’t One of Them*, VOX (July 26, 2014, 2:30 PM), <http://www.vox.com/2014/7/26/5937593/obamacare-halbig-gruber-tax-credits> [<http://perma.cc/EBM2-EMPS>].

bill as its primary template, but there were important elements of the HELP bill incorporated when the drafts were merged. In particular, the *consequences* section of the ACA — what happens if a state elects not to establish its own exchange — was taken from the HELP bill, which provided for a federal fallback exchange, with subsidies.<sup>90</sup> One reason that the HELP bill was a necessary model here was that the Finance bill had *no concept* of a federally run exchange at all: that bill included only “state exchanges” and provided that if a state failed to operate its own exchange, HHS would have to contract with a nongovernmental entity to run those exchanges in the states.<sup>91</sup> The Finance Committee markup repeatedly referred to those nongovernmental-entity fallback exchanges as “state exchanges.”<sup>92</sup>

Perhaps the Government viewed this explanation as too complicated for the Court, or perhaps there was a fear of acknowledging something that had the odor of mistake, but it explains why the statute looks the way it does. As noted, Justice Scalia’s dissent rejects a mistake story: “What are the odds,” he asks, “that the same slip of the pen occurred in seven separate places? . . . If there was a mistake here, context suggests it was a substantive mistake in designing this part of the law, not a technical mistake in transcribing it.”<sup>93</sup> In fact, because under the Finance bill, none of the exchanges was to be federally run, all the provisions retained from Finance had that state-exclusive language. All but one of the references in the final ACA to “exchange established by the state” that the dissent mentions came from the Finance draft and none came from the HELP draft.<sup>94</sup> This also explains what the challengers argued was inexplicable, namely, how the federal government could be thought to be operating a “state exchange.” That is precisely what the Finance bill had told the federal government to

---

<sup>90</sup> Compare, e.g., 42 U.S.C. § 18041 (2012) (“State flexibility in operation and enforcement of Exchanges and related requirements . . . (c) Failure to establish Exchange or implement requirements”), with S. 1679, 111th Cong. § 3104 (2009) (“Allowing State Flexibility . . . (d) Federal Fallback in the Case of States That Refuse to Improve Health Care Coverage”). Notably, one provision *not* copied was a provision in the HELP bill that would have penalized states for not running their own exchanges. See S. 1679 § 3104(d). The Court has long applied a “rejected proposal rule,” under which it refuses to construe statutes to incorporate provisions that Congress has expressly rejected. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983); *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

<sup>91</sup> S. 1796, 111th Cong. § 2225(b) (2009).

<sup>92</sup> CHAIRMAN OF THE S. COMM. ON FIN., 111TH CONG., CHAIRMAN’S MARK: AMERICA’S HEALTHY FUTURE ACT OF 2009, at 11, 20 (2009).

<sup>93</sup> *King*, 135 S. Ct. at 2505 (Scalia, J., dissenting).

<sup>94</sup> See Brief of Health Care Policy History Scholars as Amici Curiae Supporting Respondents, *King*, 135 S. Ct. 2480 (No. 14-1114), at 18. Compare S. 1679, with S. 1796. The last such mention was a cross-reference in the Finance bill but spelled out in the final ACA. Compare 26 U.S.C. § 36B(c)(2)(A)(i) (2012), with S. 1796 § 36B(c)(2)(A)(i).



set up: the Finance bill's fallback exchanges were state exchanges operated by outsiders.

Ideally, the lingering Finance language would have been clarified once the provisions modeled on the HELP bill were merged into the draft. Staffers have reported that they expected to have that opportunity, as the textbook legislative process would have permitted.<sup>95</sup> Under the conventional process, after the Senate vote, the bill would have moved to and through the House and then been cleaned up and harmonized in the two-chamber Conference Committee before a final vote by each chamber.<sup>96</sup>

As I have detailed elsewhere, however, Conference never occurred.<sup>97</sup> After combining the two Senate drafts, the Senate moved to what was at the time thought to be a preliminary vote on the bill. The House also drafted its own version of the ACA, which notably made *federal* exchanges — with subsidies — the default option.<sup>98</sup> The expectation was that differences over the exchange structure would be worked out later, before the final vote.<sup>99</sup> But one month after the Senate vote, Senator Kennedy, who had died several months earlier, was replaced by Republican Scott Brown, depriving the Democrats of their critical sixtieth vote in support of the ACA.<sup>100</sup> (Sixty is the magic number in the Senate because sixty votes are required to close debate and move to a vote on the merits.<sup>101</sup>) Without sixty votes, the Senate Democrats lost flexibility to later amend the version enacted by the Senate in December 2009 — whether to clean it up or to include items expected to be demanded by the House — because any amendment would require the same sixty-vote process of getting to a vote on the merits, and it was clear that the ACA obstructionists would filibuster. As a result, the House had no choice but to accept the Senate draft as final, and there was no Conference to eliminate imperfections.<sup>102</sup>

<sup>95</sup> Gluck & Bressman II, *supra* note 13, at 762–63.

<sup>96</sup> *See id.*

<sup>97</sup> Abbe R. Gluck, *Why Health Lawyers Must Be Public-Law Lawyers: Health Law in the Age of the Modern Regulatory State*, 18 J. HEALTH CARE L. & POL'Y 323, 325–29 (2015).

<sup>98</sup> *See* H.R. 3962, 111th Cong. (2010).

<sup>99</sup> *See* Gluck & Bressman II, *supra* note 13, at 763.

<sup>100</sup> Democrat Paul Kirk was appointed as the interim senator from Massachusetts until the election took place. *See* Fred Barnes, *Kirk Can't Vote After Tuesday*, WKLY. STANDARD: THE BLOG (Jan. 16, 2010, 10:28 PM), <http://www.weeklystandard.com/blogs/barnes-massachusetts-senatorial-race-and-obamacare> [<http://perma.cc/5BHM-YKQN>].

<sup>101</sup> *See* STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXII § 2, at 16 (2013); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 98 n.112 (2012).

<sup>102</sup> Some have speculated that another factor contributing to the lack of cleanup was what may have been less involvement than usual by the relevant agencies — HHS and the Centers for Medicare and Medicaid Services — in the drafting and review of these provisions, perhaps because those agencies have not historically been expert on questions relating to private insurance markets. Thanks to Scott Levy and Jerry Mashaw for this insight.

As the *King* majority notes, Congress did utilize a different procedure — a budget procedure known as reconciliation — to pass a law a week after the ACA was enacted that, among other provisions, included amendments to the ACA and allowed some concessions to the House. Reconciliation was useful under the circumstances because it suspends the Senate filibuster rules to facilitate the enactment of legislation.<sup>103</sup> Because it is part of the budget process, however, reconciliation is strictly limited to budget-related provisions,<sup>104</sup> and thus only certain House demands (for instance, its desire to lower the ACA’s “Cadillac tax”<sup>105</sup>) could be accomplished through this procedure. Ordinary cleanup could not.

It is worth noting that the one and only provision in the ACA that refers to the notion of an “exchange under section . . . 1321(c)” (the federally operated exchange provision) was added in reconciliation and expressly assumes the availability of subsidies on federally run exchanges, because it requires section 1321 exchanges to report them.<sup>106</sup> The Court has long recognized the particular importance of changes made at the very last stage of the legislative process.<sup>107</sup> The *King* majority, however, in lamenting that, as a result of the ACA’s unconventional legislative process, “the Act does not reflect the type of care and deliberation that one might expect of such significant legislation,”<sup>108</sup> generally treated the use of reconciliation as a pathology rather than as a source of insight.

So, was it a “mistake,” an “amalgamation” error, a “term of art” retained from the Finance draft, or just ambiguity? The statutory history illustrates that these concepts are a lot more complicated than the Court has previously understood them to be. It certainly does not seem to be the kind of “*substantive* mistake in designing this part of the law” that Justice Scalia surmises.<sup>109</sup> Justice Scalia’s cynicism about a seven-time “slip of the pen” rests on the fiction that Congress drafts statutes front to back, and always has the opportunity to perfect them. These assumptions, as detailed below, are replicated in most of the Court’s statutory interpretation doctrines. The ACA’s procedural history — and as well the history of most other modern statutes — does not fit that narrative.

---

<sup>103</sup> 2 U.S.C. § 641(e) (2012).

<sup>104</sup> *See id.* § 644.

<sup>105</sup> *See* 156 CONG. REC. H2206 (daily ed. Mar. 22, 2010); 156 CONG. REC. S1821–26 (daily ed. March 23, 2010).

<sup>106</sup> 26 U.S.C. § 36B(f)(3) (2012).

<sup>107</sup> *See, e.g.,* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 522–24 (1989); Nourse, *supra* note 101, at 98 (“[S]equence is important.”).

<sup>108</sup> *King*, 135 S. Ct. at 2492.

<sup>109</sup> *Id.* at 2505 (Scalia, J., dissenting) (emphasis added).

## II. TWO VISIONS OF MODERN CONGRESS AND THE MODERN COURT

The *King* challenge was thus grounded in a particular view of the Court's inability, or unwillingness, to deal with legislative complexity. The challengers' vision of how the Court should see Congress, adopted by Justice Scalia in dissent, embraces a profound tension at the heart of modern statutory interpretation doctrine: Congress is assumed to be both irrational and perfect at once. Congress can never be understood, but when courts interpret statutes, they should hold Congress to standards of omniscience, precision, perfection, and simplicity. Textualism has deeply influenced this vision, but it is important to recognize that it has now come to be adopted by most judges, because it is embodied in the canons of interpretation that most judges (and all of the Justices) now deploy in virtually every statutory case.

This is not to say that the Government could not have prevailed even with this view of Congress. One of the most interesting things about *King* is that so many roads open to the majority were not taken. Canons or *Chevron* easily could have carried the day for the Government, and still been compatible with a view of the ACA as too difficult for the Court to deeply understand.<sup>110</sup>

Instead, the *King* majority responds with a different vision of both Congress's and the Court's capacities. Congress is imperfect, but it has a "plan" — the most important word in the opinion, because it signals that Congress is nevertheless rational, that its work product is comprehensible, and that a laser focus on a few words is not the right perspective. Plans, as Professor Scott Shapiro has noted, are meant to be read by someone; they form the basis of relationships between those who write the plans and those who implement them.<sup>111</sup> Plans also provide the whole story, all the pieces of the big picture. The *King* majority elevates the Court by putting the Court (and not the agency) on the receiving end of the plan; tells us that Congress can trust the Court to understand it; takes a macro, functionalist, view of how all

---

<sup>110</sup> It is intriguing, however, that several of the cases cited by the Court for the interpretive approach it ultimately does apply are cases in which the federalism canon played an important role, even if unmentioned in the *King* opinion. See, e.g., *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 345–48 (1994) (cited in *King*, 135 S. Ct. at 2495); *Palmer v. Massachusetts*, 308 U.S. 79, 84–85 (1939) (cited in *King*, 135 S. Ct. at 2496). It may be the case that the Court did not want to use the federalism canon to rule for the government, see Ilya Somin, *Federalism Arguments in King v. Burwell*, WASH. POST: VOLOKH CONSPIRACY (Mar. 7, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/07/federalism-arguments-in-king-v-burwell/> [http://perma.cc/6H9W-2TJD] (arguing the canon cannot be used to "expand" federal power); my firm disagreement with this proposition must await another day. As noted, I filed a brief in the case on the applicability of the canon. See Brief for Professors Thomas W. Merrill et al. as Amici Curiae Supporting Respondents, *supra* note \*.

<sup>111</sup> See generally SCOTT J. SHAPIRO, *LEGALITY* (2011).

the pieces of the ACA work together; and concludes that the Court has a duty not to “undo what [Congress] has done.”<sup>112</sup>

Many courtwatchers saw these moves and cried “purposivism!” Labels matter because the term “purposivism” today means something different, as a term of art, from the mere use of purpose in interpretation. The term is a loaded one — a textualist foil — and tends to be coupled with charges of legislative-history use, atextual interpretation, and judicial activism. Indeed, critics have accused the majority of “legislative gap-filling”<sup>113</sup> for ignoring the “usual rules of interpretation.”<sup>114</sup> But what has escaped attention is that the kind of objectified, text-derived purpose the Court utilizes has textualist foundations, along with Legal Process ones. So does the concept of a comprehensive legislative plan. That concept has appeared in more than 100 cases in the U.S. Reports — it is a particular kind of purpose that derives from statutory text and structure, and so is different from the concept of “purposivism” as we have come to know it.<sup>115</sup>

What also has escaped attention is that the alternative that the dissent would offer is its own form of activist judicial legislation. Using rules of construction that impose a coherence, perfection, or substantive policy on statutes that Congress never did — using rules that Congress does not know, adopt, or agree with — is not passive judging. This does not make these rules illegitimate, but it means that they must find justification in arguments untethered to Congress, such as serving as system-coordinating default rules. But that would require the Court’s interpretive doctrines to be treated as “real” law — consistent, precedential, predictable — and, as I have previously illustrated, the Court has never been interested in doing that.<sup>116</sup>

Much has been written about the Chief Justice’s attention to the Court’s institutional integrity in high-stakes cases.<sup>117</sup> I will not reprise those arguments, but would argue that these broader institutional

---

<sup>112</sup> *King*, 135 S. Ct. at 2946.

<sup>113</sup> James Blumstein, *Some Reflections on King v. Burwell*, CASETEXT (July 6, 2015), <http://casertext.com/posts/some-reflections-on-king-v-burwell>.

<sup>114</sup> *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting).

<sup>115</sup> A Westlaw advanced search, from Aug. 13–Aug. 18, 2015, of (“congress! plan” OR “statut! plan” OR “legislat! plan” % redistricting) yielded 132 opinions mentioning the concept, of which research assistants determined 31 were false positives (cases that used the word “plan” but not in reference to a legislative plan as in *King*).

<sup>116</sup> See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 757 (2013) [hereinafter Gluck, *Federal Common Law*]. See generally Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898 (2011) [hereinafter Gluck, *Intersystemic*].

<sup>117</sup> See, e.g., Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 827–41 (2013); Ilya Shapiro, *Fear and Loathing at One First Street*, 18 TEX. REV. L. & POL. 357, 367–71 (2014) (book review); Lincoln Caplan, *John Roberts’s Court*, NEW YORKER (June 29, 2015), <http://www.newyorker.com/news/news-desk/the-chief-justice> [<http://perma.cc/9T2X-MQY7>].

questions, much more so than “textualism versus purposivism,” are what really divide the opinions. The connection to Congress and the relationship to agencies — including the Court’s rejection of *Chevron* in favor of *Marbury* here — are the big questions. Another is whether, and how, the Court will educate itself sufficiently about how Congress works so that it will not be duped by attempts, like this one, to take advantage of the Court’s ignorance. That is a different kind of institutional-integrity issue, and it is hard to miss in *King* the sense that the majority is reacting, with a high degree of intolerance, to that attempt in this case.

A. *Before King: A Perfect, Incomprehensible Congress*

The Court’s everyday interpretive presumptions are based on two different visions of Congress that often are in tension. The first is the notion of an incomprehensible Congress; this is an empirical vision, and one that derives from the legal realist tradition.<sup>118</sup> The second is the opposite vision of a perfect Congress; this, in contrast, is a doctrinal reaction to the first view of the world. It is a “construct” that makes workable the interpretive doctrines that courts have developed to manage the complexity of statutes and the incoherence of congressional intent.<sup>119</sup> Textualism has been the dominant influence in the development of these rules, but they are now adopted by the entire Court and so the argument I develop here applies from Justice Breyer to Justice Scalia, although I label it “textualist.”

Textualism’s founders were heavily influenced by the legal realists, who argued that collective legislative intent is an impossible notion.<sup>120</sup> Later work in law and economics, particularly the public-choice-theory arm of that movement, further developed the argument about the difficulty for judges “to aggregate individual legislators’ preferences into a coherent collective decision” and contended that legislative choices are often simply arbitrary.<sup>121</sup> This theory translated to a doctrinal approach grounded in enforcing statutory text even if a rational story about what Congress was doing was lacking.

But modern text-focused judges respond to the challenge of complexity differently than did the legal realists. Whereas the legal realists

---

<sup>118</sup> See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 n.34, 444 n.84 (2005); see also Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 131–33 (2009).

<sup>119</sup> Manning, *supra* note 118, at 425.

<sup>120</sup> See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 642 (1990).

<sup>121</sup> John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 (1997).

doubted the ability of legal doctrine to cabin judicial discretion,<sup>122</sup> judges today rely on canons of statutory construction to impose a “rule of law” on this landscape. The sheer numerosity of the canons casts serious doubt on their utility for this purpose. There are hundreds, ranging from linguistic presumptions like the presumption of consistent usage,<sup>123</sup> to policy presumptions like the federalism-respecting canon,<sup>124</sup> to subject-specific presumptions, like the tax canons<sup>125</sup> — each of these, and many more, were invoked in *King*.

The link to the core questions in *King* is that the canons are proxies for judicial expertise. Statutory language is too complex and the questions undertaken often too specialized for generalist judges to understand without some help. Consider this irony: even in this textualist era, no judge (or member of Congress) reads a statute like the ACA or the Clean Air Act or any omnibus bill in its entirety.

Here, however, is another irony. Even as the canons’ attraction stems from the notion that judges cannot or should not try to understand what exactly Congress is doing, most of the Court’s justifications for deploying the canons are grounded in purported empirical understandings of *how Congress actually works* or *what rules Congress actually knows*.

The Court, from Justice Scalia to Justice Breyer, has defended the canons as democratically legitimate and nonactivist tools of law on the ground that Congress shares the canons’ conventions<sup>126</sup> — so they serve as common background drafting presumptions<sup>127</sup> — or that the canons simply passively reflect how Congress drafts laws.<sup>128</sup> At the same time, the Court has never shown any interest in verifying its assumptions about what Congress knows or how it writes, and recent

---

<sup>122</sup> Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 754–56 (2013); see also Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 443–44 (1930).

<sup>123</sup> See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 170–73 (2012).

<sup>124</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>125</sup> See Brief for Petitioners, *supra* note 39, at 53–55.

<sup>126</sup> See *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 155 (claiming that Congress and the courts “share[] a rich set of established background conventions” (emphasis omitted)); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

<sup>127</sup> See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (calling federalism canon a “background assumption”); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (“*Chevron* . . . provides a stable background rule against which Congress can legislate . . . .”); *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 590 (1995) (calling tax canon a “strong background presumption”); John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1864–65 (2004); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 801–02.

<sup>128</sup> SCALIA & GARNER, *supra* note 123, at 51.

empirical work, including my own study with Professor Lisa Bressman, casts serious doubt on many of them.<sup>129</sup>

Many of the canons make assumptions about Congress that are incompatible with the modern legislative complexity exemplified by statutes like the ACA. The canons assume that Congress delegates to one agency, not multiple agencies with overlapping duties; they assume that a single omniscient drafter writes an entire statute and so statutes are consistent and precise; they assume that Congress doesn't repeat itself; and so on. One reason that *King* was viewed by many as a major test for textualism was a fear that the canons would lead the Court to impose a simplicity on the statute that the ACA could not bear.<sup>130</sup>

Consider this statement, unrelated to *King*, by Justice Scalia:

Whether or not Congress is always meticulous, if we don't *assume* that Congress picks its words with care, then Congress won't be able to rely on words to specify what policies it wishes to adopt or, as important, to specify just how far it wishes to take those policies.

So our delegates to Congress are not meticulous? No, we have to assume the contrary. That is the assumption of democracy. . . . Since we can't know what's in the minds of 436 legislators (counting the President), all we can know is that they voted for a text that they presumably thought would be read the same way any reasonable English speaker would read it. In fact, it does not matter whether they were fall-down drunk when they voted for it. So long as they voted for it, that text is the law.<sup>131</sup>

Congress is impenetrable on the one hand and perfect on the other. Congress should be assumed to act even arbitrarily sometimes, and yet it is assumed to be relentlessly purposive when it "picks its words with care."<sup>132</sup>

1. *Formalism and Activism.* — The canons are supposed to relieve courts of the kind of legislating for which the dissent criticizes the majority in *King*. But as I have detailed elsewhere,<sup>133</sup> the canons are their own form of judicial lawmaking. When courts craft rules that impose coherence or consistency on statutory language where Congress did not, or layer atop a statute a policy presumption with which Congress most certainly disagrees,<sup>134</sup> they are using judge-made doctrine to

<sup>129</sup> Gluck & Bressman I, *supra* note 13; Gluck & Bressman II, *supra* note 13.

<sup>130</sup> Abbe R. Gluck, *Symposium: The Grant in King: Obamacare Subsidies as Textualism's Big Test*, SCOTUSBLOG (Nov. 7, 2014, 12:48 PM), <http://www.scotusblog.com/2014/11/symposium-the-grant-in-king-obamacare-subsidies-as-textualisms-big-test> [<http://perma.cc/77U5-8S8N>].

<sup>131</sup> Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012) (citation omitted).

<sup>132</sup> *Id.*

<sup>133</sup> See generally Gluck, *Federal Common Law*, *supra* note 116; Gluck, *Intersystemic*, *supra* note 116.

<sup>134</sup> See, e.g., Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1466 (2014) (noting frequency of congressional overrides of lenity applications because legislators like to be

actively *shape* the meaning of statutory law in ways that Congress did not. There are many good reasons that courts should do this — furthering constitutional values, making text accessible to the public, and so on — but that does not make the canons passive tools.

A Court that sees its proper role as “keeper of the U.S. Code” — in the sense of reading statutes to be perfectly coherent and consistent — is not a Court focused on legislative supremacy. It is a Court that, actually, very much like Justice Breyer’s aggressively purposivist approach, aims to *improve* on Congress’s imperfections. This is a point that has been widely overlooked, but it reveals that what Justice Scalia and Justice Breyer are each doing may be more similar than different.

Some textualist commentators resist these criticisms by arguing that Congress knows the rules, so they are shared conventions.<sup>135</sup> But empirical work strongly undermines any such claims; the Court has made no effort to try to get Congress to adopt the same conventions,<sup>136</sup> and Congress has shown no interest in or capacity for doing so.<sup>137</sup>

Another defense, one that Judge Easterbrook has offered, is that the canons play a different kind of formalist role<sup>138</sup>; they are a second-best regime of system-coordinating, simplified rules to facilitate efficiency and predictability in legal decisionmaking, because it would be too costly for courts to devise doctrines that reflect the realities of the legislative process.<sup>139</sup> This is a justification for canons that I myself have supported.<sup>140</sup> But this justification depends entirely on the canons being fewer, consistently deployed, and being treated as preceden-

---

tough on crime); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1824–25 (2010) [hereinafter *States as Laboratories*] (noting that many state legislatures have attempted to override by statute the application of courts’ favorite rules, including the rule of lenity and the common law derogation canon).

<sup>135</sup> See John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. (forthcoming 2015) (acknowledging this limitation but arguing that canons still could serve as coordinating rules for lawyers and judges).

<sup>136</sup> See ROBERT A. KATZMANN, JUDGING STATUTES 52–53 (2014) (detailing the lack of communication and shared conventions across the branches).

<sup>137</sup> See Gluck & Bressman II, *supra* note 13, at 744–56, 773–75, 792–96 (documenting the inability of Congress to coordinate consistent drafting presumptions and reporting staffers’ views that Congress will not pay attention to canons until courts apply them consistently).

<sup>138</sup> See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983) (“[Canons] spare legislators the need to decide and announce, law by law, the rules that will be used for interpreting the code of words they select.”); see also ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997).

<sup>139</sup> See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 63 (1994) (advocating “understandable commands, consistently interpreted,” “confin[ing] judges,” “not because . . . language *is* simple and statutory commands ‘plain’; instead the concern is that only a relatively mechanical approach can be reconciled with the premises of democratic governance”).

<sup>140</sup> See *States as Laboratories*, *supra* note 134, at 1846–55; Gluck, *Federal Common Law*, *supra* note 116, at 806–11.



tial — as real rules of federal common law — an approach that commentators since Professor Karl Llewellyn have demonstrated does not exist, and that I have shown elsewhere that the federal courts have no interest in adopting.<sup>141</sup> It would also require much more clarity about when the canons apply, and what level of ambiguity, if any, suffices to trigger them — a question that continues to divide the Justices.<sup>142</sup> Indeed, one way to understand *King* is as a divide over this same question of when there is sufficient ambiguity to resort to considerations — including statutory context — beyond isolated text.

The point is that we have to wonder just how the modern canon-dependent approach that the *King* dissent urges is a suitable response to the kind of legislative complexity presented by statutes like the ACA. If the canons do not actually attempt to approximate how Congress drafts, they cannot be justified as democratically derived, albeit rough, proxies for judicial expertise. If they are not treated as real rules of law, they cannot be justified as formalist decision rules that sacrifice accuracy for efficiency and rule-of-law values.<sup>143</sup>

This exposition also sheds some light on why the lack of heavy-canon reliance by the *King* majority seemed to some observers so refreshing. Commentators observed that the Court's approach seemed more "in charge" without them.<sup>144</sup> Some prominent theorists view the canons as pure window dressing.<sup>145</sup> And yet the canons are now taught in most law schools, and they are briefed in virtually every case as the doctrines of the field. *King* was a moment of truth for the canons, but it did not tell us about their future. In fact, *King* probably did textualism and its canons a big favor. *King* could have been for textualism what *United Steelworkers of America v. Weber*<sup>146</sup> was for purposivism — the turning-point case that revealed the greatest risks of an extreme version of the then-dominant interpretive methodology

<sup>141</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (presenting the idea that for every canon, there is an opposing canon). The Court refuses to acknowledge the source of many canons as judge-made law undoubtedly because of the modern, post-*Erie* aversion to federal common lawmaking and because the consequences of such an acknowledgement would mean that Congress could legislate the canons — an idea that courts passionately resist. See Gluck, *Federal Common Law*, *supra* note 116, at 756–57 & 804. Cf. Richard Fallon, *The Canons of Interpretation as a Window into the Relationships Among Law, Language, and Substantive Values* (unpublished manuscript) (on file with the Harvard Law School Library) (exploring further the ambiguous legal status of the canons).

<sup>142</sup> See *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014); *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

<sup>143</sup> Cf. SCALIA, *supra* note 138, at 25 (defending the formalist approach).

<sup>144</sup> See, e.g., Simon Lazarus, *John Roberts to America: I'm in Charge Here*, NEW REPUBLIC (June 27, 2015), <http://www.newrepublic.com/article/122188/john-roberts-america-im-charge-here> [<http://perma.cc/HYG5-BMNP>].

<sup>145</sup> See, e.g., RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 209–18 (2013).

<sup>146</sup> 443 U.S. 193 (1979).

when applied to one of the most contested social issues of the day.<sup>147</sup> *King* was not that case after all, and so textualism and the canons endure.

But *King* does offer a moment's pause that may draw some attention to just what these doctrines are doing. There is no other field of law whose dominant doctrines have such an ambiguous legal status.<sup>148</sup> Justice Frankfurter, in the article cited in *King*, argued that the "canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment" and doubted that they are "in any true sense rules of law."<sup>149</sup> Justice Scalia once famously called policy-based canons "dice-loading rules,"<sup>150</sup> but routinely uses them. Professor Max Radin cautioned against use of the canons as part of a "feign[ed] . . . inferiority complex that [courts] really do not have."<sup>151</sup>

*B. King's Imperfect, but Comprehensible Congress —  
A Congress with a "Plan"*

Here, the statutory scheme compels us to reject petitioners' interpretation because it would . . . likely create the very "death spirals" that Congress designed the Act to avoid. See *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

. . . A fair reading of legislation demands a fair understanding of the legislative plan.<sup>152</sup>

The idea of a "legislative plan" that can and must be fairly read by the Court<sup>153</sup> is where *King* sets out its competing vision to the dominant notion of the impenetrable Congress. This is a different kind of response to legislative complexity; a bigger-picture approach that, as my own work with Bressman has shown, may be closer to the way that Congress itself thinks about statutes than focusing on only a few words in isolation that never caught any statute drafters' (or elected members') attention.<sup>154</sup> Elected members and policy staff craft statutory policy in broad strokes, and leave it to (often nonpartisan) drafting specialists to turn the agreed-upon initiatives into detailed statute-

<sup>147</sup> Professor Philip P. Frickey called *Weber* the "case most responsible" for the "embrace" of textualism. Philip P. Frickey, *John Minor Wisdom Lecture: Wisdom on Weber*, 74 TUL. L. REV. 1169, 1184 (2000). Thanks to Professor John Manning for this insightful comparison.

<sup>148</sup> See generally Gluck, *Intersystemic*, *supra* note 116.

<sup>149</sup> Frankfurter, *supra* note 9, at 544.

<sup>150</sup> SCALIA, *supra* note 138, at 28.

<sup>151</sup> Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 424 (1942).

<sup>152</sup> *King*, 135 S. Ct. at 2492–96 (citations omitted).

<sup>153</sup> *Id.* at 2496.

<sup>154</sup> See Gluck & Bressman I, *supra* note 13, at 967–71; Gluck & Bressman II, *supra* note 13, at 741–44.

ese.<sup>155</sup> The Court before *King* had adopted essentially the opposite focus.

But *King*'s big-picture perspective is just a *perspective*; a focus on the "plan" tells us little about the interpretive aids used to read the plan and does not necessarily mean undisciplined interpretation, or legislative history, as some have suggested.<sup>156</sup> Plans illustrate the means to an end, and *King* derives its understanding of the ACA's plan from the statute's own interlocking textual components, not from legislative history or other subjective tools.<sup>157</sup> There is also a range of what respecting a plan might mean. Self-proclaimed purposivists, like Justice Breyer, believe that the judge's role is to *further* the plan, to *improve* upon statutes. *King*'s version is more restrained; the Court holds that its role is only to not "negate" the plan. This approach rings of Justice Scalia's own admonition that judges must strive to adopt an interpretation that "does least violence to the text."<sup>158</sup> The choice of the word "plan" instead of "purpose" seems intentional: the Court is conveying something more linked to text and the statutory scheme as a whole than previous applications of both textualism and purposivism have been.

Even so, despite how innovative the Court's approach has seemed to many Court-watchers, it is not radical. The Court frequently invoked the concept of statutory plans in the pre-textualist era. More than 100 opinions did so, often referencing the "comprehensive" congressional plan, and typically — as in *King* — deriving the meaning of those plans, not from legislative history but, rather, from the way that different textual provisions interlock in an intricate statutory scheme.<sup>159</sup> Even in modern times, subtle vestiges remain; the concept of the congressional plan indirectly appears, unnoticed, in many of the Court's favorite everyday textualist canons — a presence that creates a

---

<sup>155</sup> See Gluck & Bressman I, *supra* note 13, at 967–71; Gluck & Bressman II, *supra* note 13, at 741–44.

<sup>156</sup> See Manning, *supra* note 14, at 77–78 (suggesting that a macro view necessitates deviating from textual analysis).

<sup>157</sup> Some may believe that the Court secretly consulted legislative history or other outside sources to understand the ACA. The role of bloggers and the press in the case is detailed in Part III. But, notably, those external sources did not themselves generally rely on the ACA's legislative history (in part because the ACA's unorthodox enactment made its legislative history convoluted), but rather on how the pieces of the ACA itself — the mandate, the exchanges, the subsidies — make no sense unless they work together.

<sup>158</sup> *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in the judgment).

<sup>159</sup> See *supra* note 115. For references to "comprehensive" statutory plans, see, for example, *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 885 (1986); *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 373–75 (1979); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 688–89 (1965); *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948); and *Hines v. Lowrey*, 305 U.S. 85, 88–89 (1938).

tension internal to textualism, which, at other times, embraces a more isolated focus. The idea behind all of these uses of the plan is the same: the Court assumes that legislation is comprehensible and that statutes are *meant to work*.

What makes *King* striking to the modern observer is that it makes explicit these sometimes-forgotten assumptions of Congress's rationality and the more functional judicial approach. This is why — along with the starring role the opinion gives to Justice Frankfurter — *King* has such strong echoes of the pre-textualism, pre-purposivism, Legal Process school. Fundamental to Legal Process theory was the assumption that legislation — not the subjective views of individual legislators now vilified in legislative history, but legislation *itself* — is inherently “purposive.”<sup>160</sup> The Legal Process theorists, like the Justices in *King*, assumed that the legislature is “made up of reasonable men pursuing reasonable purposes reasonably.”<sup>161</sup> That is why, rather than agree with the *King* challengers that Congress drafted the statute to fail — as the words in isolation would imply — the Court sees ambiguity in the contested language, which enables it to look to the broader statutory scheme. The Court gives Congress the benefit of the doubt.

In contrast, the *King* dissent uses its own version of purpose to reject the broader functional approach. The dissent finds that it can still tell a coherent story about the ACA from the challengers' narrow reading. But this story of congressional intent is simply a construct to support the alternate result. It matters not to the dissent whether it reflects Congress's actual purposes (who can tell in a statute this complex?). Justice Scalia has written that he looks only for “what was a *plausible* congressional purpose in enacting this language — not what I necessarily think was the real one.”<sup>162</sup> Why seek out a “plausible” purpose if not the real one? It has nothing to do with understanding Congress.

This, too, illustrates how the real divide in *King* is not over text-versus-purpose but, rather, over the Court's own role in relation to Congress's plans. One cannot be a faithful agent to a master who one believes speaks nonsense or who one finds incomprehensible. A Court that wants to take over the implementing and interpretive role of the agency cannot rationally do so while also proclaiming its own incompetence. Moreover, to assume that Congress is irrational may be to deny that the Court's role is a secondary one when interpreting Congress's work. That is the reason the Legal Process theorists insisted on

---

<sup>160</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1124–25 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

<sup>161</sup> *Id.* at 1378.

<sup>162</sup> *Holloway v. United States*, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting).

the opposite assumption, even if it was sometimes fictitious.<sup>163</sup> And that is the reason the *King* majority finds ambiguity rather than assuming that Congress wrote the words in question to read as the challengers read them. It is also why the Court couches its return to and twist on purpose — the plan — as an approach of legislative deference and restraint.

1. *Plans and Purposes in the Interpretive Tradition.* — “Plans” and “purposivism” are not the same thing, at least not in modern discourse. “Purposivism,” as noted, has taken on a particular connotation in recent decades, thanks to the impact of textualism and how it has come to associate “purposivism” with activism. But this common depiction of purposivism has become associated almost exclusively with two ideas, both irrelevant to *King*: (1) consulting legislative history and (2) consulting evidence of purpose to trump unambiguous statutory text. The latter notion should stop occupying our attention. Commentators on all sides agree that judges simply do not do this anymore.<sup>164</sup> *Church of the Holy Trinity v. United States*<sup>165</sup> — oft-maligned for its statement that statutory “spirit” may trump the plain “letter of the statute”<sup>166</sup> — is long since dead.<sup>167</sup> And to be clear: *King* is not *Holy Trinity*, although some commentators have described it that way. To the contrary, the majority goes out of its way to first find the text in question ambiguous in light of its ripple effect on other statutory provisions before it moves to broader considerations.<sup>168</sup> It is worth noting that Justice Kennedy’s majority opinion in the Fair Housing Act case decided the same day as *King* takes a similar approach.<sup>169</sup>

This leaves the remaining “purposivists” as merely describing those judges who utilize a particular evidentiary tool: judges who are willing to consult legislative history. This categorization takes an exceedingly narrow view of the concept of purpose in interpretation and, regardless, its application to *King* is also incorrect. *King* relies only on Con-

<sup>163</sup> Thanks to Professor Peter Strauss for this insight.

<sup>164</sup> See, e.g., Manning, *supra* note 126, at 114 (“[T]he Court in the last two decades has mostly treated as uncontroversial its duty to adhere strictly to the terms of a clear statutory text, even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment.”).

<sup>165</sup> 143 U.S. 457 (1892).

<sup>166</sup> *Id.* at 459.

<sup>167</sup> There are very rare exceptions, the most recent being *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81 (2007), in which Justice Breyer’s majority opinion began with purpose instead of text, *see id.* at 89–90, and Justice Stevens’s concurrence asserted he would have relied on purpose even if it conflicted with the literal text, *see id.* at 106–07 (Stevens, J., concurring). Several Justices who joined the majority opinion wrote separately to discourage the recurrence of this approach. *Id.* at 107 (Kennedy, J., concurring).

<sup>168</sup> See *King*, 135 S. Ct. at 2490–93.

<sup>169</sup> See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

gress’s own “stated purposes”<sup>170</sup> — the findings section that Congress legislated in the ACA — and the rest of the enacted provisions of the statute.<sup>171</sup> Textualists have suggested for years that such enacted statements of purpose would obviate the dangers posed by legislative history.<sup>172</sup>

*King* seems to be invoking a third way. It does not seem a coincidence that the *King* majority reaches back to 1973 for a citation on the value of a statute’s “stated purposes.”<sup>173</sup> It also cites many other pre-textualist era decisions — decisions not commonly cited by the Court in statutory cases — to support its interpretive choices. The Court seems to be looking to entrenched, earlier ways of using text and purposiveness together — and choosing a different term (the “plan”) to signal that it is doing something different — rather than aligning its view with one side or the other in the modern textualism–purposivism debates.

Perhaps this makes *King* an exercise in constrained purposivism, or it might simply reveal that textualism has had a purposive component all along.<sup>174</sup> The labels should not matter as much as they do. *King* may be collapsing the categories, and in so doing illustrating that it is time for the debate to shift to more pressing, modern questions.

2. *This Court Has Always Thought, to Some Extent, that Congress Has a Plan.* — *King* is not the first time that the Court — including the Roberts Court — has relied on the concept of a “plan,” with its attendant assumption of Congress’s rationality, and its more holistic and functional perspective. As noted, the notion frequently appeared in the U.S. Reports before the rise of textualism in the 1990s.<sup>175</sup> But even since then, many modern canons implicitly rely on the same idea: that the Court should assume that Congress has a rational plan, that statutes are meant to *work*. These canons, too, find Congress’s purposes in the ways in which statutory provisions operate together.

---

<sup>170</sup> *King*, 135 S. Ct. at 2493 (quoting *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 420 (1973)).

<sup>171</sup> See *id.* (citing 42 U.S.C. § 18091(2)(D) (2012), which includes findings related to need for insurance-purchase mandate).

<sup>172</sup> See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 53 (2006); cf. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2139 (2002).

<sup>173</sup> *King*, 135 S. Ct. at 2493 (quoting *Dublino*, 413 U.S. at 420).

<sup>174</sup> Numerous commentators have remarked on the role of objective purpose in textualism. See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65–66 (1988); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 90 (2006); Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 136, 172–74 (2008).

<sup>175</sup> 96 of the 101 references to statutory plans occurred before 1990.

Consider the presumption in favor of severability, which centers almost entirely on the question of whether excising only the objectionable part of a statute will allow it to “function” as “Congress intended.” As one of the most frequently cited severability cases, *Alaska Airlines, Inc. v. Brock*,<sup>176</sup> puts it: “The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress. . . . [T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.”<sup>177</sup>

The joint dissent in *NFIB* makes the same assumptions about Congress’s purposiveness:

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

Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion.<sup>178</sup>

There are many other examples. The canon of constitutional avoidance — the presumption that Congress does not legislate to raise constitutional questions — is based at least in part on assumptions of Congress’s basic competence.<sup>179</sup> Two other canons — the “no-elephants-in-mouseholes” rule<sup>180</sup> and the “major questions” rule<sup>181</sup> — are distinctly realist in their understanding of Congress.<sup>182</sup> Those rules, which respectively presume that Congress does not bury bombshells or indirectly delegate major decisions to agencies, assume not — as textualists say they do — that Congress is more often than not irrational in its choices, but, rather, that Congress usually *tries to draft well*.

No-elephants-in-mouseholes and major questions were two of the three canons the Court relied on in *King*. The third — that statutes must be interpreted in their structural and textual context — is another textualist favorite but one that, like these other two rules, takes both a bigger-picture view of the statutory scheme and also assumes that

---

<sup>176</sup> 480 U.S. 678 (1987).

<sup>177</sup> *Id.* at 685.

<sup>178</sup> 132 S. Ct. 2566, 2668–69 (2012) (joint dissent).

<sup>179</sup> See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment). See generally Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012) (detailing variety of alternative bases of avoidance rule).

<sup>180</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not . . . hide elephants in mouseholes.”).

<sup>181</sup> *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229–32 (1994).

<sup>182</sup> See *Gluck & Bressman I*, *supra* note 13, at 1003 (finding drafters agree with these assumptions).

statutory provisions are meant to work together properly. These rules seem to appreciate that big statutes can have minor imperfections but that does not make those statutes nonsense as a whole.

That understanding may translate to a more generous view of ambiguity, as we see in *King*. The rules implicitly recognize that there may be needles in statutory haystacks whose isolated meaning cannot rationally be attributed to Congress in the context of what the rest of the legislative scheme has directly commanded. Keep in mind that Justice Scalia himself is widely credited as the Justice who *created* both major questions and no-elephants-in-mouseholes as rules of interpretation in the first place.<sup>183</sup> *King* makes these concepts explicit, and may be their most high-profile application. But it does not invent them.

### C. A Competent Court — Marbury, not Chevron

[This] is thus a question of deep “economic and political significance” that is central to this statutory scheme . . . . This is not a case for the IRS. It is instead our task to determine the correct reading . . . .<sup>184</sup>

The other major distinguishing feature of the opinion is that the Court’s response to the plan that it sees is *Marbury*, not *Chevron*. Legal Process giants Hart and Sacks viewed it as the duty of courts both to assume that Congress is reasonable and to decide cases in that light.<sup>185</sup> Ronald Dworkin’s “Hercules” judge, who is a descendant of this Legal Process view, comes to mind here, and is a very different model of judge from the one who pleads ignorance or relies on second-best responses or other institutional actors to decide cases.<sup>186</sup> Just as canons are one type of response to and crutch for the complexity problem, *Chevron* and reliance on the agency is another. *King* chooses *Marbury* over *Chevron* and, in the process, may have announced a more limited deference doctrine for complex statutes.

Textualists have embraced *Chevron* for its simplicity and its removal of the Court from politics and policy. *King*, in contrast, shows the Court’s evolving comfort with — or at least tolerance for — political questions. The *King* majority applies the major questions rule — one of the few canons that actually transfers decisionmaking power to courts — and finds the question in *King* too big to assume that Congress implicitly gave it to the agency. *But the Court has no trouble taking and answering that big question itself.*

<sup>183</sup> Justice Scalia authored the majority opinions in both *Whitman* and *MCI*.

<sup>184</sup> *King*, 135 S. Ct. at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

<sup>185</sup> See HART & SACKS, *supra* note 160, at 1169.

<sup>186</sup> RONALD DWORIN, *LAW’S EMPIRE* 239 (1986).



One way to view these moves is simply as the Court asserting a preference for *expertise*. The IRS was perhaps not the right agency to decide this health-policy question. But the IRS piggybacked off of HHS's interpretation<sup>187</sup> — something the Court never mentions. Moreover, even if we do read the Court as emphasizing expertise, the Court at the same time seems also to be making a broader statement about *Chevron*, especially in light of other recent cases in the same vein.

*King* is just the latest in a series of cases that suggest that a contingent of the Court is dissatisfied with how much law-declaration power the Court has ceded to agencies. The Chief Justice himself warned two terms ago, in dissent in *City of Arlington v. FCC*,<sup>188</sup> that “the danger posed by the growing power of the administrative state cannot be dismissed.”<sup>189</sup> Last Term, *Perez v. Mortgage Bankers Ass'n*<sup>190</sup> cast doubt on the longstanding doctrine of *Seminole Rock/Auer* deference to an agency's interpretation of its own regulations.<sup>191</sup> Justice Thomas, the author of the case that transferred more power to agencies than any other — *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>192</sup> the bombshell holding that an agency's interpretation could displace a federal court's prior statutory interpretation precedent<sup>193</sup> — wrote five separate opinions last Term alone questioning aspects of *Chevron*.<sup>194</sup> These cases follow earlier moves to scale back *Chevron*, including *MCI Telecommunications Corp. v. AT&T Co.*<sup>195</sup> and *FDA v. Brown & Williamson Tobacco Corp.*,<sup>196</sup> which crafted the major questions rule,<sup>197</sup> and *United States v. Mead Corp.*,<sup>198</sup> which held that *Chevron* deference would no longer be available for all agency interpretations of ambiguous language.<sup>199</sup>

<sup>187</sup> Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (“Under the proposed regulations, the term *Exchange* has the same meaning as in 45 CFR 155.20, which provides that the term *Exchange* refers to a State Exchange, regional Exchange, subsidiary Exchange, and Federally-facilitated Exchange.”).

<sup>188</sup> 133 S. Ct. 1863 (2013).

<sup>189</sup> *Id.* at 1879 (Roberts, C.J., dissenting).

<sup>190</sup> 135 S. Ct. 1199 (2015).

<sup>191</sup> *Id.* at 1208 n.4.

<sup>192</sup> 545 U.S. 967 (2005).

<sup>193</sup> *Id.* at 982.

<sup>194</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2529 (2015) (Thomas, J., dissenting); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1961 (2015) (Thomas, J., dissenting); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240–45 (2015) (Thomas, J., concurring in the judgment); *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).

<sup>195</sup> 512 U.S. 218 (1994).

<sup>196</sup> 529 U.S. 120 (2000).

<sup>197</sup> See *id.* at 159–61; *MCI*, 512 U.S. at 229–32.

<sup>198</sup> 533 U.S. 218 (2001).

<sup>199</sup> *Id.* at 226–27.

One can view these developments through a variety of lenses, some of which I have detailed elsewhere,<sup>200</sup> but the most relevant here are judicial competence and the centrality of the Court in statutory cases. One way to understand *Chevron* is as a case about how courts should respond to imperfect, ambiguous, or incomplete statutes. The Court in *Chevron* concluded: “Judges are not experts in the field . . . and it is entirely appropriate for this [executive] political branch of the Government to make such policy choices.”<sup>201</sup> *Chevron*’s judges cannot understand Congress’s imperfect plans and should not try to intervene in political questions; but *King*’s judges can and should.

At least some of the Court seems to be recognizing that if it transfers away all of these questions about modern statutory interpretation and implementation — and especially implementation of ambiguous or imperfect statutes — it will be giving away the most important cases. It is not a coincidence that those jurists who have taken the strongest position on the ability and obligation of judges as Congress’s partners (Justice Breyer and Judge Posner are prominent examples) are among those who have been least enamored of *Chevron*.

But the *King* Court seems not to want to give *Congress* the power to make these delegation decisions either — at least not easily. A robust major questions doctrine will function as a strong nondelegation presumption.<sup>202</sup> Let’s be clear: this is a nondelegation presumption that increases the power of *courts*. If Congress fails to answer an important question, *King* makes courts the default decisionmaker on those matters.

These are high-level political questions, but there are also ground-level politics in play. Deference to the agency would have meant that a future IRS could have changed the rule at issue in *King*: such a holding would have kept the *King* debate alive, and the ACA’s future would have continued to be in doubt. The Court may have decided it did not want to be the enabler of such continuing and disruptive ACA politics. One of the most important components of Legal Process theory was its emphasis on institutional settlement.<sup>203</sup> The *King* Court took the last word.

It is also worth highlighting that a proper *Chevron* application here, at least as I would view it, would have had a somewhat dissonant result. The statutory phrase was ambiguous, but the ACA — its

---

<sup>200</sup> See generally Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607 (2014).

<sup>201</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

<sup>202</sup> See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 243–45 (2006) (calling major questions a “nondelegation canon”).

<sup>203</sup> Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 964 & n.48 (1994).

---

---

plan — was clear. Applying *Chevron* would have had the result of according an interpretive role to the agency (*Chevron* step 1: does the statute have an ambiguity for the agency to fill?); but holding that there was only one possible reasonable interpretation for the agency to adopt (*Chevron* step 2: defer if the agency's construction is reasonable). That would not really have been deference at all.

One way to understand all of this is to view the Court's sidestepping of *Chevron* as actually a new doctrinal move: namely, that not every ambiguity in an imperfect and complicated statute creates interpretive space for the agency. This move would mark an important shift in *Chevron* doctrine. There might be a gap that implicates politics or policy, but it might be a question that Congress itself has clearly settled in the scheme as a whole. The Court has never announced a *Chevron*, or anti-*Chevron*, rule for everyday statutory mistakes, either; but if there were a mistake that made a provision read as fundamentally inconsistent with a statute's overarching plan, could the agency really have space to interpret that language any way it wished? *King* implies, but does not outright state, that the answer is no.

So understood, *King's Chevron* holding seems closely linked to its concept of the "plan." Perhaps *Chevron* lives on, but only for mundane or confined questions that do not implicate the functionality of the overall statutory structure.

\* \* \*

Before going further, it should be acknowledged that *King* may have been an easier case for use of the plan concept than the typical statutory interpretation dispute — precisely because the question at issue in *King* was so objectively central to the statute's ability to function. The concept of a plan may not be nearly as helpful for smaller disputes, and in fact it may be the case that *King's* innovation will therefore only be useful for the most central statutory questions.<sup>204</sup> That understanding would make the connection between plans and the major questions rule even more explicit. It might also shed some light on what the Court should do about statutory mistakes, as the next Part details.

### III. UNORTHODOX LAWMAKING IN *KING* AND BEYOND

The Affordable Care Act contains more than a few examples of inartful drafting. . . . Congress wrote key parts of the Act behind closed

---

<sup>204</sup> But at least one court of appeals has already used the concept. See *Berman v. NEO@Ogilvy LLC*, No. 14-4626, 2015 WL 5254916, at \*5 (2d Cir. Sept. 10, 2015) (citing *King* for methodology of looking to the statute as a whole to interpret internal tensions in the Dodd-Frank Act).

doors, rather than through “the traditional legislative process.” . . . And Congress passed much of the Act using a complicated budgetary procedure known as “reconciliation” . . . . As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. *Cf.* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 545 (1947) (describing a cartoon “in which a senator tells his colleagues ‘I admit this new bill is too complicated to understand. We’ll just have to pass it to find out what it means.’”).

Anyway, we “must do our best . . . .”<sup>205</sup>

*King*’s recognition of the modern legislative context, novel as it is, only sketches a roadmap for cases involving similarly complex statutes in the future. On the one hand, the opinion gives us the most explicit statement ever from the Court that the one-size-fits-all approach to statutory interpretation embraced by the canons might have to bend to meet the realities of the modern legislative process. But on the other hand, the Court does not appear to fully appreciate how common the process deviations it laments now are, and the opinion also seems to rest on a host of considerations — including the likelihood of drafting errors and the difficulties of gridlock — that the Court never actually mentions, but whose doctrinal underpinnings now seem unstable.

#### A. *King*’s Recognition of Unorthodox Lawmaking, and What it Missed

Before *King*, there were almost no cases in the U.S. Reports that acknowledged any difference between long statutes and short statutes; or between single-subject bills and omnibus bills; or between statutes passed after years of deliberation and statutes passed in emergencies on the floor.<sup>206</sup> For instance, omnibus bills are not only lengthy, but also tend to bundle together bills drafted by different committees at different times, or by multiple drafters (often not even internal to Congress) that are not in communication with one another. Emergency legislation can be short and exceedingly light on the kind of detailed language that we expect in statutes.<sup>207</sup> Should the usual presumptions of consistent language, lack of redundancy, harmonious text, and so on, apply alike to these different laws? The Court has likewise not directly addressed the question of how deference works when multiple

<sup>205</sup> *King*, 135 S. Ct. at 2492 (internal citations omitted).

<sup>206</sup> See Gluck & Bressman I, *supra* note 13, at 937 n.109 (collecting cases); Gluck & Bressman II, *supra* note 13, at 760; *cf.* Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, *ISSUES IN LEGAL SCHOLARSHIP*, Nov. 2002, art. 1, at 6–12, <http://www.bepress.com/ils/iss3/art1> (suggesting that omnibus bills raise different interpretive questions than non-omnibus bills).

<sup>207</sup> See Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking: Congress, Courts and Agencies in the Era of Legislative and Regulatory Complexity*, 115 *COLUM. L. REV.* (forthcoming 2015).

agencies are given overlapping delegations, despite the fact that the rise of this type of delegation is well documented.<sup>208</sup> And there are virtually no cases that consider whether interpretive approaches might differ depending on whether a statute passes through every stage of the conventional legislative process or whether it instead passes through unorthodox pathways. The “textbook” understandings of what a statute looks like and the process through which a statute is enacted remain the baseline assumptions for virtually all of the doctrines of the field.

*King* is different. It draws an ACA-specific distinction based on the statute’s unusual enactment process. “[S]pecifically with respect to this Act,” *King* holds, “rigorous application of the [presumption against surplusage] canon does not seem a particularly useful guide to a fair construction of the statute.”<sup>209</sup> Moreover, presumptions of consistent-term usage do not hold “when, as here, ‘the Act is far from a *chef d’oeuvre* of legislative draftsmanship.’”<sup>210</sup> And the Court fixes on the ACA’s passage through reconciliation.

*King* is also noteworthy in its subtle recognition of the *Chevron*-for-multiple-agencies question. Some commentators (and one older D.C. Circuit opinion) have argued that no deference should be accorded to any agency when there is an overlap.<sup>211</sup> Empirical work suggests that drafters may take a different view.<sup>212</sup> *King*, as noted, might be read to set out a third view that deference should attach to expertise: “It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”<sup>213</sup> The Court here also cites *Gonzales v. Oregon*,<sup>214</sup> one of the only other cases to indirectly address a similar issue and, via an opinion by Justice Kennedy, resolve it on similar grounds.<sup>215</sup>

But for all its interest in Congress, *King* is wrong to suggest that the ACA’s unorthodox history is an aberration. It would be more surprising today to see a statute without at least some “inartful” wording,

---

<sup>208</sup> See FREDERICK M. KAISER, CONG. RESEARCH SERV., R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS 1–4 & nn.7–19 (2011); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 207–08; Gluck & Bressman I, *supra* note 13, at 1008.

<sup>209</sup> *King*, 135 S. Ct. at 2492.

<sup>210</sup> *Id.* at 2493 n.3 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014)).

<sup>211</sup> See *Rapaport v. U.S. Dep’t of Treasury, Office of Thrift Supervision*, 59 F.3d 212, 216 (D.C. Cir. 1995); Gersen, *supra* note 208, at 214–15.

<sup>212</sup> Gluck & Bressman I, *supra* note 13, at 1007.

<sup>213</sup> *King*, 135 S. Ct. at 2489. But, as noted, the Court does not mention that the IRS interpretation piggybacked off a previous interpretation by HHS, the lead agency. See *supra* note 187.

<sup>214</sup> 546 U.S. 243 (2006).

<sup>215</sup> See *id.* at 266–67 (2006) (rejecting the Attorney General’s interpretation of the Controlled Substances Act as criminalizing physician-assisted suicide and concluding that the decision should lie with the Secretary of HHS).

or that did not have some deviation from the textbook legislative process, than it would be to see a statute with those features.<sup>216</sup> The *Schoolhouse Rock!* cartoon version of the legislative process is dead, if it ever existed in the first place.<sup>217</sup> My previous work with co-authors Professors Bressman and Anne Joseph O’Connell and Rosa Po, which draws on the pioneering work in this area by political scientist Barbara Sinclair,<sup>218</sup> documents the increasing number of deviations from the standard accounts of the legislative and rulemaking process — what we call “unorthodox lawmaking” (Sinclair’s term) and “unorthodox rulemaking.”<sup>219</sup>

This point is not limited to health care. As one of many possible examples, in the first year of the 112th Congress, only seven of the ninety-one measures that passed went through the textbook process in both houses, passing through committees on each side, while thirty-seven measures did not go through the committee process in either chamber before final passage.<sup>220</sup> Only three of those measures passed through the conference committee process; the rest were worked out by leadership deals and special legislative processes such as reconciliation, the same process used for the ACA.<sup>221</sup> To take a different example, the Clean Air Act of 1990 was drafted by the Bush Administration and nine different congressional committees, each working on a different title.<sup>222</sup> Omnibus legislation has risen dramatically. Unorthodox lawmaking is the *new* textbook process.

The Court was also incorrect to view the ACA as not “deliberated.” The ACA was the subject of more than two years of intense study and deliberation, among five congressional committees and hundreds of hours of hearings. But it is true the statute *was not cleaned up* as drafters expected it would be. That is what the Court more accurately might have addressed.

*B. Mistakes, Gridlock, and Due Process of Lawmaking: Key Considerations Unspoken*

*King* makes a giant leap from recognizing the ACA’s unorthodoxies, and from lamenting what it saw as the statute’s lack of deliberation, to

---

<sup>216</sup> Cf. *King*, 135 S. Ct. at 2500 (Scalia, J., dissenting) (“The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined up perfectly with each other.”).

<sup>217</sup> See *Schoolhouse Rock!, I’m Just a Bill*, YOUTUBE (last visited Sept. 27, 2015), <http://www.youtube.com/watch?v=tyeJ5503Elo> (famous schoolchild’s cartoon following the conventional path a bill takes to become a law).

<sup>218</sup> SINCLAIR, *supra* note 17.

<sup>219</sup> Gluck, O’Connell & Po, *supra* note 207.

<sup>220</sup> For further documentation, see Gluck & Bressman II, *supra* note 13, at 762–63 nn.139–43.

<sup>221</sup> *Id.*

<sup>222</sup> See Theodore L. Garrett & Sonya D. Winner, *A Clean Air Act Primer: Part III*, 22 ENVTL. L. REP. 10321, 10321 (1992); Gluck, O’Connell & Po, *supra* note 207.

the opinion's conclusion. The Court simply cites Justice Frankfurter's famous article — which actually begins by documenting the already dramatic (in 1947) increase in the number and complexity of statutes<sup>223</sup> — and concludes: “*Anyway, we must do our best.*”<sup>224</sup> On the one hand, statutes like the ACA subject the Court to Justice Frankfurter's “anguish of judgment”;<sup>225</sup> on the other, the *King* majority is so certain of what the ACA means despite its messiness that the Court finds the challengers' argument “untenable”<sup>226</sup> and a contrary meaning “compel[led].”<sup>227</sup>

But how will these attempts to muddle through unfold in the future? It may be that the Chief Justice does not care too deeply about interpretive methodology — that like Justice Frankfurter he resists seeing it as legal doctrine — and will use whatever tools he can to reach the best, commonsense result.<sup>228</sup> For the Chief Justice to expressly associate himself with that pragmatic tradition — one associated today with jurists like Justice Breyer and Judge Posner<sup>229</sup> — would itself be an enormous departure from the common view that the Roberts Court is a textualist court.

But the opinion's silences themselves highlight the very questions the Court may have tried to avoid. First, whose responsibility is it to educate the Court in cases like *King*? As others have observed, the challengers' counterstory of congressional intention had unexpected “legs” early in the case, and it was left mostly to outside commentators — policy experts, press, and government officials — to correct the record, an effort that mostly took place in media venues entirely separate from the litigation until the Supreme Court stage.<sup>230</sup> It

<sup>223</sup> Frankfurter, *supra* note 9, at 527 (noting that “26 acts were passed in the 1789 session, 66 in 1790, 94 in 1791, 38 in 1792, 63 in 1793” but that in “the 70th Congress . . . there [were] 993 enactments in a monstrous volume of 1014 pages — quarto not octavo — with a comparable range of subject matter”).

<sup>224</sup> *King*, 135 S. Ct. at 2492 (emphasis added) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014)); cf. *Seinfeld: The Yada Yada* (NBC television broadcast Apr. 24, 1997), HULU, <http://www.hulu.com/watch/807615> (last visited Sept. 27, 2015) (“But you yada yada'd over the best part!”).

<sup>225</sup> Frankfurter, *supra* note 9, at 544.

<sup>226</sup> *King*, 135 S. Ct. at 2495 (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994)).

<sup>227</sup> *Id.* at 2492–93.

<sup>228</sup> In support of such an assessment we might look to *Bond*, in which the Chief Justice cited the same Justice Frankfurter article in support of applying the federalism canon. See *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (“[C]orrectly reading a statute ‘demands awareness of certain presuppositions.’” (quoting Frankfurter, *supra* note 9, at 537)).

<sup>229</sup> See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 92–102 (2010); RICHARD A. POSNER, HOW JUDGES THINK 193–203 (2008).

<sup>230</sup> See Linda Greenhouse, *The Roberts Court's Reality Check*, N.Y. TIMES (June 25, 2015), <http://www.nytimes.com/2015/06/26/opinion/the-roberts-courts-reality-check.html?>; Rachel Sachs, *Happy About the Supreme Court's ACA Decision? Thank a Law Professor*, THE CONVERSATION

may have been easier for the Court to see the ACA's "plan" in *King* because of those outside efforts,<sup>231</sup> but acknowledging that fact does not adequately respond to the important criticisms of scholars who have argued that courts will simply not be able to understand statutory unorthodoxies in every case. Nor will such a robust outside-expert response follow in every case, particularly those with less political salience. How is a generalist court to "do [its] best"?<sup>232</sup> Will unorthodox lawmaking require a heightened role for amici or for bloggers?<sup>233</sup> What is to prevent the kind of interpretive "exploit[ation]"<sup>234</sup> that was at the core of the *King* strategy?

Second, the possibility of a drafting error is a cloud that hangs over the opinion. As detailed below, going into *King*, the Court had a hard-as-nails doctrine of mistake that opened the door to the kind of exploitation that *King*'s architects attempted. The *King* Court never tells us whether it gave that mistake doctrine a pass this time, whether it is still good law, or whether the Court concluded there was no drafting error at all.

Closely related to the question of mistake is the question of gridlock. We do not know how much of the opinion was driven by the real-world fact that this particular Congress did not appear able to clean up its own mess.<sup>235</sup> A tough doctrine of mistake is particularly costly when Congress cannot act. And in fact, many presumptions of statutory interpretation — including the mistake doctrine itself — turn on the assumption that *Congress can respond*. *King* raises the question of whether the Court believes those doctrines now need to evolve, or at least have lesser application during times when Congress is gridlocked.

Finally, the Court only teases at the idea that there might be a limit — a statute that might be too unconventional, or too messy, for the Court to bend interpretation to circumstance; or a statute so unor-

---

(June 26, 2015, 10:16 PM), <http://theconversation.com/happy-about-the-supreme-courts-aca-decision-thank-a-law-professor-43889>. Several important briefs were also filed at the appellate level. See, e.g., Amicus Brief for the Commonwealth of Virginia on Behalf of Defendants-Appellees, *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) (No. 14-1158); Brief Amici Curiae of Members of Congress and State Legislatures in Support of Appellees and Affirmance, *King*, 759 F.3d 358 (No. 14-1158).

<sup>231</sup> *But cf.* Jonathan H. Adler & Michael F. Cannon, *King v. Burwell and the Triumph of Selective Contextualism*, 2014-2015 CATO SUP. CT. REV. (forthcoming) (arguing that the Court was selective in what provisions it deemed part of Congress's plan and what provisions it was willing to ignore).

<sup>232</sup> *King*, 135 S. Ct. at 2492 (quoting *Util. Air Regulatory Grp v. EPA*, 134 S. Ct. 2427, 2441 (2014)).

<sup>233</sup> *Cf. generally* Allison Orr Larsen, *The Trouble With Amicus Facts*, 100 VA. L. REV. 1757 (2014) (highlighting dangers of the Court's increasing reliance on outside experts for central case facts).

<sup>234</sup> Am. Enter. Inst., *supra* note 5.

<sup>235</sup> *Cf.* Transcript of Oral Argument, *supra* note 60, at 54 (Solicitor General Verrilli questioning whether "this Congress" would be able to "take[] care of the problem" itself).



thodoxly enacted, or so undeliberated, so as to be perceived as illegitimate. The Court for years has professed to have no role in influencing or judging the imperfections in the legislative process.<sup>236</sup> But there is tension here too because, in fact, as discussed below, the Court has consistently applied a variety of interpretive rules that indirectly do aim to teach Congress to draft better.<sup>237</sup>

My previous work explores some of these questions in more detail,<sup>238</sup> and I cannot address them all deeply here. The goal of this Part, rather, is to highlight each of these puzzles and so illustrate how much *King* opens up. These questions have lurked for years; academics have just started to really explore them. That *King* finally brings them to the fore in the Court — albeit by not mentioning them — is a welcome development.

It also should be clear that the only way to answer these questions is for the Court to articulate a clearer vision of *what it is doing*. One cannot construct a theory of the Court's role in response to legislative complexity without a jurisprudential understanding of the Court's relationship to Congress. If, for instance, the role of the Court is to reflect how Congress drafts, then attention to the legislative process must be paid. As I elaborate with O'Connell and Po, a Court with such a role might retire some perfection-expecting canons for exceedingly long statutes.<sup>239</sup> Or it might pay attention to other important structural influences on the modern legislative process that current doctrine does not generally recognize. This approach is more accessible than it may sound. Over the course of the *King* litigation itself we saw not only the Court benching certain canons, but also the lower courts paying attention for the first time to the Congressional Budget Score — an influence on modern drafting that the Gluck-Bressman study illustrated was central to how major statutes are now written.<sup>240</sup> Some lower courts, including textualist courts, have also already started to consider other modern legislative realities when asked to apply perfection-assuming certain canons.<sup>241</sup>

---

<sup>236</sup> See *infra* p. 105.

<sup>237</sup> See *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014); *Boumediene v. Bush*, 553 U.S. 723, 738 (2008).

<sup>238</sup> See Gluck & Bressman II, *supra* note 13; Gluck, O'Connell & Po, *supra* note 207.

<sup>239</sup> See Gluck, O'Connell & Po, *supra* note 207.

<sup>240</sup> See Abbe R. Gluck, *The "CBO Canon" and the Debate over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 10, 2012), <http://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html> [<http://perma.cc/A9A5-87BQ>] (introducing notion of CBO canon and its relevance for *King*).

<sup>241</sup> See, e.g., *Loving v. IRS*, 742 F.3d 1013, 1019 (Kavanaugh, J.) (D.C. Cir. 2014) (recognizing Congress is sometimes redundant and so rejecting application of presumption against superfluities to tax-code question at issue).

On the other hand, if the role of the Court is to *improve* the legislative process, that requires a different interpretive approach, elaborated below. Still another interpretive approach — one less focused on Congress entirely — would be required for a “rule-of-law” regime that has as its primary goals system efficiency and consistency. I already have detailed, in Part II, how far the Court is from successfully effectuating such a formalist approach.

My own view is that the biggest challenge is not that one of these roles is necessarily superior to the other (although I myself have advocated a view that either reflects Congress or instead perfects a true rule-of-law approach), but that the Court will not pick which one it is adopting and follow through with it. This indecision has rendered the relevant doctrines a jurisprudential mush. We do not know what they are for, and so we cannot judge how they are doing or predict which will apply in a particular case.

1. *Mistakes: Does King Signal a More Tolerant Approach?* — Let us start with the big elephant in *King’s* room: statutory mistakes. Even as (or perhaps because) the statutory landscape has become more complex, the Court has moved in recent decades to be much less tolerant of statutory imperfections, amalgamation errors, and other kinds of mistakes. One of the best examples of the old, more tolerant approach is *Green v. Bock Laundry Machine Co.*,<sup>242</sup> in which the Court, as Justice Scalia wrote in concurrence, “confronted . . . a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word . . . .”<sup>243</sup> Even as late as 2001, the Court, citing “common sense,” was willing to read an apparently inadvertently added cross-reference entirely out of a statute.<sup>244</sup>

The Court seems to have abandoned this approach a decade ago, in a little-noticed case called *Lamie v. United States Trustee*,<sup>245</sup> and now more often than not embraces the rule that it will not correct even an obvious error as long as the language still makes basic grammatical sense.<sup>246</sup> Justice Kennedy has been among the strongest proponents of

---

<sup>242</sup> 490 U.S. 504 (1989).

<sup>243</sup> *Id.* at 527 (Scalia, J., concurring in the judgment) (construing “defendant” in Federal Rule of Evidence 609(a)(1) to mean only “criminal defendant,” *id.* at 529).

<sup>244</sup> *Chickasaw Nation v. United States*, 534 U.S. 84, 91 (2001) (construing the Indian Gaming Regulatory Act’s inclusion of Internal Revenue Code chapter 35 as a tax provision applicable to Indian tribes as “simply a drafting mistake, a failure to delete an inappropriate cross-reference in the bill”).

<sup>245</sup> 540 U.S. 526 (2004).

<sup>246</sup> *Id.* at 535, 542 (“The sentence may be awkward; yet it is straightforward,” *id.* at 535; “[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent,” *id.* at 542.).

the stricter approach to mistakes,<sup>247</sup> which may explain why *King* skirts the question. But it deserves a moment of reflection to ask why the challengers themselves decided not to press a mistake argument given how strong the doctrine was in their favor. Most likely, the challengers decided that it was simply too much, from a legitimacy perspective, to ask the Court to doom the ACA to failure and deprive 7.5 million Americans of health care because of language that no one (including the Court when it interpreted the statute in *NFIB*<sup>248</sup> and Congress when it amended the Act three times before the litigation began<sup>249</sup>) had noticed until the *King* litigation was initiated.

Justice Scalia's dissent charges the Court with playing statutory "favorites"<sup>250</sup> to save the ACA.<sup>251</sup> He does not refer to the mistake doctrine, but he could have. Is *Lamie* still good law? One possibility is that *Lamie* will be unfairly applied. Perhaps the Court will be content with a tough-love theory of mistake only for statutory questions of less significance or political salience,<sup>252</sup> or that generate less of a media effort to educate the Court. Even before *King*, commentators had noted that laws like consumer and bankruptcy statutes are those most likely to be the target of the Court's harshest application of the doctrine.<sup>253</sup> Another possibility is that the Court's application of *Lamie* was tempered not by the subject matter but by the reality of gridlock, as discussed below.

A more intriguing possibility is that the concept of the statutory "plan" will inform *Lamie's* application going forward. Perhaps *King* stands for the proposition that while minor mistakes can be tolerated

<sup>247</sup> See, e.g., *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring in the judgment) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.").

<sup>248</sup> The joint dissent in *NFIB* explicitly assumed the statute allowed subsidies on the federal exchanges. Abbe R. Gluck, *What the D.C. Circuit Got Wrong About Obamacare*, POLITICO MAGAZINE (July 22, 2014, 8:49 PM), <http://www.politico.com/magazine/story/2014/07/dc-circuit-got-wrong-about-obamacare-109263.html#.Va8IWkthVUA> [<http://perma.cc/6WHN-DMME>]; see also *NFIB*, 132 S. Ct. 2566, 2665, 2673–74 (2012) (joint dissent).

<sup>249</sup> See C. STEPHEN REDHEAD & JANET KINZER, CONG. RESEARCH SERV., R43289, LEGISLATIVE ACTIONS TO REPEAL, DEFUND, OR DELAY THE AFFORDABLE CARE ACT 7–9 tbl.1 (2015) (counting a total of thirteen direct amendments to the ACA via authorizing legislation, of which four — Pub. L. No. 114-110 (2015), Pub. L. No. 113-93 (2014), Pub. L. No. 112-240 (2013), and Pub. L. No. 112-141 (2012) — were signed into law after the final IRS rule had been promulgated in May 2012); cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 599–602 (1983) (presuming congressional ratification of a statutory interpretation when Congress amends a statute post-interpretation without changing it).

<sup>250</sup> *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting).

<sup>251</sup> *Id.* at 2497.

<sup>252</sup> Cf. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) (arguing that transformative "super-statutes" deserve special interpretive treatment).

<sup>253</sup> Max Huffman, *Using All Available Information*, 25 REV. LITIG. 501, 518, 519 n.70 (2006) (book review).

and enforced as written, major mistakes that “undo” a clear statutory plan should be corrected by the courts. So understood, there would be an interesting parallel here to *King*’s major questions ruling: both rules put the Court in the driver’s seat to address the biggest legislative imperfections or ambiguities.

2. *The Court’s Role in Improving the Legislative Process.* — If the Court did cut Congress some slack for an imperfection, some might argue that *King* let Congress off too easily. Perhaps Congress has the obligation to make statutes more comprehensible to the public, and perhaps it is the Court’s role to enforce that obligation. The Court has, at least on the surface, resisted this idea. Since its 1892 holding in *Marshall Field & Co. v. Clark*,<sup>254</sup> the Court has held that it will not use doctrine to improve the legislative process.<sup>255</sup> It has thus professed to reject the idea of “due process of lawmaking” — Justice Linde’s famous term for the concept that courts should take into account the process of legislation and the quality of deliberation in judging statutes.<sup>256</sup> Notably, in the administrative law context, the Court has done more to directly encourage the kind of process it views as legitimate. *Mead* is the most prominent example. There, the Court held that *Chevron* deference applies only to administrative actions promulgated under relatively formal procedures.<sup>257</sup> In the statutory context, there is no *Mead* analogue to, for example, encourage bills to go through conference committee or take a non-omnibus form.

What to make then of the Court’s lament about the ACA’s lack of “care and deliberation”?<sup>258</sup> My study with O’Connell and Po illustrates that what is orthodox today (*Chevron*, televised committee hearings, and so forth) was viewed as unorthodox just decades ago.<sup>259</sup> Moreover, the Constitution entrusts *Congress*, not the Court, with control over legislative procedures.<sup>260</sup> Congress’s use of reconciliation in conjunction with the ACA was entirely consistent with Congress’s own rules,<sup>261</sup> even if not with what the Court itself views to be the para-

<sup>254</sup> 143 U.S. 649 (1892).

<sup>255</sup> See *id.* at 672–73 (refusing to opine on the procedural validity of any “enrolled bill”).

<sup>256</sup> Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 197 (1976); cf. SUSAN ROSE-ACKERMAN, STEFANIE EGIDY & JAMES FOWKES, *DUE PROCESS OF LAWMAKING: THE UNITED STATES, SOUTH AFRICA, GERMANY, AND THE EUROPEAN UNION* (2015) (comparing judicial approaches to reviewing the legislative and administrative processes in different nations). See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 197 (1999) (emphasizing the importance of deliberation in the legitimacy of legislation).

<sup>257</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

<sup>258</sup> *King*, 135 S. Ct. at 2492.

<sup>259</sup> Gluck, O’Connell & Po, *supra* note 207, at 2.

<sup>260</sup> See U.S. CONST. art. I, § 5, cl. 2 (providing that “[e]ach House [of Congress] may determine the Rules of its Proceedings”).

<sup>261</sup> See 2 U.S.C. § 641 (2013); Alexander Bolton, *Parliamentarian Rules Against First GOP Objection to Healthcare ‘Fixes’ Bill*, THE HILL (March 23, 2010, 10:15 AM), <http://thehill.com/home>

digmatic (now obsolete) or preferred legislative process. Who is the Court to opine?

Indeed, the *King* dissent offers a strong statement about the irrelevance of unorthodox lawmaking to judging and the Court's ensuing duty to stay out of the details of deliberation:

It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate.<sup>262</sup>

But here, too, there is much more of a history than the Court acknowledges. As recently as the 2013 Term, in *Utility Air Regulatory Group v. EPA*,<sup>263</sup> it was Justice Scalia himself who wrote that “the [Clean Air] Act is far from a *chef d’oeuvre* of legislative draftsmanship,”<sup>264</sup> and who used this fact to jettison the rule of consistent-term usage.<sup>265</sup> *King* expressly relies on this statement.<sup>266</sup> And, in *NFIB*, it was the joint dissenters who argued for the very first time that omnibus legislation should have its own special rules of severability:

The Court has not previously had occasion to consider severability in the context of an omnibus enactment like the ACA . . . . When we are confronted with such a so-called “Christmas tree,” a law to which many nongermane ornaments have been attached, we think the proper rule must be that when the tree no longer exists the ornaments are superfluous.<sup>267</sup>

There are many other examples — cases where we do see the Court either bending the rules to accommodate legislative realities or, more directly, intervening to improve the legislative process even as it contests that such intervention is its proper role.

It was this Court, led by its textualists in the Rehnquist era, that began to develop a series of “clear statement rules” that can be viewed as precisely the kind of due process of lawmaking that the Court says it does not touch. Clear statement rules require Congress to make its intentions known with unmistakable clarity on particularly salient matters, such as federalism.<sup>268</sup> They are designed to make drafters of legislation put their colleagues *on notice*, rather than allow contentious

---

news/senate/88485-parliamentarian-rules-against-first-gop-objection-to-reconciliation-bill [http://perma.cc/XCD8-RB4J].

<sup>262</sup> *King*, 135 S. Ct. at 2506 (Scalia, J., dissenting).

<sup>263</sup> 134 S. Ct. 2427 (2014).

<sup>264</sup> *Id.* at 2441.

<sup>265</sup> *See id.* at 2441–42.

<sup>266</sup> *King*, 135 S. Ct. at 2493 n.3.

<sup>267</sup> *NFIB*, 132 S. Ct. 2566, 2675–76 (2012) (joint dissent).

<sup>268</sup> *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (requiring a clear statement before a statute will be read to displace traditional state functions); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (requiring Congress to provide an “unmistakably” clear statement of intent to abrogate sovereign immunity).

moves to be buried in ambiguous statutory language. Justice Kennedy in *Boumediene v. Bush*<sup>269</sup> actually cited *The Legal Process* and then described these rules as “facilitat[ing] a dialogue between Congress and the Court” and helping “Congress . . . make an informed legislative choice.”<sup>270</sup> In the 2013 Term, Chief Justice Roberts, again citing Justice Frankfurter (and Justice Marshall), described clear statement rules as rules that “assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”<sup>271</sup> These rules are designed, at least in part, to improve how Congress drafts.

Likewise, as noted, the Court’s textualists have repeatedly argued that one purpose of a strict textual approach is to “promote clearer drafting.”<sup>272</sup> These moves are in obvious tension with the interpretive philosophy the Court claimed it had adopted before *King*: one grounded in the notion that Congress is too irrational to be any kind of partner with the Court and one divorced from the realities of congressional lawmaking.

3. *Gridlock*. — Finally, we do not know what role the fact of gridlock played in the *King* majority’s calculus. The Court appears never to have tailored a statutory interpretation opinion to the realities of Congress’s inability to react at that moment.<sup>273</sup> The *King* dissent tells us not to care about such matters. Justice Kennedy testified before Congress just weeks after the *King* oral argument: “[W]e hear that Congress can’t pass a bill one way or the other. That there is gridlock. Some people say that should affect the way we interpret the statutes. That seems to me a wrong proposition. We have to assume that we have three fully functioning branches . . . .”<sup>274</sup>

Justice Kennedy was correct that the Court acts on the assumption of no gridlock, but we should be clear that this itself is not a neutral assumption. The Court rests several very important doctrines on its views about the ease with which Congress *is* in fact able to override judicial statutory opinions. Moreover, the Court contends that it advances democracy to let Congress be the one to react to the conse-

---

<sup>269</sup> 553 U.S. 723 (2008).

<sup>270</sup> *Id.* at 738.

<sup>271</sup> *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

<sup>272</sup> SCALIA & GARNER, *supra* note 123, at 51.

<sup>273</sup> *Cf.* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014) (refusing to recognize gridlock as an “unusual circumstance” that could demand recess-appointment power during a very short congressional break).

<sup>274</sup> Josh Blackman, *Justice Kennedy Discusses Gridlock During Hill Testimony. Yes, There Is a King v. Burwell Connection*, JOSH BLACKMAN’S BLOG (Mar. 23, 2015), <http://joshblackman.com/blog/2015/03/23/justice-kennedy-discusses-gridlock-during-hill-testimony-yes-there-is-a-king-l-v-burwell-connection/> [<http://perma.cc/ECA6-R28K>].

quences of strict statutory construction. But why would a Court that already has taken a realist view of a statute's unorthodox process not also take such a view of Congress's ability to respond to an unforgiving judicial opinion? There is no such thing as a "remand" to Congress to clarify or fix a statute. The Court must take a side, and Congress will do what it will. Gridlock increases the costs of the Court's choice.

The most salient area in which this assumption of no gridlock occurs is in the important rule of super-strong stare decisis for statutory precedents, which the Court reemphasized last Term.<sup>275</sup> The Court applies a much stronger view of precedent in statutory cases than in other types of cases on the theory that Congress can always change (and should be the one to change) a statute if the Court has misinterpreted it. This special rule of precedent has been determinative of decisions in countless cases<sup>276</sup> and is expressly premised on the idea that Congress and the Court can be in an interpretive conversation. The strict approach to legislative mistakes is based on the same assumption.

At the *King* oral argument, Justice Scalia specifically referred to the likelihood of a congressional override if the Court adopted the challengers' reading:

You really think Congress is just going to sit there while — while all of these disastrous consequences ensue[?] I mean, how often have we come out with a decision . . . ? Congress adjusts, enacts a statute that — that takes care of the problem. It happens all the time.<sup>277</sup>

Justice Scalia was wrong about the general frequency of legislative overrides. Work by Eskridge, Christiansen, and Hasen has shown that overrides are now increasingly rare.<sup>278</sup> This does not mean that it is necessarily the Court's job to correct statutory mistakes or to overrule statutory precedents more eagerly, but it does mean that the jurisprudential justifications for the current doctrines — that they are democratically legitimate because Congress can act — are hollow as currently conceived.<sup>279</sup> Should it be Congress's obligation to establish a way to make sure that mistakes get corrected? Should the Court's

---

<sup>275</sup> See *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (“[S]tare decisis carries enhanced force when a decision . . . interprets a statute. . . . Congress can correct any mistake it sees.”).

<sup>276</sup> See, e.g., *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451–52 (2008); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); *Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987); *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972).

<sup>277</sup> Transcript of Oral Argument, *supra* note 60, at 54.

<sup>278</sup> See Christiansen & Eskridge, *supra* note 134, at 1319, 1322; Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013).

<sup>279</sup> See, e.g., John C. Nagle, *Textualism's Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, art.15, at 4 (“The textualist reluctance to accept judicial correction of statutory mistakes emphasizes the legislature's ability to correct its own mistakes.”).

own interpretive doctrine be the driving force in making Congress do so? Scholars and jurists for years have been trying to establish some kind of Congress–Court “corrections” process, but neither side seems sufficiently interested to entrench such procedures.<sup>280</sup>

\* \* \*

*King* has internal tensions on these questions, and perhaps that is why this portion of the opinion is short on detail. On the one hand, the Court implies that the ACA’s procedural unorthodoxies make the statute less legitimate; on the other, it seems to imply that the unorthodoxies justify the Court cutting the statute some slack.

This is not Justice Linde’s vision. Nor does it seem to be quite the “fit legislation” that Justice Frankfurter thought courts should expect from Congress and not discourage with “loose judicial reading.”<sup>281</sup> But it may bring Justice Frankfurter’s concept of what constitutes “fair adjudication” into the modern context.<sup>282</sup> In the same article, Justice Frankfurter concludes: “Perfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation. Fit legislation and fair adjudication are attainable.”<sup>283</sup> We may hear the Court echoing this comment in *King* when it concludes: “Anyway, ‘we must do our best . . .’”<sup>284</sup> Congress is not perfect, and neither is the Court. But that does not mean that either should throw up its hands and give up.

#### CONCLUSION: MODERN COURT, MODERN CONGRESS

*King* is a groundbreaking confrontation of the challenge of modern statutory complexity that reveals, but does not fully answer, a new set of questions that must occupy the Court. There is a sense that the Court is still working out its institutional position in the current statutory landscape. The unsettled roles of the canons and *Chevron* are examples. The Court’s incomplete engagement with Congress’s unorthodox lawmaking, statutory imperfection, and institutional realism are others. These questions are all at the core of the next-generation

<sup>280</sup> See, e.g., Ruth Bader Ginsburg & Peter W. Huber, Commentary, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1426–34 (1987); Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for “Statutory Housekeeping”: Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 133–36 (2007); John Copeland Nagle, Essay, *Corrections Day*, 43 UCLA L. REV. 1267, 1280–85 (1996).

<sup>281</sup> Frankfurter, *supra* note 9, at 545 (“Loose judicial reading makes for loose legislative writing.”).

<sup>282</sup> *Id.* at 546 (emphasis added).

<sup>283</sup> *Id.*

<sup>284</sup> *King*, 135 S. Ct. at 2492 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014)).



agenda for statutory interpretation theory and doctrine, and they take it far beyond the old textualism-versus-purposivism debate. We can all agree to use text and not legislative history, but that does not tell us how to deal with messy statutes that take on complex policy questions. That is where *King* takes us — also where it leaves us.

Looking beyond statutory interpretation, it is hard to resist the temptation also to situate *King* and the kinds of questions it asks within the Roberts Court's more general approach to the modern position of the federal courts. Professor Richard Pildes recently pointed out that the Court is wrestling with the tension between institutional formalism and realism across all areas of public law,<sup>285</sup> and *King* will certainly be seen as part of that struggle. But more broadly, I would suggest that we also can see the case as part of a larger movement in which the Roberts Court is grappling with the modern Congress and Congress's ever-increasing centrality to areas of the law that used to be reserved only for courts. There seems to be a broader institutional shift afoot that is motivated by this changing view of Congress, and a resulting instability as the altered doctrines are still working themselves out.

One can look across the wide variety of doctrines in Hart and Wechsler's federal-courts canon<sup>286</sup> and see similar traces of how the Court's recognition of the expanding work of Congress is subtly transforming what were familiar areas of federal-courts law. Areas of law that were once the judiciary's exclusive domain to safeguard — from standing, to divining causes of action, to the permissibility of non-Article III courts — have been increasingly recognized as profoundly altered by the displacement of judge-made law with Congress's work. As just a few examples, the Court has deferred to Congress's creation of statutory harms where harms were once thought not to exist,<sup>287</sup> refused to insert itself into areas of law where it once declared that rights deserved remedies when there is evidence that Congress has created a comprehensive statutory scheme (a plan!),<sup>288</sup> and allowed Congress to define what fair adjudication means and where it will occur when Congress creates the public right at issue.<sup>289</sup>

---

<sup>285</sup> See Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2.

<sup>286</sup> See generally RICHARD H. FALLON JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009).

<sup>287</sup> See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *FEC v. Akins*, 524 U.S. 11 (1998); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

<sup>288</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015).

<sup>289</sup> See *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *Crowell v. Benson*, 285 U.S. 22 (1932).

The Court still seems to be finding its way. Recent cases have raised questions about the wisdom of each of these moves — perhaps a sign that here, as in the *Chevron* context, at least some contingent of the Court is worried about having given away too much. We may see new efforts to reassert the Court's position in those cases, as in *King*.<sup>290</sup> Exploring these questions must await another day. But for now it seems that the Court's modern relationship to Congress may be its central question. *King* brings statutory interpretation back to this question more expressly than we have seen in a long time. In so doing, *King* realigns the most difficult questions of statutory interpretation with other basic questions the Court is facing about its institutional role in our changing legal landscape. There are likely more *Marbury* moments ahead.

---

<sup>290</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1950–52 (2015) (Roberts, C.J., dissenting) (expressing concern about infringement on the judiciary); *Armstrong*, 135 S. Ct. at 1384–87 (appearing to reserve a fallback equitable cause of action); *Stern*, 131 S. Ct. at 2611–15 (creating further doctrinal uncertainty on the status of the public/private rights distinction in the context of Congress's power to create non–Article III courts); *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413–14 (9th Cir. 2014) (questioning whether Congress may confer Article III standing by creating a private right of action based solely on a violation of a federal statute), *cert. granted*, 135 S. Ct. 1892 (2015).