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Oyez, Oyez, Oyez, the King's Court Is Now in Session

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Comment

Oyez, Oyez, Oyez, the *King*'s Court Is Now in Session

*Kelly Kearney**

King v. Burwell—the decision that sparked interpretive pandemonium surrounding the meaning of four simple words—symbolized that the United States Supreme Court, albeit the highest court in America, may have more power than originally thought or intended. At the heart of the King case was the issue of whether the Patient Protection and Affordable Care Act (“ACA”) authorized federal online insurance markets (i.e., Exchanges) to offer subsidized health insurance (“subsidies”) to individuals that resided in a state without a state-established Exchange. The ACA provides for these subsidies to be available through Exchanges “established by the State.” But the Internal Revenue Service (“IRS”) promulgated a rule after the enactment of the ACA that clarified that such subsidies would be available on all Exchanges, regardless of whether they were state or federally established. So, whose interpretation was correct? Normally, the options would be Congress—the drafters of the legislation—or the IRS—the agency to whose opinion could be deferred in the face of ambiguous statutory text. But King provides a new, third option: the Supreme Court’s own interpretation of the law. Thus, the Court granted subsidies for all—holding the statutory language, “established by the State,” to mean “and the federal government, too”—and simultaneously established the precedent that words might not have the plain meaning they facially appear to have.

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INTRODUCTION

King v. Burwell represented a transformation. *King* not only transformed the United States healthcare delivery system by permitting what appeared to be across-the-board access to subsidized healthcare, but it transformed the judiciary's role as an interpreter to potentially a lawmaker.¹ While proponents of a national healthcare system considered *King* a success story,² staunch defenders of the separation of powers doctrine could view *King* as the case that permitted the judicial branch to construe statutory language with undeniable (and perhaps unwarranted) ease.³ The manner in which the United States Supreme Court decided *King* potentially set a risky precedent, and the case illustrates the power of the Supreme Court to supersede other branches of government.⁴ *King* might have preserved consistent access to healthcare, but its deviation from the clear textual meaning of the statutory language poses a challenge to judicial consistency.⁵

King focused on a primary provision of the Patient Protection and Affordable Care Act ("ACA").⁶ In the foregoing case, the Supreme Court

1. See *Judicial Watch Statement on Supreme Court's Ruling in King v. Burwell*, JUD. WATCH (June 25, 2015), <http://www.judicialwatch.org/press-room/press-releases/scotus-king-v-burwell/> (noting the statement of Judicial Watch President Tom Fitton: "No federal judge has the power to rewrite the law, which is what the majority did today in [*King v.*] *Burwell*. Chief Justice Roberts, Justice Kennedy, Justice Breyer, Justice Sotomayor, Justice Ginsburg and Justice Kagan took part in an unconstitutional power grab every bit as unlawful as President Obama's rewrite of Obamacare. None of these justices have the constitutional power to rewrite major components of Obamacare in order to 'save it'").

2. See Jeff John Roberts, *In Big Win for Obama, Supreme Court Upholds Health Care Subsidies*, FORTUNE (June 25, 2015, 10:28 AM), <http://fortune.com/2015/06/25/in-big-win-for-obama-supreme-court-upholds-health-care-subsidies/> (explaining that if the Supreme Court had accepted the petitioners' arguments, millions of American citizens would have become ineligible for subsidies).

3. Peter Suderman, *Supreme Court Upholds Obamacare Subsidies in King v. Burwell*, REASON.COM: HIT & RUN BLOG (June 25, 2015, 10:24 AM), <https://reason.com/blog/2015/06/25/supreme-court-upholds-obamacare-subsidie> ("Basically, the Supreme Court, decided they'd rather squint at the law and look at its general shape rather than bother too much with the plain meaning of the relevant text.").

4. See Michael Busler, *Supreme Court Obamacare Ruling Sets Dangerous Precedent*, COMMUNITIES DIGITAL NEWS: BUS. & MONEY (June 25, 2015), <http://www.commdiginews.com/business-2/supreme-court-obamacare-ruling-sets-dangerous-precedent-43867/> (describing how legal solutions are often found in precedent and analogy, but that *King* implies that clear language can be ignored in the name of congressional intent, making the legal language irrelevant to a court that has other goals in mind).

5. See *supra* text accompanying note 4 (noting how *King* skips the normal process of reading language with clear definitions in mind, and moves to discerning meaning through perceived intent).

6. *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015).

examined the ACA's requirement for health insurance marketplaces.⁷ The ACA mandated the establishment of an American Health Benefit Exchange ("Exchange") in each state to serve as an online marketplace that would allow American citizens to shop for and purchase health insurance plans.⁸ If the state failed to construct such an Exchange, the federal government, through the Secretary of Health and Human Services (the "Secretary"), would theoretically "step in" and provide the Exchange for that state.⁹

The government relied on the idea that if healthcare is affordable, then all Americans would want to purchase it (or at least would not actively oppose the mandate to do so), but not everyone subscribed to this notion.¹⁰ A closer examination of the ACA's text revealed that subsidized (i.e., affordable) healthcare was only available on an Exchange "established by the State."¹¹ The Exchanges established *in* a state, but *by* the federal government because of a state's inaction, were, pursuant to the statute's plain language, not authorized to offer federal subsidies.¹² Thus began the battle of semantics now known as *King v. Burwell*.¹³

7. See *id.* ("The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange.")

8. *Id.*; see Patient Protection and Affordable Care Act, 42 U.S.C. § 18031(b)(1) (2010) (requiring that each state establish an American Health Benefit Exchange that facilitates the purchase of qualified health plans).

9. 42 U.S.C. § 18041(c) (2010) (outlining the responsibilities of the Secretary of the Department of Health and Human Services in establishing an Exchange within states that fail to establish a state-run Exchange); *King*, 135 S. Ct. at 2483 (noting the majority opinion by Chief Justice John Roberts that states: "If a State chooses not to follow the directive in Section 18031 to establish an Exchange, the Act tells the Secretary of Health and Human Services to establish "such Exchange"").

10. Jon Healey, *Will States Create Health Insurance Exchanges After King vs. Burwell*, L.A. TIMES (June 25, 2015, 4:47 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-will-states-create-health-insurance-exchanges-after-king-vs-burwell-20150625-story.html> (discussing how thirty-four states failed to set up health insurance Exchanges after this provision of the ACA was enacted because their "Republican-dominated governments didn't want to do anything that might sustain Obamacare").

11. Jonathan H. Adler, *On the Origins of 'Established by the State' in the Affordable Care Act*, WASH. POST: THE VOLOKH CONSPIRACY (May 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/26/on-the-origins-of-established-by-the-state-in-the-affordable-care-act/?utm_term=.3c59f103178d (discussing how the drafters of the ACA did not include language that expressly authorized federally established Exchanges to offer subsidies to its purchasers). See also 42 U.S.C. § 18041(f)(3)(A) (discussing that a "State may elect to authorize an Exchange established by the State").

12. Adler, *supra* note 11 (discussing whether the failure of the ACA drafters to include particular language authorizing federally established Exchanges was a drafting error, or whether it was their intention to limit the subsidized health insurance to state-established Exchanges).

13. *King*, 135 S. Ct. 2480.

This Article examines how and why the majority in *King* appeared to disregard strict textual interpretation of the legislation, and instead contrived its own perspective of congressional intent when it analyzed the meaning of, and any ambiguity in, “an Exchange established by the State.”¹⁴ In his dissenting opinion, then-Justice Antonin Scalia, noted that the response to the issue of who can establish an Exchange in a state should have been clear: an Exchange established by the state is *not* an Exchange established by the federal government, no matter the repercussions.¹⁵

Further, this Article analyzes the ambiguity that the majority saw, and that the dissenters refused to see, in the four simple words: “established by the State.”¹⁶ The argument boiled down to: if the statute was read with its literal, plain meaning of “an Exchange established by the State,” then only insureds who purchased health insurance from Exchanges established by the state were eligible for these tax credits. Therefore, those insureds who purchased insurance from an Exchange established by the federal government would not be eligible for tax credits within their states.¹⁷

This Article proceeds in five parts. Part I provides a background of the ACA and the role of the Internal Revenue Service (“IRS”) in its textual interpretation. Part I then discusses the significance of textual commitment to statutory language and congressional intent, leading to what prompted *King*. Next, this Article discusses *King* in depth by

14. 42 U.S.C. § 18031(f)(3)(A); *King*, 135 S. Ct. at 2505 (Scalia, J., dissenting) (“Trying to make its judge-empowering approach seem respectful of congressional authority, the Court asserts that its decision merely ensures that the Affordable Care Act operates the way Congress ‘meant [it] to operate.’”).

15. *King*, 135 S. Ct. at 2496–507 (Scalia, J., dissenting); see also Brief for Petitioners at 11, *King*, 135 S. Ct. 2480 (No. 14-114) [hereinafter Petitioners’ Brief] (“As statutory construction cases go, this one is extraordinarily straightforward. There is no legitimate way to construe the phrase ‘an Exchange established by the State under section 1311’ to include one ‘established by [the Department of Health and Human Services (‘HHS’)] under section 1321.’”).

16. 42 U.S.C. § 18031(f)(3)(A); see *King*, 135 S. Ct. at 2496–507 (Scalia, J., dissenting) (“So saying that an Exchange established by the Federal Government is ‘established by the State’ goes beyond giving words bizarre meanings; it leaves the limiting phrase ‘by the State’ with no operative effect at all.”); see also *id.* at 2483 (“One type of Exchange would help make insurance more affordable by providing billions of dollars to the States’ citizens; the other type of Exchange would not.”).

17. *Id.* at 2483; see also Richard Lempert, *King v. Burwell: Roberts Court Is Clear on Obamacare Ambiguity*, BROOKINGS: BLOG (June 26, 2015, 9:15 AM), <http://www.brookings.edu/blogs/fixgov/posts/2015/06/26-king-v-burwell-ambiguity-lempert> (“[The late Justice Scalia] correctly claimed that read literally, the ACA limited subsidies to insurance bought through state-established [E]xchanges. Those who purchased insurance through the federal [E]xchange were from the dissent’s perspective out of luck.”).

explaining how the Supreme Court acquired the case in the first place, and describing both the petitioners' and respondents' arguments. Part II concludes by comparing and discussing the majority opinion and the late Justice Scalia's dissenting opinion. Then, Part III analyzes whether ambiguous language was actually present in the statute, and whether alternative solutions and treatments were available if the Supreme Court found in favor of the petitioners. Last, Part IV discusses the impact that *King* has on legislative and judicial interpretation, as well as the conversation this case sparked within the general public as a result of then-Justice Scalia's dissenting opinion.

King has been described as a "big win" for proponents of national health insurance in America.¹⁸ Affordable and accessible health insurance is arguably a good outcome, but it came at a cost.¹⁹ This Article contends that the wrong branch decided this healthcare "win" (i.e., the judiciary rather than the legislature), and analyzes how *King* set a risky precedent for the power of judiciary and its interpretive authority moving forward.²⁰

I. BACKGROUND

A. *The ACA and Health Insurance Exchanges*

The ACA is fundamentally made up of three prongs: (1) the affordability of health insurance by offering refundable tax credits²¹ to those individuals whose incomes fall between 100 to 400 percent of the federal poverty level;²² (2) the guaranteed issue and community rating

18. Roberts, *supra* note 2.

19. *Id.*; see, e.g., *How King v. Burwell Could Affect Health Insurance Under Obamacare*, FAMILIES USA: RES. & PUBLICATIONS (May 2015), <http://familiesusa.org/product/how-king-v-burwell-could-affect-health-insurance-under-obamacare> (anticipating the effects of different *King* outcomes, and how a win for the petitioners would have meant that millions of Americans would have been unable to afford the cost of health insurance).

20. Busler, *supra* note 4; Roberts, *supra* note 2.

21. Refundable Credit for Coverage Under a Qualified Health Plan, 26 U.S.C. § 36B(a) (2011) ("In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle . . . an amount equal to the premium assistance credit amount.").

22. A brief outline of the three prongs of the Affordable Care Act:

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS, unless the cost of buying insurance would exceed eight percent of that individual's income. And third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line.

requirements, which ensure that the eligibility and cost of a health plan are not dependent on a potential insured's preexisting conditions or health status;²³ and (3) the individual mandate that generally requires all American citizens to either obtain health insurance or pay a tax penalty to the IRS.

The first prong of the ACA is the offering of refundable tax credits to ensure access to affordable health care.²⁴ While many Americans are fortunate enough to receive health insurance from their employers, there are still many who do not have this option (i.e., those that are self-employed or unemployed).²⁵ To rectify this difference, the ACA created Exchanges, or online marketplaces, in each state where people could access, and then easily obtain, affordable health insurance.²⁶ To ensure access to affordable health insurance, the ACA offered refundable tax credits²⁷ to low- and moderate-income individuals who purchased insurance on the Exchanges.²⁸ Without these tax credits, the cost of buying insurance would, for many individuals, rise above 8 percent of the household's income, and would thus exempt these individuals from the health insurance coverage requirement—because if paying for health insurance exceeds 8 percent of household income, purchasing insurance becomes too costly and is no longer required.²⁹

Though the tax credits ensured general affordability, access to

King v. Burwell, 135 S. Ct. 2480, 2482 (2015) (internal citations omitted).

23. 42 U.S.C. § 300gg-1 (2016) ("It is applying this paragraph uniformly to all employers and individuals in the group or individual market in the State consistent with applicable State law and without regard to . . . any health status-related factor relating to such individuals, employees and dependents.") (emphasis added); 29 C.F.R. § 2590.715-2704 (2016).

24. See text accompanying notes 21-22 (discussing the first prong of the ACA).

25. *ObamaCare and Health Insurance for the Self-Employed*, OBAMACARE FACTS: SELF-EMPLOYED HEALTH INS., <http://obamacarefacts.com/self-employed-health-insurance/> (last visited Nov. 7, 2015) (explaining how all American citizens need to obtain minimum essential health insurance coverage, regardless of whether the individual is self-employed, or pays a tax penalty).

26. *King*, 135 S. Ct. at 2485 (describing a health insurance Exchange as an online marketplace that allows potential insureds to compare and purchase health insurance plans); see 42 U.S.C. § 18001 (2010) (requiring each state to establish an American Health Benefit Exchange that "facilitates the purchase of qualified health plans").

27. 26 U.S.C. § 36B(a) ("In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle . . . an amount equal to the premium assistance credit amount.").

28. For a brief outline of the three prongs of the Affordable Care Act, see *supra* note 22.

29. 26 U.S.C. § 5000A(e)(1)(A) (2016) (exempting individuals from paying the tax penalty if the applicable individual's required contribution to health insurance exceeds eight percent of the individual's household income for the taxable year); see *King*, 135 S. Ct. at 2486 ("[T]he coverage requirement would not work without the tax credits. The reason is that, without the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement.").

insurance was also important to the ACA. Thus, the second prong of the ACA identifies the nondiscrimination health status rule.³⁰ This rule provides that health insurers must offer health insurance at a reasonable price to everyone and cannot base eligibility or cost of the plan on the potential insured's preexisting conditions or health status (that is, if the potential insured is currently sick or has a history of chronic illness, the insurance company cannot increase premiums for the insured based on either of these factors).³¹

But because insurers are required to offer health plans irrespective of an insured's health status, the adverse selection phenomenon becomes a reality. Adverse selection in health insurance refers to the problem when health insurance seems more financially attractive to individuals that are sick, or those that will incur high medical costs, rather than healthy individuals.³² Adverse selection arises when only sick people (i.e., the ones who actually *need* the health insurance) purchase health insurance, which causes health insurers to raise premiums to account for the fact that sick, rather than healthy, people are buying insurance.³³ As this phenomenon continues, the cost of insurance rises (for sick and healthy people alike), which forces the healthy people to wait and buy insurance only when they absolutely need it.³⁴ This unfortunate cycle results in a significant amount of people, particularly healthy people, without health insurance.³⁵

To cure this dilemma, the ACA's third prong refers to the individual mandate, which requires most individuals to either obtain health

30. See *supra* text accompanying note 23 (introducing and identifying the source of the second prong).

31. 42 U.S.C. § 300gg-1 (2010); Amy Howe, *Court Backs Obama Administration on Health-Care Subsidies: In Plain English*, SCOTUSBLOG (June 25, 2015, 12:01 PM), <http://www.scotusblog.com/2015/06/court-backs-obama-administration-on-health-care-subsidies-in-plain-english/>.

32. Robert H. Frank, *For Obamacare to Work, Everyone Must be in*, N.Y. TIMES (Aug. 3, 2013), <http://www.nytimes.com/2013/08/04/business/for-obamacare-to-work-everyone-must-be-in.html>.

33. The concept of adverse selection is best described as: "Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill?" *King*, 135 S. Ct. at 2484. For more information on adverse selection, see *Economics A–Z Terms Beginning with A*, ECONOMIST, <http://www.economist.com/economics-a-to-z?LETTER=A> (last visited Nov. 7, 2015) [hereinafter *Economics A–Z*].

34. *King*, 135 S. Ct. at 2484; see *Economics A–Z*, *supra* note 33 (defining economic terms).

35. See *King*, 135 S. Ct. at 2484 (noting that the Court denied the petitioners' interpretation of the ACA because it would create the "death spiral" that Congress intended to prevent); see also *Economics A–Z*, *supra* note 33 (illustrating that adverse selection drives individuals who know they have a higher risk of a claim than the average of the group to buy insurance, whereas those who have a below-average risk may decide that the cost of insurance will outweigh its worth).

insurance or pay a tax penalty.³⁶ All Americans are now required to purchase health insurance to hopefully prevent the adverse selection phenomenon, premium increases, and a subsequent economic death spiral that could certainly result if only “sick” individuals with high healthcare costs purchased insurance.³⁷

In 2012, *National Federation of Independent Business v. Sebelius* challenged the constitutionality of the ACA.³⁸ Specifically, *Sebelius* examined the constitutional issues surrounding the individual mandate³⁹ and the Medicaid expansion provisions⁴⁰ of the ACA.⁴¹ In the end, the Supreme Court upheld the individual mandate, thereby requiring essentially all American citizens to obtain health insurance or otherwise pay a tax penalty.⁴² This decision shed light on the scope of

36. See 42 U.S.C. § 18001 (mandating every American citizen, that can afford to purchase health insurance, to purchase health insurance, or pay a penalty).

37. An insurance death spiral occurs from adverse selection, when not enough young and healthy people purchase health insurance, which causes health insurers to raise premium rates. For example, there is a risk that only sick people will make up the pool of insureds, when those people who do not need health insurance, at that moment, have opted out of it. Thus, a death spiral of only sick people trying to get health insurance occurs and insurance companies subsequently drive the cost of insurance higher and higher to cover its sick insureds. For more information, see David Hogberg, *The Obamacare Death Spiral Is Still Coming*, FEDERALIST: HEALTH CARE (June 2, 2015), <http://thefederalist.com/2015/06/02/the-obamacare-death-spiral-is-still-coming/>. See also *King*, 135 S. Ct. at 2484 (“[T]he statutory scheme compels the Court to reject petitioners’ interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very “death spirals” that Congress designed the Act to avoid.”).

38. See generally *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (challenging the constitutionality of the ACA’s individual mandate provision). See also Amy Howe, *In Plain English: Is Half a Loaf Better Than No Loaf?*, SCOTUSBLOG (Mar. 28, 2012, 6:55 PM), <http://www.scotusblog.com/2012/03/in-plain-english-is-half-a-loaf-better-than-no-loaf/> (illustrating the possible repercussions that will result if the individual mandate is struck down in *Sebelius*).

39. See 42 U.S.C. § 18001 (laying out the requirements under Title 1, providing that if an American citizen is able to purchase health insurance, he or she must do so or pay a penalty [hereinafter the “individual mandate”]); see also *Summary of Provisions in the Patient Protection and Affordable Care Act*, OBAMACARE FACTS, <http://obamacarefacts.com/summary-of-provisions-patient-protection-and-affordable-care-act/> (last visited Nov. 7, 2015) [hereinafter *Summary of ACA Provisions*] (summarizing the provisions of the ACA title by title).

40. See 42 U.S.C. § 18083 (2010) (expanding the eligibility requirements for Medicaid); see also *Summary of ACA Provisions*, *supra* note 39 (summarizing the provisions of the ACA title by title).

41. See *Sebelius*, 132 S. Ct. at 2587 (holding that the individual mandate exceeded the power granted to Congress by the Commerce Clause, but was in line with its taxing powers, but finding that the Medicaid expansion provision exceeded Congress’ power under the Spending Clause); see also Memorandum from Staff of the Joint Select Comm. on Health Reform Implementation, to Members of the Joint Select Comm. on Health Reform Implementation (July 25, 2012) [hereinafter *Memorandum*] (providing a short summary of *Sebelius*).

42. *Sebelius*, 132 S. Ct. at 2583; see David B. Kopel, *Online symposium: The Bar Review*

congressional power by examining constitutional issues under the Commerce Clause,⁴³ the Taxing and Spending Clause,⁴⁴ and the Necessary and Proper Clause.⁴⁵

The plaintiffs in *Sebelius* argued that the individual mandate and the Medicaid expansion provision exceeded the federal government's constitutionally enumerated powers.⁴⁶ In its response, the federal government argued that the individual mandate was constitutional because the foregoing constitutional clauses justified its enactment.⁴⁷ The Court held that, while the federal government cannot force American citizens to purchase health insurance under the Commerce Clause or Necessary and Proper Clause, it does have enumerated powers under the Taxing and Spending Clause that allow it to enact the individual mandate.⁴⁸ Though the Medicaid expansion provision was not a valid exercise of Congress' spending power,⁴⁹ the individual mandate survived

Version of NFIB v. Sebelius, SCOTUSBLOG (July 6, 2012, 5:31 PM), <http://www.scotusblog.com/2012/07/online-symposium-the-bar-review-version-of-nfib-v-sebelius/> ("The "tax" is low enough so that a person can make a 'reasonable financial decision' to pay the tax instead of doing whatever is being taxed. The tax is not at a 'prohibitory' level.").

43. The Commerce Clause allows the federal government to regulate actions or goods that are involved in or affect interstate commerce, and prohibits the state governments from doing the same or interfering. *See* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"); *see also* Kopel, *supra* note 42 (explaining how under the Commerce Clause, Congress can regulate instrumentalities of interstate commerce, channels of interstate commerce, and activities that substantially affect commerce).

44. The Taxing and Spending Clause grants the federal government power to levy taxes and spend federal funds. *See* U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power to tax); *see also* Kopel, *supra* note 42 (explaining how under the Spending Clause, Congress can encourage states to enact certain laws but cannot use it to force or coerce states to enact certain laws).

45. *Sebelius*, 132 S. Ct. at 2583; *see* Kopel, *supra* note 42 (explaining how under the Commerce Clause, Congress can regulate instrumentalities of interstate commerce, channels of interstate commerce, and activities that substantially affect commerce; how Congress has the power to pay the debts and provide for common welfare of the United States; and how under the Necessary and Proper Clause, Congress has the power to make all laws necessary for carrying into execution the powers dictated in the Constitution of the United States).

46. *See Sebelius*, 132 S. Ct. at 2587 (holding that the individual mandate exceeds the power granted to Congress by the Commerce Clause); *see also* Memorandum, *supra* note 41 ("[T]he federal government may only pass laws and regulations pursuant its constitutionally enumerated powers.").

47. Memorandum, *supra* note 41; *see also Sebelius*, 132 S. Ct. at 2572 (explaining that the individual mandate was not a constitutionally abiding provision under the Commerce Clause and Necessary and Proper clause, but that it passes constitutional muster under the Spending Clause).

48. Memorandum, *supra* note 41; *see also Sebelius*, 132 S. Ct. at 2572 (holding that "[t]he Act provides that this 'penalty' will be paid to the Internal Revenue Service with an individual's taxes, and 'shall be assessed and collected in the same manner' as tax penalties").

49. Memorandum, *supra* note 41 ("States that elect to proceed with the Medicaid expansion would presumably be unaffected by the ruling.").

because it was deemed a constitutional exercise of Congress' taxing power due to the federal government labeling the consequence of not purchasing health insurance as a *tax*.⁵⁰

While proceedings for *Sebelius* were ongoing, the Court posed the question of whether it would be better to just wipe the slate clean and have Congress start over with this legislation.⁵¹ Many viewed the individual mandate as the prong that, if struck down, would bring the rest of the ACA down with it.⁵² Justice Sonia Sotomayor argued that adjusting or striking down another part of the ACA would be a job for Congress, not for the judiciary—already hinting that this topic might not be something for the Supreme Court to handle.⁵³ Justice Ruth Ginsburg agreed, and voiced that Congress would be better suited for determining which parts of the ACA should stay without the individual mandate.⁵⁴ Justice Antonin Scalia, in accord with his typical devotion to the Constitution, argued that if legislators are considering revising the ACA, they should just scratch the whole legislation and have Congress start over.⁵⁵ This next Part demonstrates how the ACA should have had

50. *Id.*; see also *Sebelius*, 132 S. Ct. at 2594 (“The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects.”). Further, the Medicaid expansion issue was addressed with the solution that the federal government can no longer withdraw existing federal funds for Medicaid from the states that did not choose to comply with the expansion in the first place—the federal government may incentivize state action, but it cannot unreasonably coerce it. Memorandum, *supra* note 41 (“In other words, the Court ruled that states that do not comply with the Medicaid expansion would only lose the matching funds for the newly eligible population; existing Medicaid funding would not be affected.”); see also *Sebelius*, 132 S. Ct. at 2607 (“What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).

51. See Howe, *supra* note 38 (“Although Justice Ruth Bader Ginsburg returned to Justice Sotomayor’s suggestion that Congress was better suited to figure out what parts of the Act should survive without the mandate (a suggestion with which Kneeder agreed), Justice Scalia again pushed back. If Congress is going to have to reconsider the Act anyway if the mandate is struck down, he asked, why shouldn’t it do so on a blank slate?”).

52. See Howe, *supra* note 31 (discussing, generally, the components of the individual mandate); see also John Hudson, *What Happens If the Individual Mandate Is Struck Down*, WIRE (Mar. 27, 2012, 5:00 PM), <http://www.thewire.com/politics/2012/03/what-happens-if-individual-mandate-struck-down/50415/> (discussing how striking down the individual mandate in *Sebelius* will bring the rest of the ACA down with it, because the mandate is meant to expand the pool of insureds, and without this great variety of insureds, aspects like subsidies for those who cannot afford health insurance and denying coverage based on pre-existing health conditions are much harder to sustain).

53. See Howe, *supra* note 38 (stating that Sotomayor “seemed especially reluctant to strike down any other part of the ACA if the mandate falls”).

54. See *id.* (noting that Justice Ginsburg “returned to Justice Sotomayor’s suggestion that Congress was better suited to figure out what parts of the Act should survive without the mandate”).

55. See *id.* (“Nor did the Justices appear to relish the prospect of going through the entire 2700-plus pages of the ACA, line by line, to determine what provisions should fall with the mandate;

legislative reworking because textual commitment to the words of the ACA did not equate to the Supreme Court's perceived goal of the Act.

B. What it Means to Have Textual Commitment to the Constitution and Legislation

In 2014, only sixteen states had established Exchanges themselves, while the remaining thirty-four states had Exchanges established by the federal government.⁵⁶ The uncertainty surrounding the language in section 1401—providing subsidies to Exchanges “established by the State,”—begs the question of how one is to interpret this provision of the ACA.⁵⁷ Courts have approached this question in different ways, one of

indeed, in one of his many laugh lines of the day, Justice Scalia suggested that such a chore would violate the Eighth Amendment's prohibition on cruel and unusual punishment.”). In the end, the individual mandate was upheld, effectively by calling it a tax, which would entail facing a penalty as part of filing federal tax returns. *See generally Sebelius*, 132 S. Ct. 2566 (holding that the individual mandate exceeded Congress' power under the Commerce Clause, but was deemed constitutional when labeled as a tax). *See National Federation of Independent Business v. Sebelius*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/national-federation-of-independent-business-v-sebelius/> (last visited Nov. 7, 2015) (“Although the mandate is not authorized under the Commerce Clause, it is nonetheless a valid exercise of Congress's power under the Taxing Clause.”); *see also* Lyle Denniston, *Court to Rule on Health Care Subsidies*, SCOTUSBLOG (Nov. 7, 2014, 12:49 PM), <http://www.scotusblog.com/2014/11/court-to-rule-on-health-care-subsidies/> (“The Supreme Court . . . rejected a challenge to the individual mandate, finding that the arrangement Congress had made was a valid tax scheme. No one absolutely had to buy insurance, but those who did not would face a penalty as part of their filing of federal tax returns, as the Court viewed the mandate.”).

56. *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) (“At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so.”); Petitioners' Brief, *supra* note 15, at 9 (“After the IRS announced that taxpayers would be eligible for subsidies whether or not their states established Exchanges, 34 states declined to create Exchanges for 2014.”). *But see State Health Insurance Marketplace Types, 2016*, HENRY J. KAISER FAM. FOUND., <http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/> (last visited Nov. 7, 2015) (compiling current state legislation and other insurance marketplace information). Just as the issue was whether the ACA provided subsidies to federally established Exchanges too, when it stated “established by the State,” one might ask whether subsidies would be awarded to those that purchase insurance on Exchanges created by a federal-state partnership (a form of Exchange not contemplated at the ACA's inception). *See generally* Sarah Dash et al., *Health Insurance Exchanges and State Decisions*, HEALTH AFF. BRIEF 1, 2–3 (July 18, 2013), http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_96.pdf. But Exchanges created by a federal-state partnership would be subjected to the same scrutiny as Exchanges created by the federal government.

57. *See King*, 135 S. Ct. at 2489 (discussing how Congress likely would not leave the interpretation of the ACA's provisions on tax credits, which is one of the ACA's key reforms, to judicial or agency interpretation); *see also* Abbe 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/> (“Obamacare's opponents have depicted the challenges in *King v. Burwell*,

which includes a strict textual interpretation.⁵⁸ Justice Scalia was a big supporter of this textual approach, and believed that the rule of law ought to be a law of rules—meaning that the words of the law should, and need to, govern just what they say they will.⁵⁹ He believed the Supreme Court should determine whether a particular case falls in or outside of historically set rules, not construing these rules altogether.⁶⁰ Justice Scalia's beliefs, as well as other judges' successful commitments to textualism, are illustrated throughout the following cases.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Clean Air Act Amendments of 1977 required certain states to establish a program that would regulate major stationary sources of air pollution and ensure that these sources met national air quality standards established by the Environmental Protection Agency (“EPA”).⁶¹ The EPA was challenged regarding whether it could treat all pollution-emitting devices within the same industry as though they were grouped into a single, treatable “bubble.”⁶² The Court in *Chevron* grappled with the definition of “stationary source,” and, like *King*, pondered the idea of giving deference to the agency (hereinafter, coined “*Chevron* deference”) and allowing the EPA to control both the definition and the application of the

Halbig v. Burwell, and the other subsidies cases as the choice between clear statutory text and vague notions of statutory purpose.”).

58. William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (“[V]irtually all theorists and judges are ‘textualists,’ in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear.”). For Justice Antonin Scalia’s classic articulation, see generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed. 1997).

59. See William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1133 (1992) (discussing how Justice Scalia has a strong commitment to statutory text when interpreting a statute); see also *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (stating that the “regular method” for interpreting a statute is, first, to “find the ordinary meaning of the language in its textual context; and second, using established canons of construction, [to] ask whether there is any clear indication that some permissible meaning other than the ordinary one applies”).

60. See Popkin, *supra* note 59, at 1133 (discussing how Justice Scalia believes that judges should avoid judicial lawmaking when faced with unclear statutory language, and should instead adopt clear rules or exercise deference to a qualified agency’s interpretation).

61. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984) (holding that the Environmental Protection Agency (“EPA”) regulation that allowed states to treat all pollution-emitting devices as though they were contained within a single bubble-like industrial grouping was based on a permissible construction of the term “stationary source” construed by the agency itself); see also 42 U.S.C. § 7401 *et seq.* (1970) (enacting amendments in 1977 to set new goals for achieving attainment of National Ambient Air Quality Standards).

62. *Chevron*, 467 U.S. at 840 (“The question presented by these cases is whether [the] EPA’s decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single ‘bubble’ is based on a reasonable construction of the statutory term ‘stationary source.’”).

term in question.⁶³ A significant outcome of this case was that policy determinations were deemed better suited for legislators or administrators, not the judiciary.⁶⁴ The judiciary is the final authority on statutory construction, and has a duty to reject administrative constructions that are contrary to the original, clear congressional intent.⁶⁵ Statutory *construction*, as is the judiciary's role, is not the same as rewriting the law.⁶⁶

Another challenge regarding statutory language, specifically in the Voting Rights Act of 1965 ("Voting Rights Act"), was presented in *Chisom v. Roemer*.⁶⁷ The Supreme Court took a broad interpretation of some of the words in the Voting Rights Act, thus straying from a purely textualist approach, to construe the Voting Rights Act as it saw fit.⁶⁸

63. See Gluck, *supra* note 57 (explaining that to give *Chevron* deference to an agency means to defer to an agency's interpretation, and require that the agency's own construction be reasonable). *Chevron* questioned how courts ought to treat a qualified agency's interpretation of statutes that mandate that such agency take some sort of action. *Chevron*, 467 U.S. at 844. The Supreme Court in *Chevron* held that courts should defer to an agency interpretation in the foregoing situation unless that interpretation is unreasonable. *Id.*

64. See *id.* at 864 (arguing that the policy arguments over the EPA's "bubble concept" are properly suited to be addressed to legislators or administrators, but not to judges).

65. This case held that Supreme Court Justices ought to be the ones deciding whether a statute is purporting to say what the plain language of the text says it is:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation [i.e., the Environmental Protection Agency]. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842–43.

66. See *id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." (internal citation omitted)).

67. The Voting Rights Act of 1965 is a significant piece of federal legislation that prohibits racial discrimination in voting, and greatly impacted American civil rights at the time it was enacted. For more information, see NAT'L VOTING RTS. MUSEUM & INST., http://nvrmi.com/?page_id=41 (last visited Nov. 7, 2015). See generally *Chisom*, 501 U.S. 380 (analyzing a challenge by Black registered voters in Louisiana to the system of electing the state's Supreme Court Justices, and holding that state judicial elections are included in the statute that prohibits certain voting or prerequisite qualifications that result in the denial of a right to vote on account of race or color).

68. *Id.* at 386 (noting how the terms "voting" and "vote" in the Voting Rights Act of 1965 had broad definitions).

Justice Scalia, in line with his commitment to the plain meaning of text, dissented.⁶⁹ Justice Scalia's approach to construe statutory language is to first discern the ordinary meaning of the statutory language in the context of the rest of the legislation; then, while consulting precedent, consider whether any other permissible meaning, other than the one derived from the plain meaning, applies.⁷⁰ If there is no other clear, permissible meaning of the text, then Justice Scalia encourages the application of the ordinary meaning—a concept that should not be lost in judicial interpretation.⁷¹

And again, in *New York State Department of Social Services v. Dublino*, the Supreme Court ruled that federal statutes cannot be interpreted to negate their own purposes.⁷² In this case, there was a clash between a New York state law and the federal Social Security Act ("Act").⁷³ An amendment to the Act mandated that states adopt a Work Incentive Program.⁷⁴ The plaintiffs alleged that New York's work rules, which accounted for various conditions for the state's unemployed residents, were now preempted by this new provision in the Act.⁷⁵

69. Arguing for the plain-meaning reading of the text in the Voting Rights Act of 1965: Section 2 of the Voting Rights Act of 1965 is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute. I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.

Id. at 404 (Scalia, J., dissenting).

70. *Id.*

71. *Id.*

72. *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973).

73. *See id.* at 406–07 (presenting the issue in this case as whether the Social Security Act of 1935 prevents a state from requiring its residents to accept employment as a condition for receiving federal aid to families with dependent children); *see also* Social Security Act, 42 U.S.C. § 301 (1935) (providing for the general welfare by establishing a system of federal benefits and enabling several states to improve upon provisions for the elderly, blind, dependent and crippled children, maternal and child welfare, and public health and to compensate the same for unemployment). For more information on the Social Security Act of 1935, *see Social Security Act of 1935*, SOC. SECURITY: LEGIS. HIST., <https://www.ssa.gov/history/35act.html> (last visited Nov. 7, 2015).

74. *Dublino*, 413 U.S. at 406–07. For more information on work incentives, *see Work Incentives—General Information*, SOC. SECURITY, <https://www.socialsecurity.gov/disabilityresearch/wi/generalinfo.htm#work> (last visited Nov. 7, 2015) (defining “work incentives” as ways to make it possible for disabled persons, who are already receiving Social Security or Supplemental Security Income, to also work, while still receiving monthly payments from the job and maintaining eligibility under Medicare or Medicaid).

75. *Dublino*, 413 U.S. at 407 (reiterating that the issue in the case is whether the Work Incentive Program, a federal program under the Social Security Act, preempts New York's own laws

Dublino highlighted the importance of allowing state governments considerable latitude in reaching their own resolutions, while also cooperating with the federal government.⁷⁶ *Dublino* also emphasized the need to preserve legislative interpretation in the legislative branch, unless there are clear indications that the legislation is undergoing grave misunderstandings.⁷⁷

In *Crandon v. United States*, the majority opinion also emphasized a literal reading of the statutory provision in question.⁷⁸ In this case, five executives from the Boeing Company, Inc. (“Boeing”), resigned or took early retirement before taking a new job with the government.⁷⁹ Boeing made a payment to each executive, intending to mitigate the expected financial loss of the employment position change.⁸⁰ The issue in *Crandon* was whether these payments violated the Criminal Code when the Code appears to specifically prohibit this sort of compensation.⁸¹ The Court held that, to accurately discern a statute’s meaning, it needed to look at the particular statutory language along with its design, object, and policy.⁸²

Interestingly, Attorney General Kennedy explained that one of the purposes of the legislation at issue in *Crandon* was to assist the government in obtaining temporary services from people who had the requisite, specialized qualifications.⁸³ His prediction was that this would

concerning its residents’ welfare).

76. See *id.* at 413 (explaining how federal government interference could significantly impair the capacity of the state government to effectively handle its own welfare issues, and arguing that, as long as states are cooperating with the federal government toward a similar, beneficial goal, the Supreme Court should not interfere with what is already working, and the state governments should be allowed this kind of latitude in solving their own resolutions); see also *Dandridge v. Williams*, 397 U.S. 471, 478 (1970) (discussing how statutory analysis must begin with an acknowledgment of how federal laws generally give states great latitude in how it dispenses its federal funds).

77. See *Dublino*, 413 U.S. at 421 (suggesting that when interpreting statutory language, one should follow the construction by those who execute the statute unless there are clear indications that it is blatantly wrong).

78. See *Crandon v. United States*, 494 U.S. 152, 159 (1990).

79. See *id.* at 154–55 (describing the background of *Crandon*).

80. *Id.* at 154.

81. *Id.* at 158–59 (describing the standard set forth in the Criminal Code).

82. *Id.* at 158.

83. President Kennedy explaining the purpose of the statute at issue in *Crandon* stated:

Such regulation, while setting the highest moral standards, must not impair the ability of the Government to recruit personnel of the highest quality and capacity. Today’s Government needs men and women with a broad range of experience, knowledge, and ability. It needs increasing numbers of people with top-flight executive talent. It needs hundreds of occasional and intermittent consultants and part-time experts to help deal with problems of increasing complexity and technical difficulty. In short, we need to draw upon America’s entire reservoir of talent and skill to help conduct our generation’s

help expand the pool of talent to better serve the specialized needs of various departments and agencies.⁸⁴ But this idea of expansion ran counter to the unforeseen issue raised in *Crandon* of whether these employees could receive preemployment payments.⁸⁵ Because this issue invoked the Criminal Code, the Rule of Lenity Doctrine applied, meaning that any ambiguities would be decided in favor of the plaintiffs.⁸⁶ The Supreme Court reasoned, however, that it is not the judiciary's role to approve or disapprove the actual payment—instead, it needs only to ensure that a literal reading of the statute is consistent with the policies that motivated its enactment.⁸⁷ To do this, the Court's function is to check that its reading of the statute aligns with the “spirit and purpose” of the legislation.⁸⁸ It determined that this harmony was present, and thus ruled that the preemployment payments were not an example of a departure from what the statute encompassed.⁸⁹

Additionally, *Caminetti v. United States* was one of the first cases to describe a “plain meaning rule”—where statutory intent is read within the confines of the words in the statute.⁹⁰ The Court found that the judiciary must first look for the meaning of a statute within the actual statute

most important business—the public business.

Id. at 166–67 (quoting President Kennedy).

84. *Id.*

85. *Id.* at 167 (explaining that the expansion of the statute to encompass these pre-employment payments would be inconsistent with the goal of the statute altogether).

86. *Id.* at 175 (“Even if one does not think that a meaning trumps an implication, at most we have an ambiguity—and since this is a criminal statute, the rule of lenity demands that it be resolved in favor of the more narrow criminal liability.”).

87. Describing the judiciary's role in reading legislation:

It is not our function to express either approval or disapproval of this kind of unconditional severance payment. We note only that a literal reading of the statute—which places a pre-Government service severance payment outside of the coverage of section 209(a)—is consistent with one of the policies that motivated the enactment of the statute. Because the language Congress used in section 209(a) is thus in “harmony with what is thought to be the spirit and purpose of the act,” this case presents none of the “rare and exceptional circumstances” that may justify a departure from statutory language.

Id. at 168.

88. *Id.*

89. *Id.*

90. A description of the “plain meaning rule” according to *Caminetti v. United States*:

[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.

242 U.S. 470, 485 (1917).

itself.⁹¹ If the statutory language is deemed plain and clear, and if the law is constitutional and enacted within the legislative body's authority, then the sole purpose of the judiciary is to enforce the legislation as it is written.⁹²

This plain meaning rule is especially appropriate when the statutory text is unambiguous, and when it invokes only one true meaning.⁹³ In *Caminetti*, the statute specifically stated that it was an offense to transport a female for the purpose of prostitution.⁹⁴ There is a presumption to read statutory words as uniform and with the ordinary and usual meaning typically attributed to them, unless there is an obvious ambiguity.⁹⁵ Because the petitioner's action of transporting, or causing to be transported, women across state lines for an immoral purpose was clearly against the intended purpose of the statute, his actions fairly fell within the legal grasps of the statute.⁹⁶ Moreover, the petitioner was not merely going against the implied meaning of the statute, but the Court adopted the plain, literal meaning of the statutory words, and the petitioner was thus liable for defying its clear, intended, and explicit purposes.⁹⁷

Further, the D.C. Circuit Court in *Halbig v. Burwell* also shed light on the power of the judiciary.⁹⁸ Despite being vacated and held in abeyance, the reasoning behind this case provides a useful backdrop in understanding how the Court decided *King*.⁹⁹ The concept of textualism was revisited in *Halbig*: the legislative history was a source to consult to

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* at 484–85 (describing the prostitution statute).

95. *Id.* at 485–86 (“Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them.”).

96. *Id.* at 486.

97. *Id.*

98. 758 F.3d 390 (D.C. Cir. 2014), *vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. 2014); *see* Petitioners’ Brief, *supra* note 15, at 10 (explaining how the Supreme Court granted certiorari to a decision by the Fourth Circuit (ruling in favor of the federal government) and the D.C. Circuit (ruling in favor of the plaintiffs), causing the D.C. circuit to hold *Halbig v. Burwell* in abeyance until the Supreme Court could decide it for themselves); *see also* *Halbig v. Burwell*, 758 F.3d 390, 394 (D.C. Cir. 2014), *vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. 2014) (vacating the IRS’s rule that any exchange, whether State-established or HHS established, could offer subsidized health insurance). Another court, after reviewing the two circuit opinions, found *Halbig* to be much more persuasive, and even argued that the federal government’s defense of *Chevron* deference to the IRS was condemnable. The court declared the IRS deference as “lead[ing] us down a path toward Alice’s Wonderland, where up is down and down is up, and words mean anything.” *Oklahoma v. Burwell*, 51 F. Supp. 3d 1080, 1089 (E.D. Okla. 2014).

99. *See* Petitioners’ Brief, *supra* note 15, at 10 (explaining how the Supreme Court granted certiorari when faced with a division between the Fourth Circuit and the D.C. Circuit).

verify congressional intent.¹⁰⁰ But legislative history is not the only source for this form of evidence, the literal words in the statute should also warrant purposeful reading.¹⁰¹ The Court has already made it clear that it will not give effect to the very literal meaning of a statute's text if, in doing so, it creates an outcome noticeably far from what Congress initially (and, arguably, clearly) intended.¹⁰²

In *Halbig*, the IRS Rule that allowed tax credits for those who purchased health insurance on both a state-run *and* a federally facilitated health insurance Exchange—just as in *King*—was challenged.¹⁰³ The IRS broadly interpreted section 36B's application to cover all Exchanges established under section 1321 of the ACA. The United States District Court for the District of Columbia ruled similarly to the *Chevron* case¹⁰⁴—where the court gave deference to an agency like the IRS.¹⁰⁵ The *Halbig* Court called these health insurance Exchanges both a gatekeeper *of*, and a gateway *to*, affordable health insurance.¹⁰⁶ It recognized the importance of these Exchanges, and even acknowledged the genuine similarities of an Exchange established per section 1311 and

100. *Halbig*, 758 F.3d at 407 (“Legislative history is a means to an end, to be consulted for evidence of congressional intent.”); *see, e.g.*, *Sierra Club v. EPA*, 551 F.3d 1019, 1026 (D.C. Cir. 2008) (discussing *Chevron* deference, and how both the court and the relevant agency must give deference to the intent of Congress where it is unambiguously expressed, and how the agency should only be consulted where the statute is silent or ambiguous on a very particular issue).

101. *See Halbig*, 758 F.3d at 402 (discussing how courts have an obligation to avoid adopting statutes that provoke absurd results, but that courts do not “disregard statutory text lightly”).

102. *See id.* (explaining that the Court will not give effect to a statute's literal meaning if the statute would become “nonsensical or superfluous” or the outcome would be against perceived social values in such a way that Congress could not have intended).

103. *See id.* at 393 (describing how the IRS interpreted section 36B of the Internal Revenue Code (“IRC”) broadly to authorize subsidies on federally facilitated exchanges); *see also supra* text accompanying notes 98–107 (summarizing *Halbig*).

104. *See supra* notes 80–85 and accompanying text (delineating the phrase “*Chevron* deference”—where deference is given to a qualified agency to interpret legislative intent). For more information, *see generally* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that the EPA's interpretation of the statute was permissible because legislative history was silent on the issue).

105. *See Halbig*, 758 F.3d at 393 (“Furthermore, the court held that even if the ACA were ambiguous, the IRS's regulation would represent a permissible construction entitled to deference under *Chevron*.”); *see also Chevron*, 467 U.S. at 844 (“We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”).

106. *Halbig*, 758 F.3d at 394. The Exchanges are gatekeepers because they determine which health insurance plans will satisfy both state and federal standards, and there are also websites allowing individuals and employers to enroll in the qualified plans. *Id.* These Exchanges are also gateways to health insurance because section 36B allows refundable tax credits (i.e., subsidized health insurance). *Id.*

one established per section 1321 of the ACA.¹⁰⁷

The difference in these Exchanges, however, hinges on *who* established the Exchange.¹⁰⁸ This distinction determines who can, and who cannot, receive federally subsidized health insurance.¹⁰⁹ The majority opinion cited precedent to illustrate how clearly the D.C. Circuit Court ought to read the statutory language, arguing that it is a common presumption that Congress intentionally places language in certain parts of a statute, and different language in another part.¹¹⁰

Federally facilitated Exchanges are Exchanges established under section 1321 of the ACA; they are not Exchanges established by the state under section 1311. The fact that federally facilitated Exchanges do not fall under section 1311's provision relating to tax credits demonstrates that Congress intended to incentivize states to establish Exchanges—this incentivizing language is only present in the “state section” under 1311.¹¹¹

C. *How is Congressional Intent Discerned?*

The most traditional way to determine congressional intent is to follow the teachings of the D.C. Circuit Court in *Halbig*, and read the literal text itself.¹¹² Justice Scalia advocated for this textual originalism, where one could ascertain the natural meaning of legislation from the governing text.¹¹³ He also rejected judicial speculation about the intent in

107. *See id.* at 400 (suggesting that, even though the federal government can establish an Exchange *within* a state, it does not actually “stand in the state’s shoes” when it does this); *see also* 42 U.S.C. §§ 18031, 18041 (2010) (distinguishing between a state-established and a federally established Exchange).

108. *Halbig*, 758 F.3d at 400 (“The problem confronting the IRS Rule is that subsidies also turn on a third attribute of Exchanges: who established them.”).

109. *See* §§ 18031, 18041 (distinguishing between Exchanges established by the state and established by the federal government).

110. *Halbig*, 758 F.3d at 400 (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.” (quoting *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2582 (2012))).

111. *Id.* at 416 (“The statutory provision presumes the existence of subsidies and was drafted to establish a formula for the payment of tax credits, not to impose a significant and substantial condition on the States.”); *see also* Petitioners’ Brief, *supra* note 15, at 10 (arguing that Congress could reasonably expect states not to reject a deal where its residents could receive billions of free federal funds in order to purchase health insurance).

112. *Halbig*, 758 F.3d at 402 (“The Constitution assigns the legislative power to Congress, and Congress alone . . . and legislating often entails compromises that courts must respect.”).

113. *See generally* Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism> (explaining how Justice Scalia urges fellow judges to look for meaning in the governing text and ascribe it the meaning that is borne from its inception).

congressional drafting and urged fellow judges and justices to provide a fair reading of all legislation.¹¹⁴ The consultation of legislative history ought to play a secondary role to the initial read-through of statutory text.¹¹⁵ Legislative history is not to be used to explain clear text; one can examine legislative history when the text produces various understandings, but unless something is clearly at odds with congressional intent, the text should not lead to a consultation with a history book.¹¹⁶

D. *King v. Burwell and the Unwelcomed Role of the IRS*

The dispute in *King* centered on who could be eligible for the tax credits provided under the ACA: persons in states with state-operated *and* persons in states with federally operated Exchanges, or *only* persons in states with state-operated Exchanges. Section 1311 of the ACA affords states the opportunity to create an Exchange.¹¹⁷ If a state does not elect to establish an Exchange, section 1321 of the ACA requires the Secretary of Health and Human Services to “establish and operate such Exchange within the State.”¹¹⁸ It is undisputed that both states and the federal government can create Exchanges. But the heart of the *King* dispute hinges on section 1401 of the ACA—which created section 36B of the Internal Revenue Code (“IRC”)—and authorized “federal tax credit subsidies for health insurance coverage that [are] purchased through an Exchange *established by the State* under Section 1311 of the ACA.”¹¹⁹

114. *See id.* (“[L]ook for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extra-textually derived purposes and the desirability of the fair reading’s anticipated consequences.” (citing generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)).

115. *See id.* (“Scalia is a pertinacious critic of [using] legislative history to illuminate statutory meaning . . . [because] his criticism is that a legislature is a hydra-headed body whose members may not share a common view of the interpretive issues likely to be engendered by a statute that they are considering enacting.”).

116. *Halbig* provides additional information on when, and in what order, history ought to be consulted:

We begin by clarifying the role the ACA’s legislative history might play in our analysis. Legislative history is a means to an end, to be consulted for evidence of congressional intent . . . But legislative history is not the sole, or even the primary, source of such evidence. Rather, “[t]he most reliable guide to congressional intent is the legislation the Congress enacted.”

Halbig, 758 F.3d at 407 (quoting *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002)).

117. 42 U.S.C. § 18031.

118. 42 U.S.C. § 18041.

119. 26 U.S.C. § 36B (emphasis added). The relevant portion of section 1311 regarding American Health Benefit Exchanges of the ACA states:

Section 1401 of the ACA states that these tax credits are only available to people who purchase their health insurance on an Exchange “established by the State”—which posed the issue of whether the millions of people who purchased health insurance through an Exchange established by the federal government were out of luck.¹²⁰ The IRS subsequently issued a regulation, interpreting the language of section 1401 of the ACA (“IRS Rule”), and stated that tax credits are available on “an Exchange.”¹²¹ But in the section for definitions of the IRS Rule, the IRS noted that the word “Exchange” includes an Exchange “regardless of whether the Exchange is established and operated by a State . . . or by [the Secretary].”¹²²

The IRS Rule was proposed in 2011, and then promulgated in 2012, and allowed federal subsidies to be provided to all individuals who purchased health insurance through an Exchange, regardless of the entity that established it.¹²³ This meant that an Exchange could be established by a state under section 1311 of the ACA, or established by the federal government through the Secretary under section 1321 of the ACA, and subsidies would still be awarded to the eligible taxpayers.¹²⁴ The IRS chose to adopt the definition of an “Exchange,” from the portion of the

Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange . . . for the State that—

- (A) facilitates the purchase of qualified health plans;
- (B) provides for the establishment of a Small Business Health Options Program . . . that is designed to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market in the State

42 U.S.C. § 18031(b)(1)(A)–(B). See Petitioners’ Brief, *supra* note 15, at i (“The question presented is whether the Internal Revenue Service (“IRS”) may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA.”); see also Michael F. Cannon, *Seven Things You Should Know About the IRS Rule Challenged in King v. Burwell*, NAT. REV. (Mar. 4, 2015, 4:00 AM), <http://www.nationalreview.com/article/414809/seven-things-you-should-know-about-irs-rule-challenged-king-v-burwell-michael-f> (explaining that state-established Exchanges were originally intended to trigger “tax penalties under the law’s individual and employer mandates”).

120. Howe, *supra* note 31.

121. 26 CFR § 1.36B–2 (2011).

122. 46 CFR § 155.20 (2015).

123. 26 U.S.C. § 36B (extending the ACA’s subsidies to all exchanges, whether established by the state or federal government); see Petitioners’ Brief, *supra* note 15, at 5 (suggesting that, perhaps, the IRS was worried that states would not establish exchanges to purchase health insurance, and this is why it extended subsidies to all exchanges).

124. See Petitioners’ Brief, *supra* note 15, at 6 (explaining how the IRS regulations that extended subsidies to state and federal exchanges contradicted clear text in the ACA legislation); see also 42 U.S.C. §§ 18031, 18041 (requiring states to establish Exchanges, but providing for the federal government to establish an Exchange in the state’s failure to do so).

ACA that discusses the federal government's responsibility to set up an Exchange (i.e., section 1321 of the ACA).¹²⁵ This IRS Rule allowed states to provide federal subsidies, regardless of which entity set up the Exchange.¹²⁶ At first blush, it appears to incorporate a beneficial concept, but issues regarding federalism and the intrusion by the federal government to do what states may have done on their own arise.

This move by the IRS removed all incentives for the remaining thirty-four states to establish state-run Exchanges.¹²⁷ With the IRS's announcement that taxpayers would be granted eligibility for subsidies whether their states *or* the federal government established the Exchange, these remaining states had no inducement to create their own Exchange to supply their citizens with the same level of tax refunds that they could retrieve from other states with state-established Exchanges.¹²⁸ So, state residents who purchased health insurance through an Exchange established by the federal government benefited from this plan because they were able to afford this subsidized health insurance.¹²⁹ If the IRS had not "stepped in," these subsidies would only be granted to insureds who purchased health insurance through a state-established Exchange, thus likely increasing the cost of insurance—and probably to an unaffordable extent—to residents of states with a federally established and operated Exchange.¹³⁰ Though an unfortunate consequence, whether

125. See Petitioners' Brief, *supra* note 15, at 6 (explaining how the IRS made subsidies available to anyone who purchased health insurance on an Exchange established by either a state or the federal government); see also 42 U.S.C. § 18041(c) ("[Where a state] [f]ail[s] to establish Exchange . . . the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements.").

126. See Petitioners' Brief, *supra* note 15, at 6 ("[T]he IRS Rule allows subsidies for coverage purchased through the federal Exchange, known as HealthCare.Gov, rather than just for coverage purchased through state-run Exchanges.").

127. See *id.* at 7 (pointing out how states declined to create health insurance exchanges for 2014 when the IRS made it possible for taxpayers to be eligible for federal subsidies whether the states in which they reside established an exchange); see also Brief of the Commonwealths of Virginia et al. as Amici Curiae in Support of Affirmance at 21–22, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) (discussing the incentives that were given to states in the form of federal funds to be handed out as subsidies to applicable residents that purchase insurance through a state-run Exchange).

128. See Petitioners' Brief, *supra* note 15, at 7 (describing how states no longer had an incentive to establish an Exchange).

129. See Ariane de Vogue, *How the Supreme Court Could Send Obamacare into a 'Death Spiral'*, CNN POL. (June 23, 2015, 6:14 PM), <http://www.cnn.com/2015/06/18/politics/obamacare-aca-supreme-court-exchange-state/> (explaining how health insurance is made affordable through subsidies, and how many people would likely be uninsured without these subsidies because the cost of health insurance would be unaffordable).

130. See *id.* (paraphrasing Health and Human Services Secretary Sylvia Burwell's feelings that

the avoidance of such consequence is a proper justification to rewrite the law is still debated.¹³¹

Though the ACA's statutory text appears to *limit* tax subsidy awards to those who purchased insurance through a state-established Exchange under section 1311, *King* recognizes a definition of an Exchange that stems from section 1321 of the ACA, which states that an Exchange can be established by the federal government with the same benefits as one established by a state.¹³² The problem is that the two types of Exchanges—section 1311 (Exchanges established by a state)¹³³ and section 1321 (Exchanges established by the federal government)¹³⁴—were confused, or wrongfully merged, when the IRS exceeded its authority in offering subsidies under section 36B.¹³⁵

The issue in *King* originated when the petitioners, residents of Virginia—a state with a federally established Exchange—noticed this very discrepancy between those who could receive subsidies according to the ACA, and those who could receive subsidies according to the IRS.¹³⁶ The Virginia petitioners argued that Congress intended the limiting language of “established by the State” to incentivize states to establish Exchanges so that their insureds could receive these subsidies.¹³⁷ But this incentive for the states disappears when federally run Exchanges can provide the exact same benefits to their citizens by

ruling against the IRS rule would cause “massive damage” to the healthcare system and the states, and how Congress would have to figure out a way to make healthcare affordable again); *but see* Petitioners' Brief, *supra* note 15, at 14 (explaining how valuable it would have been for states to take action and establish their own exchanges).

131. *See* *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring) (“I do not think . . . that the avoidance of unhappy consequences is adequate basis for interpreting a text.”); *see also* Petitioners' Brief, *supra* note 15, at 9 (“[A]s a result of the IRS Rule, [the petitioners] will incur some financial cost because they will be forced to buy insurance or pay the [individual mandate] penalty.” (quoting Pet.App.52a-53a)).

132. *See* Petitioners' Brief, *supra* note 15, at 36 (discussing how the federal government believes that section 36B subsidies are too important to be conditioned on who established the exchange); *see also King*, 135 S. Ct. at 2494 (discussing the federal fallback that the legislation provides by allowing the federal government to establish an exchange in states that fail to do so).

133. 42 U.S.C. § 18031.

134. *Id.*

135. Cannon, *supra* note 119.

136. *See de Vogue*, *supra* note 129 (explaining what healthcare Exchanges are, why “established by the State” is important, and the implications of the holding in *King*).

137. *See id.* (discussing how the ACA was designed as an incentive for states to take action); *see also* Petitioners' Brief, *supra* note 15, at 4 (explaining how, given that the Constitution bars the federal government from forcing states to enact a law, states were then incentivized to take the lead role in establishing exchanges so that its residents could obtain subsidized healthcare).

offering subsidies too).¹³⁸

Additionally, without this incentive, states would not voluntarily create Exchanges—in part because establishing a health insurance Exchange is not a quick and easy thing to do.¹³⁹ Michael Carvin, the leading attorney for the Virginia petitioners, pointed out that agencies, like the IRS, must follow the law as it is written.¹⁴⁰ In other words, these agencies cannot “revise it to better achieve what they assume to have been Congress’s purposes,” even if it seemingly resolves the subsidy award issues.¹⁴¹

Essentially, the residents of Virginia did not want to purchase health insurance and sought to become the exception to the individual mandate.¹⁴² That is, without subsidies, health insurance is lawfully too expensive for them to afford, which exempts them from having to purchase health insurance.¹⁴³ This concept shocked one of the

138. See de Vogue, *supra* note 129 (discussing how the limiting language was designed to encourage states to act); see also Petitioners’ Brief, *supra* note 15, at 16 (“[On]e of the Act’s principal architects later explained that the point of linking subsidies to state Exchanges was precisely to politically pressure states by offering the incentive of federal funds for state residents.”).

139. See Lisa Schencker & Virgil Dickson, *Most States Unlikely to Create Insurance Exchanges to Save ACA Subsidies*, MODERN HEALTHCARE (June 6, 2015), <http://www.modernhealthcare.com/article/20150606/MAGAZINE/306069960> (describing how, even in states that have governments that want to establish an Exchange, aspects like “fierce Republic opposition, high costs, logistical hurdles and timing” significantly slow, or even halt, the process of establishing an Exchange); see also de Vogue, *supra* note 129 (describing the political hurdles that states would have to surmount in order to establish the exchange).

140. Michael Carvin specializes in constitutional challenges to the Affordable Care Act. JONES DAY, <http://www.jonesday.com/macarvin/> (last visited Oct. 19, 2016).

141. See de Vogue, *supra* note 129 (“‘If the rule of law means anything,’ Carvin argued in court papers, ‘it is that text is not infinitely malleable, and that agencies must follow the law as written—not revise it to ‘better achieve’ what they assume to have been Congress’s purposes.’” (quoting Michael Carvin)).

142. 26 U.S.C. § 5000A(e)(1)(A) (2012) (outlining the individual mandate exemptions). There are a few exemptions to the ACA’s individual mandate. If the lowest-priced coverage available to an individual costs more than 8.05 percent of the individual’s household income, then that individual qualifies for the income-related exemption to the individual mandate and does not need to purchase health insurance through an exchange. For more information, see *2015 Tax Year Exemptions from the Fee for Not Having Health Coverage*, HEALTHCARE.GOV: INDIVIDUALS & FAMILIES, <https://www.healthcare.gov/fees-exemptions/exemptions-from-the-fee/> (last visited Nov. 7, 2015). See also Petitioners’ Brief, *supra* note 15, at 8 (discussing which individuals are allowed to be exempt from the individual mandate).

143. See de Vogue, *supra* note 129 (“If millions of American [sic] were to lose the tax subsidies and as a result not buy insurance, it would cause premiums to skyrocket in the individual market because there would be less healthy people in the pool.”); see also Petitioners’ Brief, *supra* note 15, at 8–9 (discussing how health insurance would lawfully be too expensive to afford where federal subsidies are not provided, and how the petitioners “do not want to comply with the individual mandate, and, given their low incomes, would not be subject to penalties for failing to do so, but for the IRS Rule” that allows for subsidized healthcare on both Exchanges).

respondents, Sylvia Burwell of the Department of Health and Human Services (“HHS”), who argued that if millions of American insureds were to lose out on the tax subsidies they received to buy insurance on federally established Exchanges, healthy people would drop out of the market, individuals would wait until they got sick to purchase health insurance, and insurance premiums would skyrocket.¹⁴⁴ So, whose interpretation is correct? And who should decide? Enter: *King v. Burwell*.

II. DISCUSSION

Part II first discusses the issue of the IRS Rule in interpreting the ACA.¹⁴⁵ It then discusses and explains the pertinent facts and rationale of the petitioners’ arguments in *King*,¹⁴⁶ the majority’s opinion,¹⁴⁷ and Justice Scalia’s dissenting opinion.¹⁴⁸

A. *The Issue that Prompted the Supreme Court’s Grant of Certiorari to King v. Burwell*

The issue in *King* was whether the subsidies, as described in the ACA, were available to states that rejected the opportunity to create a state-established Exchange, and instead had a federally established Exchange established in their state.¹⁴⁹ The tax credits that caused the issue were borne from the IRS Rule, and allowed qualified taxpayers who purchased health insurance through an Exchange—whether it was established in that state *by* the state, or in that state, but *by* the federal government—to receive subsidized healthcare if their household incomes fell between 100 and 400 percent of the federal poverty line.¹⁵⁰

144. *See de Vogue, supra* note 129 (explaining how a pool of sick applicants would significantly increase the cost of insurance, thereby creating the very insurance death spiral that the federal government wanted to avoid).

145. *See infra* Part II(A) (discussing the issue that prompted the Supreme Court’s grant of certiorari in *King*).

146. *See infra* Part II(B) (discussing the petitioners’ and respondents’ arguments in *King*).

147. *See infra* Part II(C) (discussing the majority’s opinion in *King*).

148. *See infra* Part II(D) (discussing Justice Scalia’s dissent in *King*).

149. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015) (“This case is about whether the Act’s interlocking reforms apply equally in each State no matter who establishes the State’s Exchange. Specifically, the question presented is whether the Act’s tax credits are available in States that have a Federal Exchange.”). *See* Petitioners’ Brief, *supra* note 15, at 9 (explaining how the Virginia petitioners, residing in a state with a federally established Exchange, did not want to comply with the individual mandate component of the ACA, and, with their low incomes, would be exempt from paying the penalty for not purchasing health insurance).

150. *King*, 135 S. Ct. at 2487; *see supra* note 119 and accompanying text (explaining the exchange at issue and also the effect of the IRS Rule’s section 36B tax credits); *see also infra* note 179 and accompanying text (same).

If the Court decided to interpret the ACA to permit subsidized healthcare on *only* state-established Exchanges, it could have undermined the ACA by rendering health insurance unaffordable to many individuals who had purchased subsidized care on a federally established Exchange.¹⁵¹ But in the end, the majority held that “established by the State”—referring to each of the fifty states and the District of Columbia—is actually an unclear, and even ambiguous, phrase.¹⁵² It is this very notion of ambiguity that distinguished the parties’ arguments.

On one hand, defenders of the ACA contended that the limiting nature of the words was merely a drafting error and the result of hasty lawmaking.¹⁵³ On the other end, challengers of the ACA read the law as properly limiting the subsidies to state-established Exchanges, maintaining a deference to, and respect of, Congress’ legislative abilities (i.e., relying upon the notion that Congress places words in statutes with a calculated and precise purpose and intention).¹⁵⁴ Challengers asserted that any problematic interpretation of the ACA was not the result of an alleged ambiguity in the words of the law, but rather created by ACA

151. See Howe, *supra* note 31 (“[T]he Court turned back a challenge to the subsidies that many people receive to pay for their health insurance, ending a case that had the potential to seriously undermine the ACA, if not dismantle it altogether.”); see also Matthew Bloch et al., *The Health Care Supreme Court Case: Who Would Be Affected?*, N.Y. TIMES (June 22, 2015), http://www.nytimes.com/interactive/2015/03/03/us/potential-impact-of-the-supreme-courts-decision-on-health-care-subsidies.html?_r=0 (“If the court rule[d] against the Obama administration in [*King*], about 6.4 million people could lose their subsidies in 34 states that use the federal health care marketplace.”).

152. See *King*, 135 S. Ct. at 2491–92 (holding that subsidies will be available on both a state established and federally established Exchange); see also Howe, *supra* note 31 (“[T]he Court agreed with the Obama administration that the subsidies are available for everyone who bought health insurance through an Exchange, no matter whether that Exchange was created by a state or the federal government.”).

153. See A. Barton Hinkle, *Four Little Words That Could Kill Obamacare*, REASON.COM (Nov. 17, 2014), <https://reason.com/archives/2014/11/17/four-little-words-that-could-kill-obamac> (discussing how supporters of the ACA, who want to see the law upheld no matter what, contend that the failure to specify that Exchanges established by the federal government could also offer subsidized healthcare was merely a drafting error, and not what Congress meant to do); see also *King*, 135 S. Ct. at 2492 (calling the manner in which the ACA was produced a form of “inartful drafting”).

154. See *King*, 135 S. Ct. at 2505 (Scalia, J., dissenting) (arguing that the Supreme Court has no license to disregard clear language, and that the only evidence pointing to what Congress actually intended stems from the precise, clear language of the law, and that the ACA’s terms show nothing else but that tax credits are available only on state Exchanges).

supporters¹⁵⁵ seeking to uphold the legislation.¹⁵⁶ After all, the petitioners endorsed the notion that an error in predicting a plan's effect—as in, the ACA's Exchange incentives not provoking the state action Congress foresaw—is not the same as an error in drafting.¹⁵⁷

Chief Justice Roberts, writing for the majority, answered “no” to those wondering if individuals who had already purchased health insurance on a federal Exchange were out of luck.¹⁵⁸ He reasoned that, if the Court takes the most natural meaning of “established by the State,” then tax credits could not be afforded to individuals on federally established Exchanges. If this occurred, there would be no qualified individuals on federal Exchanges, which would be problematic to the majority.¹⁵⁹ The Chief Justice explained that Congress obviously intended for every

155. Defenders of the ACA argue that Congress intended for subsidies to be available on all exchanges, and that it was merely a drafting error that is causing this issue:

Obamacare's defenders hotly contest this reading of the law. They say it is simply a drafting error—a bit of sloppy wording that should have been tidied up before passage, but wasn't. They contend Congress clearly intended every eligible citizen to receive subsidies, so it would be the height of judicial activism for the high court to rule otherwise based on a glorified typo.

Hinkle, *supra* note 153.

156. The text of the ACA clearly states that health insurance purchased through federally established Exchanges were not to be given the same treatment as those Exchanges established by the state:

The deliberate creation of a separate section to authorize a separate federal entity is not a drafting error. The repeated and deliberate reference to one section but not another is not a drafting error. The refusal to grant equal authority to two programs authorized by two separate sections is not a drafting error. The decision to specifically reference section X but not section Y in a portion of a law that grants spending or tax authority is not a drafting error.

Sean Davis, *No, Halbig Did Not Gut Obamacare Because of a “Drafting Error”*, FEDERALIST (July 23, 2014), <http://thefederalist.com/2014/07/23/no-halbig-did-not-gut-obamacare-because-of-a-drafting-error/>; see also Hinkle, *supra* note 153 (citing Sean Davis arguing that the deliberate creation of a separate section to authorize a separate federal entity, the repeated and deliberate reference to one particular section but not another, and the refusal to grant authority to two programs are not, in any ways, drafting errors).

157. Ramesh Ponnuru (@RameshPonnuru), TWITTER (July 22, 2014, 10:55 AM), <https://twitter.com/rameshponnuru/status/491597304718450688>.

158. See *King*, 135 S. Ct. at 2489 (calling a federal Exchange an Exchange that can still provide subsidized health insurance to state residents); see also Margot Sanger-Katz, *Obamacare, Back at the Supreme Court: Frequently Asked Questions*, N.Y. TIMES: THE UPSHOT (June 25, 2015), http://www.nytimes.com/interactive/2015/02/03/upshot/obamacare-back-at-the-supreme-court-frequently-asked-questions.html?_r=0 (summarizing *King* and explaining that the Supreme Court ruled for the government, which means that subsidies could continue to be distributed in every state, regardless of the entity that established the Exchange).

159. See *King*, 135 S. Ct. at 2490 (“And that’s a problem: If we give the phrase ‘the State that established the Exchange’ its most natural meaning, there would be no ‘qualified individuals’ on Federal Exchanges.” (emphasis omitted)); see also 42 U.S.C. §§ 18031, 18041 (distinguishing between a state-established and a federally established Exchange, respectively).

Exchange to have qualified individuals, and because the ACA had not textually provided for it, it was the judiciary's role to do so.¹⁶⁰ After all, he noted, the judiciary's role in a democracy is to say what the law is.¹⁶¹ Chief Justice Roberts reminded the opposing parties and remaining justices that the judiciary's role is not to examine isolated provisions in legislation, but to construe full statutes in their proper context, while also maintaining an understanding of the legislative plan.¹⁶²

The Chief Justice also criticized the manner in which Congress drafted this legislation, noting that it wrote key parts in a manner far from the traditional legislative process.¹⁶³ His critique of Congress' process implied a hasty, error-prone manner of legislative drafting that could have, and supposedly did, lead to unintentionally ambiguous language that was uncharacteristic of such a significant piece of legislation.¹⁶⁴ While the remainder of a statute is typically used to help clarify vague terms in a specific provision, this reliance is insufficient when the meaning of the statute is only discerned after it has already been passed.¹⁶⁵

B. *The Petitioners' and Respondents' Arguments*

Because the petitioners were from a state that opted out of establishing its own Exchange, the federal government was required to create a

160. *See King*, 135 S. Ct. at 2490 (explaining that the ACA clearly envisioned that there would be qualified individuals on all Exchanges because the ACA *does* require all Exchanges to make such qualified health plans available to qualified individuals. This is something an Exchange could not do if there were, obviously, no qualified individuals); *see also* 42 U.S.C. § 18031(e)(1)(B) (requiring Exchanges to consider the interests of their qualified individuals).

161. *See King*, 135 S. Ct. at 2496 (“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.’” (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803))).

162. *Id.* at 2489 (noting that the Court's duty is “to construe statutes, not isolated provisions,” and that “in every case [the Court] 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” (citation omitted)).

163. *Id.* at 2492 (“The Affordable Care Act contains more than a few examples of inartful drafting Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through ‘the traditional legislative process.’”).

164. *See* Jess Bravin, *Unanswered Health Law Question: So Why Was It Written that Way?*, WALL ST. J.: POLITICS (June 25, 2015, 7:53 PM), <http://www.wsj.com/articles/unanswered-health-law-question-so-why-was-it-written-that-way-1435256767> (discussing how Chief Justice Roberts “chided” lawmakers and staffers for the way the ACA was drafted).

165. *See King*, 135 S. Ct. at 2492 (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” (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947))).

federally established Exchange in Virginia in the state's place.¹⁶⁶ But even though Virginia had a federally established Exchange, the IRS Rule rendered the petitioners eligible for tax credit subsidies. And because the cost of health insurance with the tax credits fell below 8 percent of the petitioners' household incomes, the provision of tax credits simultaneously removed them from the exempted category.¹⁶⁷ But the petitioners did not want to comply with the individual mandate component of the ACA, no matter how affordable it was made. At that point, the petitioners had two options, to either: (1) pay for health insurance; or (2) pay a penalty.¹⁶⁸ But, the petitioners did not find either choice attractive. Therefore, the petitioners argued that tax subsidies were only available through state-established Exchanges.¹⁶⁹ This argument was available to the petitioners because their incomes were low enough that, without the subsidized care through tax credits, insurance would not be "affordable" to them (i.e., their premium would cost more than 8.16 percent of their income) and they would be exempt from paying a penalty for failing to acquire health insurance.¹⁷⁰

To achieve the petitioners' abovementioned goal of exemption, the petitioners made five arguments on behalf of wrongful interference of the IRS and the federal government.¹⁷¹ The arguments all centered on this

166. Petitioners' Brief, *supra* note 15, at 9.

167. See Petitioners' Brief, *supra* note 15, at 9 (explaining that if health insurance coverage falls below 8 percent of an individual's projected income, such individual is discharged from the exemption); see also text accompanying *supra* note 35 (exempting individuals from paying the tax penalty if the applicable individual's required contribution to health insurance exceeds eight percent of the individual's household income for the taxable year).

168. See Petitioners' Brief, *supra* note 15, at 9 (explaining that as a result of the IRS Rule granting broad coverage of section 36B, the petitioners will suffer some financial cost, whether it be from being forced to buy health insurance or paying a penalty); see also *supra* notes 35–55 and accompanying text (describing how the individual mandate was deemed constitutional as a tax).

169. Petitioners' Brief, *supra* note 15, at 9; see also *infra* note 180 (noting the petitioners' argument).

170. Petitioners' Brief, *supra* note 15, at 9; see also *supra* notes 38–50 and accompanying text (summarizing *Sebelius* and explaining the significance of the individual mandate portion of the ACA). For more information on the individual mandate and the penalties for failing to purchase health insurance, see generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

171. The petitioners attacked five key points of the respondents' contention that "established by the state" essentially means "established by the federal government, too,": (1) just because the ACA authorizes the federal government to create an Exchange in the state does not mean that the Exchange is "established by the state"; (2) telling the federal government to establish an Exchange in the state does not establish the same kind of Exchange a state can; (3) the notion that the federal government acts *on behalf of* a state that declines to establish an Exchange is irrelevant to the argument; (4) confusion over whether the federal government acts under section 1311 or section 1321 of the ACA is proof of why the IRS clarifies that only Exchanges established by the state can offer subsidized insurance; and (5) Congress could have deemed federal Exchanges to have the

notion that Congress intentionally, through the ACA, provided for states to establish Exchanges per section 1311, and a federal fallback provision per section 1321 if states opted out of this.¹⁷² With this perspective, tax subsidies were intended to be afforded only to state residents who purchased health insurance “through an Exchange established by the State under section 1311” of the ACA.¹⁷³ To the petitioners, this language made it very clear that subsidies were not available to those who purchased health insurance through an Exchange established by the federal government.¹⁷⁴

In the petitioners’ first argument, they asserted that simply because the ACA authorized the federal government to establish Exchanges in a state, does not equate to such Exchanges being established *by* that state.¹⁷⁵ Second, it was not the *type* of Exchange that was at issue, but *who* established the Exchange.¹⁷⁶ An Exchange is an Exchange, but the subsidies hinged on whether the state was properly incentivized to establish the Exchange on its own, or if the federal government theoretically stepped in to do so.¹⁷⁷ Third, it was irrelevant that the

same properties as those established by the state, but it chose not to *intentionally*. For more information, see Petitioners’ Brief, *supra* note 15, at 12–13; see also Jonathan Keim, *The Busy Reader’s Guide to Amicus Briefs in King v. Burwell*, NAT. REV.: BENCH MEMOS (Feb. 26, 2015, 11:17 AM), <http://www.nationalreview.com/bench-memos/414478/busy-readers-guide-amicus-briefs-king-v-burwell-jonathan-keim>.

172. See Petitioners’ Brief, *supra* note 15, at 11 (describing that though a state can establish an Exchange and the federal government can establish an Exchange in states that fail to do so, subsidies are only available through an Exchange established per section 1311 of the ACA (i.e., by a state), not section 1321 (i.e., by the federal government)); see also 42 U.S.C. § 18031(b) (instructing states to establish health insurance Exchanges).

173. Petitioners’ Brief, *supra* note 15, at 11; see also 26 U.S.C. § 36B(c)(2)(A) (using the phrase “an Exchange established by the State under section 1311” twice to distinguish between section 1311 Exchanges and section 1321 Exchanges).

174. Petitioners’ Brief, *supra* note 15, at 11 (“As statutory construction cases go, this one is extraordinarily straightforward. There is no legitimate way to construe the phrase ‘an Exchange established by the State under section 1311’ to include one ‘established by HHS under section 1321.’”); see *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) (“Words no longer have meaning if an Exchange that is not established by a State is ‘established by the State.’”).

175. Petitioners’ Brief, *supra* note 15, at 12 (“[T]he fact that the Act authorizes HHS to establish Exchanges plainly does not imply that those Exchanges are ‘established by the State.’”); see also *infra* notes 180–185 accompanying text (noting that without a financial incentive states are unlikely to voluntarily establish an exchange).

176. Petitioners’ Brief, *supra* note 15, at 12 (explaining that giving instruction to the federal government to establish an exchange in a state that has opted out of doing so is not an issue of type, but rather of who establishes the exchange); see also *infra* notes 180–185 and accompanying text (noting that without a financial incentive states are unlikely to voluntarily establish an exchange).

177. Petitioners’ Brief, *supra* note 15, at 12; see also *supra* note 171 and accompanying text (discussing the petitioners’ five key points of contention that “established by the State” essentially means “established by the federal government, too”).

federal government was to act on behalf of a state that elected not to establish an Exchange, as the authority for the federal government to take that action was conditioned on a state's refusal to establish its own Exchange.¹⁷⁸ Fourth, the petitioners contended that, if there was any confusion as to who needed to establish the Exchange for the subsidies to be triggered, section 36B arguably clarified that it was only state-established Exchanges that had that power.¹⁷⁹ Last, the petitioners asserted that Congress could have allowed federally established Exchanges to issue subsidies if it had wanted to—however, the petitioners claimed, that was clearly not the case, as it chose to incentivize states with subsidies for its residents instead.¹⁸⁰

According to the petitioners, Congress intended section 1311 to encourage states to establish Exchanges.¹⁸¹ The petitioners believed it reasonable that Congress would expect states to not reject a piece of legislation that provided its residents with billions of dollars to be used for affordable healthcare.¹⁸²

These acts of legislation, are not created overnight, but rather built on a knowledgeable history of legislative and judicial wins and losses.¹⁸³ The petitioners argued that Congress wanted to politically pressure states into establishing insurance Exchanges for its residents.¹⁸⁴ Further, state

178. Petitioners' Brief, *supra* note 15, at 12; *see also supra* note 171 and accompanying text (discussing the petitioners' five key points of contention that "established by the State" essentially means "established by the federal government, too").

179. Section 36B of the IRC is said to clarify which Exchanges are lawfully able to offer subsidized healthcare and that the provision refers, twice, to Exchanges established by the state under section 1311 of the ACA. 26 U.S.C. §§ 36B(b)(2)(A), 36B(c)(2)(A)(1). *See* Petitioners' Brief, *supra* note 15, at 12 (noting that the ACA defines "Exchange" under section 1311, and that section 36B of the IRC clarifies that only Exchanges established by the state can hand out subsidies to qualified taxpayers); *see also supra* note 171 and accompanying text (discussing the petitioners' five key points of contention that "established by the State" essentially means "established by the federal government, too").

180. Petitioners' Brief, *supra* note 15, at 13 (arguing that the federal government's contention that Exchanges established by the federal government are the same as those established by the state is a dogmatic and unproven statement); *see also supra* note 171 and accompanying text (discussing the petitioners' five key points of contention that "established by the state" essentially means "established by the federal government, too").

181. *See* Petitioners' Brief, *supra* note 15, at 14 (arguing that there is no inconsistency between Congress wanting subsidized healthcare but also wanting to condition such care on state action, because inducing states to act is such a valuable component of the ACA).

182. Petitioners' Brief, *supra* note 15, at 14 (explaining how reasonable it is that Congress likely expected states to not want to pass up on the chance to offer billions of federal dollars to its residents to purchase healthcare).

183. *See* *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (reasoning that courts cannot "revise clear statutory terms that turn out not to work in practice").

184. Petitioners' Brief, *supra* note 15, at 16 ("[O]ne of the Act's principal architects later

governments were unlikely to spring into action with this new legislation without receiving some form of a monetary reward for doing so.¹⁸⁵

The respondents, on the other hand, argued that the provisions in the ACA suggested that Congress might not have intended the phrase “established by the State” to carry the most allegedly natural meaning.¹⁸⁶ If this were the case, they contended, it would be in line with the argument that the legislation was drafted quickly and was prone to errors, like using “established by the State” in sections that would have benefited from the hypothetical clarification “and the federal government, too.”¹⁸⁷

The respondents argue that subsidies in federally established Exchanges are necessary to accomplish the overall purpose of the ACA (i.e., reducing healthcare costs and improving overall access).¹⁸⁸ These subsidies are needed because, without them, insurance market death spirals would surely result, and it simply looks bad to revoke a promise of affordable healthcare for all Americans.¹⁸⁹ The respondents further

explained that the point of linking subsidies to state Exchanges was precisely to politically pressure states by offering the incentive of federal funds for state residents.”); *see also supra* notes 142–143 and accompanying text (discussing the individual mandate exemptions).

185. *See* Timothy Jost, *Implementing Health Reform: What Makes a State Exchange?* (Updated), HEALTH AFF. BLOG (July 28, 2014), <http://healthaffairs.org/blog/2014/07/28/implementing-health-reform-what-makes-a-state-exchange/> (explaining that establishing an Exchange is different from carrying out the daily tasks of an Exchange and that there are many steps incorporated in establishing such an Exchange); *see also* Richard Lempert, *In King v. Burwell, an Easy Answer to the ACA's Definition of "Exchange"*, BROOKINGS: BLOG (Mar. 3, 2015, 7:30 PM), <http://www.brookings.edu/blogs/fixgov/posts/2015/03/04-king-burwell-aca-exchange-supreme-court-lempert> (“The model that the petitioners have of the Congressional mind seems to be one in which Congress is so sure that states would not want to deprive their citizens of federal subsidies that the threat of their unavailability would induce them to set up exchanges . . .”).

186. *See* Brief for Respondents at 15, *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) (No. 14-114) [hereinafter Respondents’ Brief] (“[T]he definitional and other directly applicable provisions of the Act—including provisions cross-referenced in Section 36B itself—demonstrate that the Act treats an Exchange established by HHS in a State’s stead as an Exchange ‘established by the State.’”); *see also* 42 U.S.C. § 18031, 18041 (2010) (distinguishing between a state-established and a federally established exchange, respectively); *see also King*, 135 S. Ct. at 2490 (“These provisions suggest that the Act may not always use the phrase ‘established by the State’ in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.”).

187. *See King*, 135 S. Ct. at 2490 (suggesting that the ACA uses the phrase “established by the State” in different ways and with different meanings throughout the ACA); *see also* Respondents’ Brief, *supra* note 186, at 15 (arguing that the ACA treats a federally established Exchange as an Exchange established by the state).

188. Respondents’ Brief, *supra* note 186, at 26; Hatch, *infra* note 250, at 8–9; *see* Transcript of Oral Argument at 44, *King*, 135 S. Ct. 2480 (No. 14-114) [hereinafter Oral Argument Transcript] (“[O]ur reading is compelled by the Act’s structure and design.”).

189. Oral Argument Transcript, *supra* note 188, at 44–45.

supported this contention by adding that this surely could not “be the statute that Congress intended.”¹⁹⁰

C. *The Majority Opinion*

In the effort to explain how the majority reached the conclusion that it did, Chief Justice Roberts outlined an opinion that centered on the importance of granting as many Americans as possible subsidized and affordable health insurance.¹⁹¹ He points out that some situations—with the present one in mind—warrant examination exceeding a cursory read-through into what exactly Congress intended in its legislation.¹⁹² The Chief Justice determined that the language in the ACA was ambiguous and appeared to provide subsidized care through state *and* federally established Exchanges.¹⁹³ In such an instance, the Chief Justice found it appropriate to read the ambiguous text as an implicit delegation from Congress to the IRS to be the ultimate interpreter.¹⁹⁴ He found the tax credits to be one of the ACA’s key reforms, and thus resolved that any discussion regarding their interpretation involved significant insight into the economic and political significance of the credits.¹⁹⁵

Further, the Chief Justice found it especially unlikely that Congress

190. *Id.* at 45.

191. *King*, 135 S. Ct. at 2483 (2015) (highlighting the significance between the two versions of Exchanges at issue: one Exchange would provide affordable health insurance through billions of federal dollars, while the other would not afford American residents such a luxury); *see also* Respondents’ Brief, *supra* note 186, at 2 (“Among the many measures designed to achieve Congress’s goals, the Act provides tax credits to make health insurance affordable for millions of low- and moderate-income Americans.”).

192. *See King*, 135 S. Ct. at 2488 (describing how an agency’s statutory interpretation, according to the *Chevron* framework, begins first with determining whether any ambiguities exist in the language of the text, and, if so, whether the agency’s interpretation of such text is reasonable); *see also id.* at 2488–89 (“In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))).

193. *King*, 135 S. Ct. at 2488 (describing how a statute that contains ambiguous language was created as an implicit delegation from Congress to look to the qualified agency to interpret, or fill in the gaps of, the statutory language).

194. *Id.*; *see also supra* notes 91–92 (describing how courts will often give deference to an agency that is qualified through experience and knowledge to interpret an ambiguous statute).

195. Chief Justice Roberts illustrated the importance of offering tax credits, and how, because of this, great insight and care is mandated in the interpretation of their application to state or federal Exchanges:

The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.

King, 135 S. Ct. at 2489 (citing *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

would have intended the IRS to craft a health insurance policy—like the IRS Rule—when the IRS has no expertise in the field of health insurance policy drafting.¹⁹⁶ Casting deference to the IRS for its “fill in the blanks” capabilities would only be appropriate if the IRS had the expertise to reasonably interpret and construe a healthcare statute—but the Supreme Court majority found the IRS, a tax agency, lacked this expertise.¹⁹⁷ By showing zero deference to the agency, the Court assumed its role as “Plan B”—allowing it, as the judiciary, to be the final authority in how the language is interpreted when the statutory text cannot be enforced according to its plain terms.¹⁹⁸

Thereafter, the majority sought to analyze section 36B of the IRC.¹⁹⁹ As aforementioned, this IRS Rule allowed federal subsidies to be given to insureds that purchased health insurance through an Exchange established by the state or through the Secretary, the federal option.²⁰⁰ Concurrent with the reasoning in the IRS Rule, the Chief Justice explained that, if read literally, there would be no qualified individuals on a federally established Exchange because the ACA defines a qualified individual as someone who resides in the state that established the Exchange.²⁰¹ Therefore, if the state did not establish the Exchange, the

196. *See id.* (explaining how it is the Supreme Court’s role to determine the correct reading of section 36B and that if the language of the statute is plain, it must be enforced according to the terms set out, but if it is not plain, the judiciary must discern the meaning); *see also supra* note 66 (explaining how the judiciary must reject administrative constructions that are contrary to clear congressional intent, like that of the IRS regarding its enactment of section 36B).

197. *See King*, 135 S. Ct. at 2489 (“This is not a case for the IRS.”); *see also supra* note 65 (explaining what it means to give *Chevron* deference to an agency after the words in a statute have been deemed ambiguous or when congressional intent is obviously unclear).

198. *See King*, 135 S. Ct. at 2489 (“It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms.”).

199. *See id.* (recognizing that the IRS could not be given deference to reasonably interpret the tax credit provisions in the IRS, and beginning a judicial analysis of the same); *see also* 26 U.S.C. § 36B (making tax credits available to insureds on all Exchanges).

200. Chief Justice Roberts explains what must occur for an individual to lawfully receive tax credits in purchasing health insurance through an Exchange according to section 36B:

As relevant here, section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through “an Exchange established by the State under [42 U.S.C. § 18031].” In other words, three things must be true: First, the individual must enroll in an insurance plan through “an Exchange.” Second, that Exchange must be “established by the State.” And third, that Exchange must be established “under [42 U.S.C. § 18031].”

King, 135 S. Ct. at 2489. *See* 26 U.S.C. § 36B (applying subsidies to participants in federal exchanges as well as state exchanges); *see also* Part II(B) (discussing the issue with the IRS Rule that prompted *King*).

201. 42 U.S.C. §§ 18031(d)(2)(A), 18032(f)(1)(A) (making qualified health plans available to qualified individuals, then defining a qualified individual as someone who is a resident of the state that established the Exchange from which the individual purchased health insurance).

Chief Justice recognized that the individuals who purchased insurance in that state could not be labeled as “qualified individuals.”²⁰² He further explained that Congress likely did not intend to use “established by the State” in its natural meaning each time it was written through the ACA.²⁰³ It was thus possible, according to the majority, that the single phrase “established by the State” referred to all Exchanges, so that any qualified individual who purchased health insurance through an Exchange, and qualified for the subsidy, would receive the subsidy.²⁰⁴

The Chief Justice also criticized the manner in which the ACA was drafted, noting that much of it was drafted behind closed doors instead of utilizing the traditional, careful legislative process.²⁰⁵ This, he claimed, reflected poor draftsmanship. But because the Chief Justice recognized that rejecting the provision would be too risky, he implied that the natural meaning of the ACA’s words might not reflect Congress’ genuine intent.²⁰⁶

This provision—relating to federal subsidies—was so important that rejecting it due to purported drafting errors would cause the ACA to collapse, bringing national access to affordable health insurance down

202. See *King*, 135 S. Ct. at 2490 (“After telling each State to establish an Exchange, Section 18031 provides that all Exchanges ‘shall make available qualified health plans to qualified individuals.’ Section 18032 then defines the term ‘qualified individual’ in part as an individual who ‘resides in the State that established the Exchange.’ And that’s a problem: If we give the phrase ‘the State that established the Exchange’ its most natural meaning, there would be *no* ‘qualified individuals’ on Federal Exchanges.” (internal citations omitted)).

203. See, e.g., *King*, 135 S. Ct. at 2490 (“This problem [of not using the phrase in its natural meaning] arises repeatedly throughout the Act,” like in section 18031(b)(2) where a state is allowed to create an Exchange for qualified individuals and qualified small employers, instead of creating separate exchanges); see also *id.* at 2492 (citing to the ACA’s use of three section 1563’s as an example of “inartful drafting”).

204. *Id.* at 2491 (“But it is also possible that the phrase refers to all Exchanges—both State and Federal—at least for purposes of the tax credits.”). But see *id.* at 2497 (Scalia, J., dissenting) (arguing that the majority contradicts itself when it says that the most natural meaning of “established by the state” would apply just to states, but then the majority goes on to say that the quoted phrase could apply to both state and federal exchanges).

205. *Id.* at 2492 (majority opinion) (“The Affordable Care Act contains more than a few examples of inartful drafting . . . [(e.g.,) the Act creates three separate Section 1563s.] . . . Congress wrote key parts of the Act behind closed doors, rather than through ‘the traditional legislative process.’”). For more information on the traditional legislative process, see John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 L. LIBR. J. 131, 162–63 (2013).

206. See *King*, 135 S. Ct. at 2492 (supporting the contention that Congress did not follow the traditional legislative process in enacting the ACA by stating that Congress had passed much of the ACA through reconciliation and “bypassed the Senate’s normal 60-vote filibuster requirement”). For more information on reconciliation, see Cannan, *supra* note 205, at 159–70 (explaining that “reconciliation” is a complicated budgetary procedure that limits opportunities for debate and amendments).

with it.²⁰⁷ Although Congress may have believed it was offering states a deal that could not be refused, the Chief Justice interpreted this in a different way.²⁰⁸ Instead, he pointed to the federal fallback provided in section 1321—mandating the Secretary to establish an Exchange where states opted to not do so—as proof that Congress was giving states an incentive to establish an Exchange, but also expressly providing for instances in which this did not occur.²⁰⁹ The Chief Justice doubted that Congress would have wanted to limit the applicability of tax subsidies—if it had, Congress could have expressed this in a variety of definitions of qualified individuals or Exchanges throughout the ACA.²¹⁰

The majority opinion concludes with a reference to the strong precedent set in *Marbury v. Madison*: “Our role is more confined . . . to say what the law is.”²¹¹ While the majority in *King* saw this statement as a justification to aid the ACA in surviving its third challenge,²¹² the dissent argued that this statement baited the majority into thinking it should save the ACA in any way possible.²¹³

D. Justice Scalia's Dissent

Although Chief Justice Roberts quoted *Marbury*²¹⁴ to support his

207. *King*, 135 S. Ct. at 2493 (“The combination of no tax credits and an ineffective coverage requirement could well push a State’s individual insurance market into a death spiral.”).

208. The petitioners argued that Congress believed it was offering states a deal they would not refuse when offering federal subsidies to state residents that purchased insurance from an Exchange established by that state. Petitioners’ Brief, *supra* note 15, at 14. Even if this were true, and Congress was wrong in its foresight, the petitioners argued that incorrect predictions in participation were not an excuse to rewrite the ACA to resolve this. *Id.* at 36. *But see King*, 135 S. Ct. at 2494 (arguing that the federal fallback of section 18041, allowing the Secretary to establish the Exchange where a state fails to do so, proves that Congress did not believe it was offering a deal that could not be refused, but instead was stating expressly what would happen *when* states refused the deal).

209. *See supra* note 208 (explaining the difference between how the petitioners interpreted congressional intent, and how the *King* majority viewed it).

210. Chief Justice Roberts offers an avenue Congress could have taken had it intended to limit subsidies to state-established Exchanges:

We doubt that is what Congress meant to do. Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in the definition of “applicable taxpayer” or in some other prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit.

King, 135 S. Ct. at 2495.

211. *Id.* at 2496 (citing *Marbury*, 1 Cranch at 177) (reinforcing the idea that the role of the legislature must always be respected).

212. This was the third challenge to the ACA, as the constitutionality of the individual mandate and the Medicaid expansion provision were challenged in *Sebelius*. *See supra* text accompanying notes 38–50 (summarizing the pertinent facts and outcomes of *Sebelius*).

213. *King*, 135 S. Ct. at 2496 (Scalia, J., dissenting); *see* Part III(C) (discussing Justice Scalia’s dissenting opinion in *King*).

214. *See King*, 135 S. Ct. at 2496 (“In a democracy, the power to make the law rests with those

insistence that the power to make the law rests with those who are chosen by the people, Justice Scalia believed this was construed far too broadly.²¹⁵ And again, while Chief Justice Roberts contended that to read legislation fairly, one must have a qualified understanding of the legislative plan, Justice Scalia strongly believed that the ACA did not receive the fair reading that it deserved.²¹⁶ Instead, according to Justice Scalia, the majority went beyond its inherent powers and effectively rewrote the law.²¹⁷

The majority opinion focused on the issue of whether the ACA's reforms apply equally in each state regardless of who (i.e., the state or the federal government) establishes the Exchange within the state.²¹⁸ This issue is distinguished against the concern that Justice Scalia saw, and explained in his dissent.²¹⁹ Justice Scalia saw an error in the role of the judiciary versus the legislature, while the majority saw error in not providing as many people as possible with affordable health insurance when it was given the opportunity to do this—looking at what they like to call a drafting mistake, instead of a legislative plan not unfolding as anticipated.²²⁰

Justice Scalia opposed a case-by-case determination of legislative

chosen by the people. Our role is more confined—“to say what the law is.” (citing *Marbury*, 1 Cranch at 177)).

215. *See id.* at 2505 (arguing that the majority took whatever approach it wanted to in interpreting the ACA, and reminding readers that the judiciary is meant to apply the law, not improve upon it in the manner it sees fit); *see also supra* notes 103–104 and accompanying text (discussing the IRS's interpretation of section 36B of the IRC).

216. *King*, 135 S. Ct. at 2496 (Scalia, J., dissenting) (“A fair reading of legislation demands a fair understanding of the legislative plan.”).

217. *See id.* at 2501 (explaining that the Supreme Court did not need to rewrite the law because the legislation was clear on its face and was not anywhere near ambiguous enough to warrant such interpretation from the Court); *see also id.* at 2500 (“This Court ‘does not revise legislation . . . just because the text as written creates an apparent anomaly.’” (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014))).

218. *Id.* at 2485 (majority opinion) (stating that the issue in *King* is whether the ACA's provisions regarding Exchanges, specifically, apply to all Exchanges, regardless of the entity that established the Exchange).

219. *See id.* at 2502 (Scalia, J., dissenting) (calling the manner in which the majority decided the case “outlandish” and far from the ordinary meaning of the statutory language).

220. *See id.* at 2496 (majority opinion) (holding that Congress most likely intended to improve health insurance markets, not destroy them, and thus warrants the interpretation that subsidized healthcare ought to be available on exchanges established by both the state and the federal government); *see also id.* at 2499–500 (Scalia, J., dissenting) (explaining how the majority simply got it wrong in both their role relating to legislative interpretation, and in the interpretation itself, because there is no way that “established by the State” means anything but “established by the State” or not established by the state); *see also supra* notes 148–152 and accompanying text (discussing *King*).

intent because, he thought, judicial lawmaking should be avoided whenever possible, if not altogether.²²¹ He determined the meaning of statutory text by presuming authorship of some ideal drafter who meets the proper standards of syntax, semantics, and grammar.²²² This served his textualist objectives very well, because it limited the judicial interpreter's discretion and, hopefully, goads the legislature into more careful drafting.²²³ This originalist (or textualist) approach to judicial interpretation is advocated because Justice Scalia believed it assisted the Court in producing a unified front.²²⁴

As a proven advocate of textual commitment to the Constitution and legislation, Justice Scalia read the words of the ACA with what he perceived as their intended operative effect.²²⁵ He saw a great issue with reading "an Exchange established by the State" as "by the State or federal government."²²⁶ A legislative interpreter (i.e., those justices serving on the Supreme Court) must give effect to every word and every clause of a statute.²²⁷ As learned in *Marbury*, legislators do not (or are not supposed to) use terms devoid of meaning.²²⁸ Thus, interpreting "by the State" to comprise the meaning of "by the State *or* federal government," causes

221. Popkin, *supra* note 59, at 1186.

222. *Id.* at 1143.

223. *Id.*

224. George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1304 (1989–1990) ("Originalism therefore prospers, or at least survives, because the truth is, 'You can't beat somebody with nobody.'" (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989))).

225. *King v. Burwell*, 135 S. Ct. 2480, 2497–98 (2015) (Scalia, J., dissenting) (arguing that the majority decision gives the phrase "established by the State" no operative meaning or effect because the majority decided that that phrase means "established by the State or the Federal Government"); see also Ralph A. Rossum, *The Textualist Jurisprudence of Justice Scalia*, 28 PERSP. ON POL. SCI. 5, 5 (1999) (discussing how Justice Scalia urges judges to take on a textualist approach in statutory interpretation; an approach guided by the text and its ordinary meaning instead of the intentions or ideals that may or may not surround it).

226. See 26 U.S.C. § 36B(b)(2) (outlining which Exchanges are authorized to provide subsidized healthcare); see also *supra* note 225 and accompanying text (discussing Justice Scalia's dissent in *King*). See also 42 U.S.C. §§ 18031, 18041 (distinguishing between a state-established and a federally established Exchange, respectively).

227. See *King*, 135 S. Ct. at 2498 (Scalia, J., dissenting) (claiming that the majority failed "to give effect . . . to [every] clause and word" of the ACA and, instead, gave the exchange provision a different meaning (citing *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))); see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

228. See *Marbury v. Madison*, 1 Cranch 137, 138 (1803) (1803) ("An act of congress repugnant to the constitution [cannot] become a law.").

this phrase to completely lose its originally limiting value.²²⁹

As stated, the ACA gives authority to the states to establish their own Exchanges in section 1311—and, in section 1321, the federal government is granted authority to establish an Exchange in the states that opt out of establishing a section 1311 Exchange.²³⁰ Justice Scalia pointed out that the authority to establish the Exchange clearly comes from separate sources, and that this is just another notch in the ladder of contextual cues undermining the majority’s opinion.²³¹ The rest of the ACA has other sharp distinctions as to who can establish an Exchange and what the repercussions will be if it is state versus federally established:²³² the source of funding is different (i.e., for states it comes from section 18031(a) and for federally established Exchanges it comes from section 18121²³³); who runs the Exchange is different (i.e., the state runs a state-created Exchange, while the Secretary runs a federally created Exchange)²³⁴; and, interestingly, the Secretary only obtains the power to

229. See *supra* note 226 and accompanying text (discussing Justice Scalia’s dissent in *King*).

230. 42 U.S.C. § 18031(b) (instructing states to establish health insurance Exchanges); see *id.* at § 18041(c) (providing that HHS can establish an Exchange in the state that fails to establish the Exchange); see also Petitioners’ Brief, *supra* note 15, at 11 (explaining further the separation of and difference in sections 1311 and 1321 of the ACA).

231. See *supra* note 230 and accompanying text (depicting the differences between sections 1311 and 1321 of the ACA); see also *King*, 135 S. Ct. at 2498 (Scalia, J., dissenting) (“The States’ authority to set up Exchanges comes from one provision, § 18031(b); the Secretary’s authority comes from an entirely different provision, § 18041(c).”).

232. Justice Scalia, in *King*, cites to several provisions in the ACA where he believes the congressional intent—having state-established Exchanges be fundamentally different from federal exchanges—is clearly illustrated.

Funding for States to establish Exchanges comes from one part of the law, § 18031(a); funding for the Secretary to establish Exchanges comes from an entirely different part of the law, § 18121. States generally run state-created Exchanges; the Secretary generally runs federally created Exchanges. § 18041(b)–(c). And the Secretary’s authority to set up an Exchange in a State depends upon the State’s “[f]ailure to establish [an] Exchange.” § 18041(c) (emphasis added). Provisions such as these destroy any pretense that a federal Exchange is in some sense also established by a State.

King, 135 S. Ct. at 2498 (Scalia, J., dissenting). See also *id.* at 2498–99 (discussing how the ACA has a number of provisions apart from section 36B of the IRC that distinguishes state-established Exchanges from those established by the federal government, and how adopting the federal government’s interpretation of “established by the State” serves to nullify *multiple* other provisions in the ACA).

233. See *supra* note 232 and accompanying text (discussing Justice Scalia’s dissent in *King*); see also 42 U.S.C. §§ 18031(a), 18121(a)–(b) (showing that the funding sources for state-established Exchanges and federally established Exchanges are outlined in different provisions of the ACA—funding for state Exchanges is described in section 18031(a), and funding for federally established Exchanges is described in section 18121).

234. 42 U.S.C. § 18041(b)–(c) (requiring states to establish Exchanges per the standards set forth in section 18041(a), and, if a state fails to do so, noting that the federal government has the authority to establish and run a federally created Exchange in that state).

establish a federal Exchange when the state fails to establish a state-run Exchange.²³⁵ Justice Scalia believed his illustration of these stark differences in the ACA significantly undermined the majority's argument that an Exchange established by the federal government is entitled to the same treatment as an Exchange established by the state.²³⁶

Justice Scalia also asserted that it is not the Supreme Court's responsibility to rescue legislation from alleged drafting errors by Congress.²³⁷ Further, he found it not only plausible that the section 36B tax credits were intended to serve as an incentive for states to establish Exchanges per the ACA guidelines, but that this could be the *exact intent* that Congress had in mind.²³⁸

While one reading of "Exchange established by the State" clearly provides a better outcome for Americans, Justice Scalia and the petitioners in *King* made the valid point that the judiciary cannot merely rewrite laws when they are found to have negative societal repercussions.²³⁹ Justice Scalia advocated for this textual commitment to statutory language.²⁴⁰ This contention goes back to the foundational case of *McCulloch v. Maryland*, where Justice Marshall stated that "it is

235. 42 U.S.C. § 18041(c) (giving the federal government the power to establish an Exchange in the state *only when* the state fails to do so).

236. *See supra* note 232 (discussing Justice Scalia's dissent in *King*); *see also King*, 135 S. Ct. at 2498 ("Provisions such as these destroy any pretense that a federal Exchange is in some sense also established by a State.").

237. *King*, 135 S. Ct. at 2504 (Scalia, J., dissenting) ("This Court, however, has no free-floating power 'to rescue Congress from its drafting errors.'" (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004))).

238. *Id.* at 2505 (Scalia, J., dissenting) ("It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble."); *see also* 26 U.S.C. § 36B(b)(2) (outlining which Exchanges are authorized to provide subsidized healthcare).

239. *King*, 135 S. Ct. at 2504 (Scalia, J., dissenting) ("[W]ouldn't that outcome satisfy two of the Act's goals rather than just one: enabling the Act's reforms to work and promoting state involvement in the Act's implementation?"). Justice Scalia further states:

This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it. In order to receive any money under [section] 36B, an individual must enroll in an insurance plan through an "Exchange established by the State." The Secretary of Health and Human Services is not a State. So, an Exchange established by the Secretary is not an Exchange established by the State—which means people who buy health insurance through such an Exchange get no money under [section] 36B.

Id. at 2496–97.

240. *See Popkin, supra* note 59, at 1133 (explaining how Justice Scalia is committed to the text of the legislation); *see also supra* note 77 and accompanying text (discussing statutory interpretation in *Dublino*).

a constitution we are expounding,” noting that the Constitution is an outline to be interpreted, not reworked to serve the judiciary’s desires.²⁴¹

More attention ought to be given to the congressional practice of writing each word with specific intent behind it.²⁴² As Justice Scalia explained, misplacing a comma is more likely to occur than gross grammatical errors in legislative drafting, and he practiced deference to the text of legislation.²⁴³ For him, “only established canons of construction can unsettle ordinary meaning, and substantive policies are admissible only to check whether the statutory text makes sense.”²⁴⁴

Justice Scalia’s argument was clear—he firmly believed the stated purpose was, in fact, for state Exchanges to be the *only* Exchanges offering subsidized healthcare, and that the ACA posed a clear congressional preference for state action over federal interference.²⁴⁵ In sum, Justice Scalia argued that the Supreme Court was not merely acting outside the scope of its powers, but that it stepped in to reconfigure a clause that was only meant to serve as a fallback.²⁴⁶

III. ANALYSIS

While the Supreme Court is the highest court in the United States, the higher the court does not necessarily equate to the sounder the holding.²⁴⁷

241. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819); see Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1033 (1980–1981) (interpreting Justice Marshall’s statement that a constitution is to be expounded upon to mean that, while an outline is naturally a document that adapts to the crises around it, the constitution is also a document full of particular, carefully-placed limits that does not allow for great freedoms to construe meanings as the reader pleases).

242. MANUAL FOR DRAFTING LEGISLATION § 1.1 (6th Ed. 2009) (“A drafter who cares passionately about clear writing understands fully the myth of legislative intent. The rule of law is possible only if words have lives of their own. The drafter must choose words that will speak clearly long after the words are written.”).

243. *Crandon v. United States*, 494 U.S. 152, 170 (1990) (Scalia, J., concurring).

244. See *id.* at 1142 (“For Justice Scalia, only established canons of construction can unsettle ordinary meaning, and substantive policies are admissible only to check whether the statutory text makes sense.”).

245. *King v. Burwell*, 135 S. Ct. 2480, 2504 (2015) (Scalia, J., dissenting) (arguing that the ACA illustrates a “congressional preference for state participation” in Exchange establishment, and that ruling otherwise, while providing a good outcome of subsidized healthcare for many, frustrates the very goal of state action).

246. *Id.* (citing to the provisions of the ACA to emphasize his contention that Congress intentionally gave states the first opportunity to establish an Exchange, then, and only as a fallback, permitted the federal government to establish an Exchange in the state if that state failed to do so); see 42 U.S.C. § 18041(c) (outlining the responsibilities of the Secretary in establishing an exchange within states that fail to establish a state-run exchange).

247. The outcome of *King* has been deemed full of irony, and thus not necessarily laying claim to a descriptor of soundness:

The decision in *King* embodies an obvious pursuit to preserve the ACA on the Court's terms.²⁴⁸ Regardless of the difference between section 1311's and section 1321's definitions of Exchanges, it appears that the Supreme Court used *King* to illustrate its ease in exchanging a reasonable, textualist approach to statutory interpretation, for an exhibition of judicial power.²⁴⁹

When examining the text, there is no reason to believe that any part of the Exchange provisions of the ACA are ambiguous, especially to the level of warranting judicial interpretation of the highest court, over deference to a lesser-qualified agency.²⁵⁰ Revisiting the facts, a

It is a decision rich with irony. For example: the Chief Justice refuses to give *Chevron* deference to the IRS's interpretation of the statute because "[i]t 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." Never mind that just three years ago the Chief Justice himself saved the Affordable Care Act's individual mandate – another of the three core ACA features shaping the Chief Justice's statutory interpretation in *King*—by interpreting it as a *tax*.

Adam White, *Symposium: Defining Deference Down*, SCOTUSBLOG (June 25, 2015, 11:27 PM), <http://www.scotusblog.com/2015/06/symposium-defining-deference-down/>.

248. See *id.* (“[T]he . . . Court has significantly reinforced and reinvigorated the ‘major questions’ doctrine . . . [in effort] to restrain the administrative state by infusing the interpretation of regulatory statutes with structural constitutional concerns – namely, that the courts must not presume that Congress delegates vast powers to regulatory agencies through obscure statutes.”). The “major questions” doctrine is an exception to granting *Chevron* deference to agencies, and allows courts to interpret legislation with potentially big policy impacts. For more information on the “major questions” doctrine, see Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 594 (2008) (“The purpose of the rule, then, is to prevent agencies from altering the regulatory backdrop against which Congress is negotiating, and the purpose of judicial enforcement of [the] rule is to restore the pre-interference regulatory reality so that congressional negotiations can pick up where they left off”). See also *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting) (arguing that the Supreme Court majority so clearly wants to preserve the ACA, that it ought to be called “SCOTUScare”).

249. See James Lankford, *Judicial Deference Enables Agencies to Usurp Congress's Legislative Power*, NAT. REV. (July 14, 2015, 4:00 AM), <http://www.nationalreview.com/article/421124/judicial-deference-enables-agencies-usurp-congress-legislative-power-james-lankford> (claiming that the Supreme Court chose not to give *Chevron* deference to the IRS, but instead gave deference to its own interpretation of the law); see also Gluck, *supra* note 57 (explaining how textualist judges have spent decades trying to convince judges of all political backgrounds to follow in their line of reasoning, but the *King* challengers put all of this at risk).

250. The text “established by the state” is clear and unambiguous:

Here, the text of Obamacare clearly limits subsidies to individuals who purchase insurance through state-run exchanges. That ends the matter. But even if the text is ambiguous, interpreting the statute to permit subsidies on federally established exchanges is not reasonable because it contravenes Congress's intent in conditioning subsidies on creation of state-run exchanges. Under both steps of *Chevron*, this interpretation fails.

subscriber to a state-established Exchange will be eligible for a subsidy for each month that this subscriber is covered by a plan that he or she “enrolled in through an Exchange established by the State.”²⁵¹ But, if a state did not establish an Exchange by the January 1, 2014 deadline, the Secretary could establish and operate an Exchange within the state that declined to establish its own.²⁵² When the IRS Rule contradicted the ACA by effectively providing subsidies to insureds that bought insurance on all healthcare Exchanges, it illustrated that an Exchange *in* the state does not support the assertion that it is an Exchange established *by* the state itself.²⁵³

This Part covers a critical analysis of the soundness of the outcome of *King*.²⁵⁴ It discusses alternative treatments of the issues presented and distinguishes any questions that the Supreme Court left unanswered on the issues of the ACA, subsidy eligibility, and the separation between what should remain with the legislature and what is appropriate for the judiciary to decide.²⁵⁵ Finally, this Part covers the alternative solutions that were, or could have been, considered in *King*.²⁵⁶

A. *The Soundness of a Claim for Ambiguity*

The soundness of a decision is determined by the argument’s reasoning and validity.²⁵⁷ Statutory interpretation is incredibly important, and Justice Scalia proposed—and enforced to the extent that he could—the use of the text as the basis for such interpretation because it is a common-sense notion that lends itself well to judicial consistency and

Orrin G. Hatch, *King v. Burwell and the Rule of Law*, 63 UCLA L. REV. DISC. 2, 6–7 (2015). *See also* 26 U.S.C. § 36B (2011) (providing subsidies for applicable taxpayers who purchase insurance through an Exchange established by the state).

251. 26 U.S.C. § 36B(c)(2)(A)(i) (2011); *see also* Hatch, *supra* note 250, at 7 (summarizing eligibility requirements for obtaining subsidies from state-established Exchanges).

252. 42 U.S.C. § 18041(c)(1). *See also* Hatch, *supra* note 250, at 7 (summarizing the role of the federal government that was conditioned on the state’s opting out of its role in establishing an Exchange).

253. *Id.* at 8 (“There is, in short, no ambiguity in the statute. Subsidies are available for plans purchased through state exchanges. Subsidies are not available for plans purchased through federally established exchanges.”).

254. *See infra* Part III(A) (discussing the soundness of a claim for ambiguity).

255. *See infra* Part III(C) (discussing alternative treatments of the ACA, subsidies, and separation of powers).

256. *See infra* Part III(C) (discussing alternative treatments of the ACA, subsidies, and separation of powers).

257. Aaron Ancel, *Fundamentals: Soundness*, KHANACADEMY, <https://www.khanacademy.org/partner-content/wi-phi/critical-thinking/v/soundness> (last visited Nov. 7, 2015) (explaining the components of a sound argument).

reliability.²⁵⁸ Yet, when faced with four plain words, attached to four plain meanings, some judges still find ambiguity.²⁵⁹

To reiterate, the Court's reasoning throughout *King* taught that there were, in fact, ambiguities present in the Exchange provisions of the ACA that needed clarification by the Court.²⁶⁰ But, the petitioners' arguments held merit: the statutory text contained no ambiguities, and if it did, the Court still interpreted it wrong.²⁶¹

Even if ambiguities were found, the IRS should not have enacted a Rule that ran counter to what the ACA clearly encompassed.²⁶² The Court's acknowledgment that the Court would not apply *Chevron* deference to the IRS Rule—because the IRS allegedly did not possess the requisite skill, experience, and knowledge to authorize premium tax credits from federally established health insurance Exchanges—was the

258. *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) (“[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.” (citing *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925))); see Popkin, *supra* note 59, at 1138 (explaining that Justice Scalia prefers a textual approach to statutory interpretation because “the rule of law should be a law of rules”); see also Gluck, *supra* note 57 (“[N]o interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts” (quoting Justice Antonin Scalia)); see also Gluck, *supra* note 57 (“Textualists have spent the past thirty years persuading even their opponents of the jurisprudential benefits of a sophisticated text-based interpretive approach.”); see also Rachel VanSickle-Ward, *The Supreme Court Is Debating Ambiguities in Obamacare. So Why Do Politicians Even Write Ambiguous Laws?*, WASH. POST: MONKEY CAGE (Mar. 6, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/06/the-supreme-court-is-debating-ambiguities-in-obamacare-so-why-do-politicians-even-write-ambiguous-laws/> (“More precisely worded policy provides more direction and less discretion to bureaucratic and judicial actors.”).

259. See *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting) (arguing that words no longer have meaning when “established by the State” does not mean exactly that—established by the state).

260. See *generally id.* (majority opinion) (holding that the ACA accorded subsidized healthcare to those that purchased insurance on both Exchanges established by the state as well as those established by the federal government); see also 42 U.S.C. §§ 18031, 18041 (mandating that states establish Exchanges, and that the Secretary of HHS will establish them in states that fail to do so); see also *supra* notes 166–185 and accompanying text (discussing the petitioners' brief and encompassed arguments in *King*).

261. See *King*, 135 S. Ct. at 2496–97 (Scalia, J., dissenting) (arguing that “established by the State” is simply not an ambiguous statement mandating interpretation because it means exactly what it says). But see VanSickle-Ward, *supra* note 258 (suggesting that calling a piece of legislation ambiguous is more of an invitation for compromise when key participants disagree over its details).

262. Andy S. Grewal, *Lurking Challenges to the ACA Tax Credit Regulations*, Univ. of Iowa C. of Law, Research Paper No. 15-20 (2015), reprinted in BLOOMBERG BNA DAILY TAX REP. (May 21, 2015) (“Because [the IRS Rule] contradicts the congressionally prescribed criteria, it reflects an impermissible interpretation of the statute.”).

Court's way of saying that Congress' failure to expressly delegate policy interpretation of ambiguous language to the IRS was the open door for the Court to defer to its own construction.²⁶³

But, it is important to note that the IRS did not have any expertise in health insurance or in crafting health insurance policies, so there was no reason for the Court to defer to the IRS in the first place.²⁶⁴ Interestingly, the Court managed to endorse the IRS Rule without giving deference to the agency.²⁶⁵ It is peculiar, though, that the Court was willing to recognize an explicit absence of a delegation to the IRS, but not the explicit absence of "or the federal government" after "established by the State."²⁶⁶

Further, the majority opinion attempted a sound argument in its claim that Exchanges established per section 1311 and section 1321 of the ACA were functionally, for all intents and purposes, the same Exchange.²⁶⁷ The ACA clearly states, though, that to be eligible for subsidies, the Exchange must have been established "under section 1311" of the ACA.²⁶⁸ The condition provided for creating federal Exchanges is

263. See *King*, 135 S. Ct. at 2489 (arguing that it is highly unlikely that Congress would have delegated this sort of decision on Exchanges to the IRS); see Lankford, *supra* note 249 (describing how the majority in *King* decided to give deference to its own interpretation of the statute).

264. See *King*, 135 S. Ct. at 2489 (2015) (arguing that this is not a case to be decided by the IRS); see also Gluck, *supra* note 57 (explaining that *Chevron* deference occurs where deference is given to a qualified agency to interpret ambiguous legislation). For more information, see generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

265. See White, *supra* note 247 (expressing surprise that the Supreme Court refused to give *Chevron* deference to the IRS, but then ultimately endorsed the IRS's statutory interpretation, which, even further, was deemed "at odds" with the most natural meaning of the statute's text).

266. See Paula Stannard et al., *King v. Burwell: The Supreme Court as Interpreter*, ALSTON & BIRD: CLIENT ADVISORY 1, 6 (June 26, 2015) (noting how the Court strayed from a typical *Chevron* analysis to construe the ambiguous language of the ACA directly).

267. Chief Justice Roberts equated Exchanges established by the state and established by the federal government:

By using the phrase "such Exchange," section 18041 instructs the Secretary to establish and operate the same Exchange that the State was directed to establish under section 18031. See Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). In other words, State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes. Although State and Federal Exchanges are established by different sovereigns, sections 18031 and 18041 do not suggest that they differ in any meaningful way. A Federal Exchange therefore counts as "an Exchange" under section 36B.

King, 135 S. Ct. at 2489–90.

268. See 26 U.S.C. § 36B(c)(2)(A)(i) (requiring the IRS Rule coverage to apply only to "an Exchange established by the State under section 1311 of the [ACA]"); see also Hatch, *supra* note 250, at 8 (explaining that the IRS provision specifies that the state Exchange must have been established under section 1311 of the ACA).

located under an entirely different section: section 1321.²⁶⁹ There is simply no reading that provides any correlation between a state Exchange established under section 1311 and a federally established Exchange under section 1321.²⁷⁰

Additionally, the majority disregarded an important takeaway—and valid argument—from the prior opinion it vacated before granting certiorari to *King*: federal Exchanges only satisfy two out of three required elements of an Exchange permitted to grant its qualified purchasers tax credits.²⁷¹ There is no reading of section 1321 that implies a federal Exchange is also an Exchange established by the state; rather, federal Exchanges are only (1) Exchanges (2) established under section 1311.²⁷² Chief Justice Roberts attempted to use this “sameness” argument to prove that a federal Exchange was therefore an Exchange for purposes of allowing subsidies across all Exchanges, but his idea of sameness is unfortunately different from the natural meaning of sameness.²⁷³

This returns to Justice Scalia’s sound, and arguably preferred, means of examining what the text explicitly says and fairly implies.²⁷⁴ It is the

269. See 42 USC § 18041(c)(1) (discussing the federal fallback provision); see also Hatch, *supra* note 250, at 8 (arguing that the placement of the different Exchanges throughout the statute (i.e., in section 1311 for state and section 1321 for the federal government) further supports the contention that a federally established Exchange is, by its very definition, not a state-established Exchange).

270. See Hatch, *supra* note 250, at 8 (emphasizing that there is absolutely no ambiguity in the text of the statute, and that subsidies are clearly not available through federal Exchanges established per section 1321 of the ACA).

271. The majority in *Halbig* ruled against the IRS Rule because federal Exchanges did not satisfy all of the elements required by the Rule:

Under section 36B, subsidies are available only for plans “enrolled in through an Exchange established by the State under Section 1311 of the [ACA].” Of the three elements of that provision—(1) an Exchange (2) established by the State (3) under section 1311—federal Exchanges satisfy only two: they are Exchanges established under section 1311.

Halbig v. Burwell, 758 F.3d 390, 400 (D.C. Cir. 2014).

272. See *id.* (explaining that the federal Exchanges failed to satisfy all elements of Exchanges under section 1311 because an Exchange established by the federal government cannot be an Exchange established by a state); see also 42 U.S.C. §§ 18031, 18041 (describing state and federal Exchanges).

273. See *King v. Burwell*, 135 S. Ct. 2480, 2489–90 (2015) (arguing that, despite being established by different sovereigns, the text of sections 1311 and 1321 does not suggest that these provisions differ in any meaningful way).

274. Justice Scalia was a renowned textualist who looked to the text of legislation first to discern its meaning, and rejected judicial speculation on congressional intent. For more information, see Ken Adams, *Some Thoughts on Scalia and Garner’s Book “Reading Law: The Interpretation of Legal Texts”*, ADAMS ON CONT. DRAFTING (Aug. 1, 2012), <http://www.adamsdrafting.com/scalia-and-garners-book-reading-law-the-interpretation-of-legal-texts/> (“Textualism, in its purest form,

judge's job to determine what facts fall in or outside of the guidelines established by the text, and it is not the judge's job to forcefully fit such facts within those textual boundaries.²⁷⁵ Justice Scalia discerned legislative meaning by examining, in order, the ordinary meaning of the text, the surrounding text, and the large group of statutes passed by the legislature.²⁷⁶ Hence, Justice Scalia determined that "established by the State" had the ordinary meaning of "established by the State," when surrounded by statutory language consistent with this meaning and also among the vast number of like provisions enacted by the ACA. It is, therefore, not surprising that his formulaic and reliable approach brought him to conclude that federal Exchanges established per section 1321 of the ACA were not intended to be afforded the same rights as state-established Exchanges.²⁷⁷

B. Alternative Solutions if the Supreme Court Had Found for the Petitioners

The Supreme Court did not need to decide *King* in the manner that it did.²⁷⁸ The original drafters in Congress could have amended the ACA²⁷⁹ and the Court also could have more thoroughly investigated congressional intent.²⁸⁰ Perhaps the most obvious alternative is that the Supreme Court—when faced with the absence of a formal circuit split

begins and ends with what the text says and fairly implies." (quoting Justice Scalia)).

275. Popkin, *supra* note 59, at 1133; *see also supra* Part I(B) (discussing what it means to have a textual commitment to the Constitution and the words of legislation).

276. *See* Popkin, *supra* note 59, at 1140 (describing Justice Scalia's deference to text and rules to provide guidance in statutory interpretation); *see also id.* at 1142 ("For Justice Scalia, only established canons of construction can unsettle ordinary meaning, and substantive policies are admissible only to check whether the statutory text makes sense.").

277. *See King*, 135 S. Ct. at 2497–98 (Scalia, J., dissenting) (explaining the almost comical way the majority found for the respondents in *King* and how state and federally established Exchanges are so fundamentally different that they could never be considered the same).

278. *See infra* text accompanying notes 280–281 (discussing why the Supreme Court granted certiorari in *King*).

279. *But cf.*, Jonathan H. Adler & Michael F. Cannon, *Another ObamaCare Glitch*, WALL ST. J.: COMMENT. (Nov. 16, 2011), <http://www.wsj.com/articles/SB10001424052970203687504577006322431330662> (recognizing that Congress had the ability to amend the legislation, but the Obama administration found the error so egregious that it wanted to rewrite the ACA without involving Congress).

280. The ACA is not a dated piece of legislation, and with such a strong focus on congressional intent, there could have been greater showing of discerning what this actual intent was by consultation with members of Congress. Actual ACA drafters from the Democratic party were even available to comment on what they had intended. For more information, see Sarah Kliff, *The People Who Wrote Obamacare Think the New Supreme Court Case Is Ridiculous*, VOX (Nov. 7, 2014, 2:39 PM), <http://www.vox.com/2014/7/23/5927169/halbig-says-congress-meant-to-limit-subsidies-congress-disagrees>.

between the D.C. Circuit and the Fourth Circuit Courts of Appeals—did not need to grant certiorari to review *King*.²⁸¹

The drafters of the ACA clearly contemplated that there would be qualified individuals under the Exchanges, but the ACA does not seem to provide for qualified individuals who purchase insurance from an Exchange not established by the state.²⁸² In the pursuit of equal application of justice, surely a legislative challenge cannot be rejected because it would destabilize the insurance market.²⁸³ There was an inadequate showing that rejecting this challenge to the ACA would result in insurance market instability.²⁸⁴

An analysis of the consequences if there was a ruling in the petitioners' favor was published prior to the ultimate decision, examining the perceived devastation that would come.²⁸⁵ The authors, after an exhaustive showing of graphs and data, predicted that there would be 8.2 million more people uninsured and 35 percent higher premiums.²⁸⁶ If

281. There are many reasons for the Supreme Court to grant certiorari to a case. In this instance, certiorari was likely granted because *King* concerned an important question of federal law because of its impact through the ACA. Additionally, certiorari could have been granted because many states were starting to litigate this issue, and the Supreme Court's review of the ACA could efficiently surface a clear, nationwide understanding of the law. Further, the Supreme Court was aware that this subsidy eligibility created a divide amongst circuit courts, and was likely to soon create a formal circuit split. For more information, see Johnathan H. Adler, *Why did the court grant cert in King v. Burwell?*, WASH. POST: THE VOLOKH CONSPIRACY (Nov. 7, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/07/why-did-the-court-grant-cert-in-king-v-burwell/?utm_term=.5bf97b924a9a. See also SUP. CT. R. 10 (explaining considerations that govern review on certiorari).

282. See *King*, 135 S. Ct. at 2490 (describing how it would be problematic to limit qualified individuals to those who purchased insurance from a state-established Exchange); *but see id.* at 2507 (Scalia, J., dissenting) (“This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.”).

283. *Id.* at 2493 (majority opinion) (“Here, the statutory scheme compels the Court to reject petitioners’ interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very “death spirals” that Congress designed the Act to avoid.”); *but see* *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring) (arguing that avoiding unhappy circumstances is an inadequate basis for legislative interpretation).

284. Linda J. Blumberg et al., *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums*, URBAN INST. 1, 2 (Jan. 2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000062-The-Implications-King-vs-Burwell.pdf> (offering only one prediction as to the repercussions of an outcome for the petitioners).

285. *Id.* (predicting the direct and indirect implications of finding a verdict in favor of the petitioners in *King*).

286. Predictions on the repercussions of a verdict in favor of the *King* petitioners:

We estimate that a victory for the plaintiff would increase the number of uninsured in 34 states by 8.2 million people (a 44 percent increase in the uninsured relative to the number of uninsured under the law as currently implemented) and eliminate \$28.8 million in tax

this had been the case, a textualist reading of the statute would indicate that Congress likely intended to incentivize states to avoid such devastation.²⁸⁷ One would also think states would *want* to provide these federal funds to its citizens, therefore, state inaction likely occurred when states knew their inaction led to no damaging repercussions.²⁸⁸

The impact of deciding otherwise in *King* might have also been a good thing.²⁸⁹ Without subsidies on federal Exchanges, state residents in states with federal Exchanges would face much higher costs and likely unaffordable healthcare.²⁹⁰ Circling back to the likely intent of Congress, this outcome reasonably would have been the push states needed to establish their own Exchange to avoid depriving their residents of affordable healthcare.²⁹¹ This case raises significant red flags in the department of legislative interpretation, as there is now case precedent that says this is no longer as important as once thought.²⁹² If one cannot rely on what the law plainly says, forthcoming legislation will be read

credits and cost-sharing reductions in 2016 (\$340 billion over 10 years) for 9.3 million people. In addition, the number of people obtaining insurance through the private nongroup markets in these states would fall by 69 percent, from 14.2 million to 4.5 million, with only 3.4 million of these remaining in the ACA's marketplaces.

Id.

287. Lempert, *supra* note 185 (“The model that the petitioners have of the Congressional mind seems to be one in which Congress is so sure that states would not want to deprive their citizens of federal subsidies that the threat of their unavailability would induce them to set up [E]xchanges.”).

288. Hatch, *supra* note 250, at 9 (“But there is good reason to believe Congress did intend to deny subsidies for federally enrolled plans, and not just because that’s what the statute says. The reason is that Congress needed a way to incentivize the states to create their own [E]xchanges.”).

289. *See id.* at 9–10 (describing the benefits of deciding for the petitioners (e.g., encouraging state action over a federally controlled insurance market)). For additional examples regarding the many benefits that would have resulted had the Supreme Court decided for the respondents in *King*, see Michael F. Cannon, *Benefits of ‘King v. Burwell’: More Jobs, Higher Incomes & 70 Million Freed from Illegal Taxes*, FORBES: HEALTHCARE, FISCAL, & TAX (June 24, 2015, 11:32 AM), <http://www.forbes.com/sites/michaelcannon/2015/06/24/benefits-of-king-v-burwell-more-jobs-higher-incomes-70-million-freed-from-illegal-taxes/>.

290. *See* Hatch, *supra* note 250, at 10 (describing how the Obama administration and Supreme Court essentially waited too long in addressing the IRS Rule, and how because of this, thirty-four states let HHS establish federal Exchanges instead of being properly incentivized by the original intent of the ACA).

291. *Id.*

292. Describing how *King* set a dangerous precedent for future statutory interpretation:

Most disturbing is that this decision now sets a precedent. That is, even when the language in a contract or a law is written clearly and in plain language, a party may be free to take actions inconsistent with the wording and later claim that their actions are consistent with the intent of the document. Does this now mean that clear, plain language may not be as clear and plain as the parties believe?

Michael Busler, *The Baffling Supreme Court Obamacare Decisions Sets a Dangerous Precedent*, EPIC TIMES: POL. (June 25, 2015), <http://www.epictimes.com/michaelbusler/2015/06/the-baffling-supreme-court-obamacare-decision-sets-a-dangerous-precedent/3/>.

with SCOTUS-colored lenses.²⁹³

In *Halbig*, the D.C. Circuit Court found that the ACA contained ambiguous language, that the Court could rightfully interpret it, and that the tax credits were meant to be restricted to the health insurance purchasers in a state-run Exchange.²⁹⁴ Unfortunately, a difference in opinion existed between the Fourth Circuit Court of Appeals in *King* and the D.C. Court of Appeals in *Halbig* on what to do with this sort of challenge to the ACA.²⁹⁵ The Supreme Court decided to grant certiorari in *King* in November of 2014, removing the possibility of maintaining textual commitment to statutory language.²⁹⁶ Had this been properly left to the states, or properly left to be decided in the respective circuits, traditional analysis of statutory meaning could have been preserved.²⁹⁷

Even though Congress might have believed it was offering states a great deal with the tax incentives through the Exchange process, this idea did not pan out as planned.²⁹⁸ Despite Congress' mistake regarding the willingness of states to create and implement an Exchange, however, this does not give the Supreme Court the power to rewrite the ACA to align it with some justices' perceived views of its original intent.²⁹⁹ The states might have created these Exchanges on their own if the IRS Rule had been erased and incentives had been maintained.³⁰⁰

The petitioners argued that the IRS stepped in before states had a chance to use the incentives Congress wanted to give them.³⁰¹ The

293. *See id.* (describing the reliability of the law as established in *King*).

294. *Halbig v. Burwell*, 758 F.3d 390, 415 (D.C. Cir. 2014) (holding that the ambiguous statute would not be interpreted to allow federal Exchanges to offer subsidized healthcare).

295. Joyce Frieden, *Appeals Courts Rule Opposite Ways on ACA Subsidies*, MEDPAGE TODAY (July 22, 2014), <http://www.medpagetoday.com/Washington-Watch/Reform/46884> ("Opposing rulings by two federal appeals courts Tuesday on the legality of subsidies for people purchasing insurance through the Affordable Care Act's federally run exchanges are almost certainly going to send the issue up to the Supreme Court, experts said.").

296. The Supreme Court's decision to grant certiorari to *King*:

The Supreme Court . . . agreed . . . to decide how far the federal government can extend its program of subsidies to buyers of health insurance. At issue is whether the program of tax credits applies only in the consumer marketplaces set up by sixteen states, and not at federally operated sites in thirty-four states.

Denniston, *supra* note 55.

297. *See Stannard, supra* note 266, at 5–6 (describing the implications of different outcomes for *King*).

298. *King v. Burwell*, 135 S. Ct. 2480, 2494 (2015) (explaining how Congress may have intended to provide incentives to states through subsidies, but these incentives were not powerful enough).

299. *Id.*

300. *Id.*

301. Petitioners' Brief, *supra* note 15, at 36; *see also King*, 135 S. Ct. at 2494 (explaining how

government's argument regarding Congress' purpose reduces to this notion that section 36B subsidies are too important to be conditioned on states having the option to establish, or not establish, an online Exchange.³⁰² The government argues that Congress would never have created something so important that gave states merely the option to participate.³⁰³ Further, just because the Chief Justice claims the legislation was written in a hasty manner, does not necessitate the Court stepping in to clean up a semantics mess—if read properly, there was not even a mess to begin with.³⁰⁴

C. *Alternative Treatments of the ACA, Subsidies, and Separation of Powers*

Many Americans feared a catastrophe if a decision for the petitioners resulted from *King*, but what would have really happened?³⁰⁵ If the majority decision in *King* had been for the petitioners instead, it might have destroyed the ACA, but Congress could have easily cleared the resulting debris of a gutted statute.³⁰⁶ After all, Congress would have been free to rewrite the statute or enact an entirely new policy.³⁰⁷ The judiciary was not the only branch (read: it was not even the *right* branch) to rewrite this language.³⁰⁸ This Article contends, in accordance with Justice Scalia's dissent, that the Supreme Court ought not to take unwarranted statutory interpretation upon itself when the Justices lose their faith in a democratic system.³⁰⁹

Congress may have intended to provide incentives to states through subsidies, but these incentives were not powerful enough).

302. *King*, 135 S. Ct. at 2494; Petitioners' Brief, *supra* note 15, at 26.

303. *King*, 135 S. Ct. at 2494; Petitioners' Brief, *supra* note 15, at 26.

304. David French, *King v. Burwell: An Embarrassing Decision*, NAT. REV. (June 25, 2015, 2:00 PM), <http://www.nationalreview.com/article/420315/king-v-burwell-embarrassing-decision-david-french> (“[Chief Justice Roberts] does not . . . know whether insurance markets would be destabilized because he does not know the congressional response to a contrary ruling. He distrusts Congress, so he’s going to ‘fix’ their mess.”).

305. *Id.* (“[A] Supreme Court decision applying the clear language of the statute wouldn’t have mandated any particular congressional or presidential reaction. Congress would have been free to reform Obamacare, rewrite it to include federal exchanges in the subsidy scheme, or enact entirely new policies.”).

306. *See id.* (describing the ease of the process in which Congress could have corrected the ACA to be more clear).

307. *See id.* (explaining that Congress could have reformed, rewritten, or enacted completely new policies to fix the ACA instead of leaving it to the judiciary’s wrongful determination).

308. *Id.* (“The Supreme Court rewrites the Obamacare law instead of letting Congress do its job.”).

309. *Id.* (“The Supreme Court, however, decided not to take any chances on democracy, so—in an opinion long on insurance-economics analysis and short on statutory or constitutional

Interestingly enough, the D.C. Circuit Court in *Halbig* found that the ACA “unambiguously restrict[ed]” the tax credits to those who purchased health insurance in a state-run Exchange, yet the *King* court did away with this.³¹⁰ The *King* Court went in a different direction and did not target the IRS like the circuit court did in *Halbig*, but rather re-interpreted the law to apply more broadly.³¹¹

The majority seemed to ignore the idea that Congress wanted to incentivize states to create their own Exchanges.³¹² In referring back to the reasoning in *Sebelius*, one is reminded that the Constitution does not allow the federal government to effectively order states around.³¹³ There is somewhat of an exception, though, as the federal government can provide incentives to states to entice them into opting in to a federal program.³¹⁴ Congress wanted states to feel some sort of external pressure to establish insurance Exchanges on their own.³¹⁵ Failing to establish an Exchange deprives state residents of millions of federal dollars in subsidies.³¹⁶ One would think this would be enough to persuade states into fulfilling the goal Congress envisioned.³¹⁷ This makes it appear that Congress had the foresight to know that if subsidies were available on both state and federal Exchanges, there would be no incentive for states to act without Congress’s direct command.³¹⁸ With no incentive, states

reasoning—it effectively changed the statute. Why? Because of the entirely speculative real-world effects.”).

310. *Halbig v. Burwell*, 758 F.3d 390, 394 (D.C. Cir. 2014).

311. Petitioners’ Brief, *supra* note 15, at 10.

312. *See Hatch, supra* note 250, at 9 (“But there is good reason to believe Congress did intend to deny subsidies for federally enrolled plans, and not just because that’s what the statute says. The reason is that Congress needed a way to incentivize the states to create their own [E]xchanges.”).

313. *See supra* notes 26–41 and accompanying text; *see also Hatch, supra* note 250, at 9 (explaining how the anticommandeering principle prevents the federal government from commanding states to do something).

314. *See generally* Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566 (2012) (challenging the constitutionality of the ACA’s individual mandate provision). *See also Howe, supra* note 38 (illustrating the possible repercussions if the individual mandate was struck down in *Sebelius*).

315. *Hatch, supra* note 250, at 9.

316. *See Tony Pugh, Money and Quality of Life at Stake as Health Law Returns to Supreme Court*, STATE (Feb. 27, 2015), <http://www.thestate.com/incoming/article13734041.html> (describing the projected 2016 impact of the petitioners’ victory in *King*).

317. *Hatch, supra* note 250, at 9.

318. *See id.* at 10 (“If you give unconditional subsidies, then . . . there is absolutely no incentive for States to do it, and you have fundamentally undermined that distinct statutory purpose.” (quoting Michael A. Carvin, counsel for the petitioners)). Moreover, without this incentive, the ACA becomes a “federally run healthcare market,” which makes the ACA hugely unappealing to many Republicans whose votes were needed to pass the legislation. This, also, may only be a temporary success for the ACA, because as a result of the 2016 elections, the Republicans have retained control of Congress, specifically in the House of Representatives.

are more likely to “sit back” and let the Secretary establish the Exchanges for them.³¹⁹ Moreover, without this incentive, the ACA becomes a “federally run healthcare market,” which makes the ACA very unappealing to many Republicans whose votes were needed to pass this legislation.³²⁰ This, also, may only be a temporary success for the ACA, as the Republicans now have control of Congress and have regained the house.³²¹

The Supreme Court’s actions destroyed the structure of incentives initially intended by Congress.³²² During financial hardships, not creating an Exchange could be very appealing, especially given the lack of repercussions if the federal government has the funds to do what states do not feel is affordable.³²³ It is clear why states would be reluctant to take action under the Court majority’s interpretation of the statute, but this interpretation runs contrary to Congress’s original intent.

Is this too much pressure, though? In oral arguments, Justice Anthony Kennedy thought incentivizing states with that much money at stake was putting an unconstitutional amount of pressure on states to conform to a federal program.³²⁴ Justice Kennedy read the petitioners’ argument as, “either create your own Exchange, or we’ll send your insurance market into a death spiral.”³²⁵ But the solicitor general pointed out that, if this were rising to the level of unconstitutional, then the doctrine of constitutional avoidance would come in to play.³²⁶ According to this doctrine, a federal court (i.e., the Supreme Court) ought to refuse to rule on a constitutional issue if the case can be resolved on a non-constitutional basis.³²⁷ This also only applies, however, when the statute

319. *See id.* at 10.

320. *See id.*; *see also* Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO (Jan. 25, 2010, 7:59 PM), http://www.politico.com/livepulse/0110/Nelson_National_exchange_a_dealbreaker.html (noting that Senator Ben Nelson stated he would oppose any health care reform bill with a national insurance exchange); Patrick O’Connor & Carrie Budoff Brown, *Nancy Pelosi’s Uphill Health Bill Battle*, POLITICO (Jan. 9, 2010, 9:43 AM), <http://www.politico.com/news/stories/0110/31294.html> (“Speaker Nancy Pelosi is telling her caucus not to believe stories that the House will simply roll over and accept the Senate’s hard-fought health bill.”).

321. Howe, *supra* note 31.

322. Hatch, *supra* note 250, at 10.

323. *Id.* *See, e.g., State Budget Shortfalls, SFY2013*, HENRY J. KAISER. FAM. FOUND., <http://kff.org/other/state-indicator/state-budget-shortfalls-sfy13> (last updated June 27, 2012) (discussing shortfalls or budget gaps in the state budget).

324. Respondents’ Brief, *supra* note 195, at 15, 37.

325. Oral Argument Transcript, *supra* note 188, at 16 (statement of Justice Kennedy).

326. *Id.* at 49–50 (statement of Donald B. Verrilli).

327. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also* *Ex Parte Randolph*, 20 F. Cas. 242, 254 (C.C.C.D. Va. 1833) (No. 11, 558).

is ambiguous.³²⁸ Therefore, even if this kind of coercion were to be deemed “too much,” it is *still* not an issue for the judiciary to decide.³²⁹

IV. IMPACT

While the actions of the Supreme Court might be viewed as progressive, it is certainly not in line with a democracy.³³⁰ Justice Scalia’s dissent pointed out how easily the Court will preserve, protect, and *rewrite* the law—a practice that some view elevates the nation to a federal technocracy.³³¹ The Court set a risky precedent by “adding” language to the ACA, and it is now effectively allowing lower courts to do the same by citing back to the reasoning in *King*. Additionally, an even scarier idea is that this case was not even about the ACA at all—rather, it was about what the states have a right to do, or not to do.³³²

King was decided by all nine of the Supreme Court Justices. Chief Justice Roberts delivered the opinion of the court, joined by Justices Anthony Kennedy, Ruth Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justice Scalia wrote a twenty-one page, scathing dissent, that was joined by Justices Clarence Thomas and Samuel Alito. While a decision in favor of the respondents would likely still have resulted even if the case had been decided today—without Justice Scalia on the bench—his biting dissent is properly credited with shedding so much public light on the issues in *King*.³³³

The public first read that this was a “big win” for the ACA, and rejoiced in the notion that the ACA was here to stay.³³⁴ But what really

328. See *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2011) (“[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity.”); see also Oral Argument Transcript, *supra* note 188, at 17.

329. Hatch, *supra* note 250, at 13.

330. French, *supra* note 304.

331. *Id.*

332. See Abbe R. Gluck, *King v. Burwell Isn’t About Obamacare*, POLITICO (Feb. 27, 2015), <http://www.politico.com/magazine/story/2015/02/king-v-burwell-states-rights-115550.html> (stating that \$25 billion in subsidies were at stake in *King*); see also Blumberg et al., *supra* note 284, at 1 (“[V]ictory for the plaintiff would . . . eliminate \$28.8 billion in tax credits and cost-sharing reductions in 2016 . . .”). See also Michael Rosman, *Symposium: King v. Burwell and the Plain Meaning Rule*, SCOTUSBLOG (Nov. 11, 2014 10:25 AM), <http://www.scotusblog.com/2014/11/symposium-king-v-burwell-and-the-plain-meaning-rule/> (“So *King v. Burwell* may not be quite as consequential for public policy as many would have us believe. It can, though, be quite important for the development of the law . . .”).

333. John Daniel Davidson, *The Media Doesn’t Want Americans to Know Anything About King v. Burwell*, FEDERALIST (June 18, 2015), <http://thefederalist.com/2015/06/18/the-media-doesnt-want-americans-to-know-anything-about-king-v-burwell/> (explaining how little Americans knew about *King v. Burwell* before the Supreme Court reached its decision).

334. Paige Lavender, *See How People Outside the Supreme Court Reacted to the King v.*

went viral was the (admittedly) outrageous language in Justice Scalia's dissent.³³⁵ It was language that could be understood, or identified with, on many socioeconomic levels—a law degree is not necessary to understand that there was outrage over some big issue.³³⁶ Justice Scalia's claim that “[w]ords no longer have meaning” is clear and powerful, and begged a closer examination of the process used by the majority to decide *King*.³³⁷ His dissent sparked conversation in social media regarding his unusual and sarcastic phrasing, and fostered discussion by many who may never have noticed the case's outcome, and meaning, to begin with. The reasoning and the holding of *King* continue to be revisited due, in large part, to the shocking and persuasive arguments made by the late Justice Scalia.

Justice Scalia was concerned that public respect for the courts might dissolve if judges are viewed as making (instead of interpreting) law, thereby impairing the Court's ability to protect individual rights.³³⁸ In *King*, the Supreme Court did exactly this: it rewrote a portion of the ACA by adding two words that drastically changed the scope of whose healthcare insurance could be subsidized.³³⁹

It is peculiar that, of the roughly two thousand pages of the ACA, the Supreme Court zoned in on the alleged ambiguity of just four words: established by the state.³⁴⁰ This action lends itself to be interpreted as a case about federalism and state power, *not* about the ACA.³⁴¹ States had the option to create Exchanges, and their resident purchasers would have subsequently received subsidized tax credits.³⁴² But the Court's distrust

Burwell *Decision*, HUFFINGTON POST (June 25, 2015 1:04 PM), http://www.huffingtonpost.com/2015/06/25/supreme-court-obamacare-photos_n_7663324.html (showing the “running of the interns” as the decision was released and celebrations ensued).

335. *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) (Scalia, J., dissenting). See also Tiffany Bates & Elizabeth Slattery, *Top 9 Quotes from Justice Scalia's Scathing Dissent in King v. Burwell*, THE DAILY SIGNAL (June 25, 2015), <http://dailysignal.com/2015/06/25/top-9-quotes-from-scalias-scathing-dissent-in-king-v-burwell/>.

336. *King*, 135 S. Ct. at 2487 (Scalia, J., dissenting).

337. *Id.*

338. See Popkin, *supra* note 59, at 1187 (highlighting Justice Scalia's commitment to a textualist approach to statutory interpretation).

339. *Id.*

340. See Gluck, *supra* note 332 (“The challengers have seized on four words in this 2,000-page law that, they contend, contain a dramatic consequence for the 34 states that have made this choice and allowed the federal government to step in: the loss of critical insurance subsidies that makes health insurance affordable and sustain the insurance markets under the law.”).

341. Federalism is about the role of states in the United States; and Congress enacted this legislation as a way to defer to states to decide what to do. *Id.*

342. See *id.* (“The ACA gives the states the opportunity to run these insurance markets, but provides a federal fallback.”).

of states' abilities, or even desires, to enact these Exchanges to provide their residents with federally subsidized healthcare is apparent.³⁴³

Congress enacted the ACA to give states the option to opt in or opt out of its nationwide healthcare program.³⁴⁴ This program has been compared to what was implemented through the Clean Air Act,³⁴⁵ which provides for a federal "fallback" if states do not cooperate with the way Congress initially foresaw (i.e., where the federal government would effectively "step in" in place of a state's inaction).³⁴⁶

Congress was explicit in its "take it or leave it" language in the ACA.³⁴⁷ It also appears that Congress anticipated a multitude of outcomes, and provided for these variations in the statutory language of the ACA.³⁴⁸ This is the most that society can expect from a legislative body: to prepare for as much as possible.³⁴⁹ It sends a conflicting message to the public when the judiciary claims that congressional "fallbacks" are insufficient.³⁵⁰

Continuing with the idea of a dangerous precedent, it is important to remember that it was the IRS that initially caused havoc in the interpretation of who is eligible to receive subsidies.³⁵¹ The IRS allowed subsidies to go to those who purchased health insurance through a federally established Exchange in the state in which he or she resided. It was this key IRS provision that ran counter to the very clear words in the ACA. The decision in *King* not only sets a precedent that language can, essentially, be added to legislation by the Supreme Court, but it also effectively condones a regulatory agency like the IRS to fix something that is not broken.³⁵²

343. *See id.* ("Just as the challengers urge an over-simplistic reading of the statutory text, [the court] have dramatically oversimplified how Congress approaches the states in the statute, masking the state-deferential way in which the ACA actually addresses the insurance [E]xchanges.").

344. *See id.* ("The issue in *King* is whether the ACA penalizes states that opt out of setting up their own health insurance [E]xchanges and, instead, let the federal government do it for them.").

345. Clean Air Act, 42 U.S.C. § 7401 et seq. (1970); *see also Summary of the Clean Air Act*, EPA, <http://www2.epa.gov/laws-regulations/summary-clean-air-act> (last visited Nov. 7, 2015) (summarizing the Clean Air Act).

346. Gluck, *supra* note 332.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *See* Busler, *supra* note 4 (describing how legal solutions are often found in precedent and analogy, but *King* implies that clear language can be ignored in the name of intent, making the legal language irrelevant to a court who has other goals in mind).

352. Logan Albright, *Top Five Misconceptions about King v. Burwell*, FREEDOMWORKS (June 22, 2015), <http://www.freedomworks.org/content/top-five-misconceptions-about-king-v-burwell>

Many Americans are also under the unfortunate misconception that these Exchanges, whether federally or state-established, are running smoothly and efficiently.³⁵³ *King* represents the *third* attack on the ACA, and it is impressive that it has withstood these challenges for this long.³⁵⁴ The ACA is not achieving all that was planned, though, and going with it are the online insurance Exchanges.³⁵⁵ Less people are enrolling, and HHS has reported an enrollment rate of half of what it expected.³⁵⁶ Insurance companies are not taking in enough revenue to afford all of the Americans who are now mandated by law to seek coverage.³⁵⁷

In light of a discussion on a dangerous precedent, *King* has already been used as authority to add language to legislation. The Second Circuit, in *Berman v. Neo@Ogilvy LLC*, faced its own interpretation issue.³⁵⁸ In *Berman*, the statutory provision contained the phrase “provide . . . to the Commission,” and there was a question of what this literally meant, and whether it applies to other provisions in the statute.³⁵⁹ The Second Circuit cited to *King* when it gave *Chevron* deference to a definition coined by the agency, the Securities and Exchange Commission (“SEC”).³⁶⁰ In *King*, however, the IRS lacked sufficient expertise to contradict the ACA provision, but the agency (the SEC) in *Berman* was

(“[This] case will decide whether it is okay for a regulatory agency—the IRS—to effectively rewrite a law based on its own interpretation of the language. This could set a very dangerous precedent for future cases, if the Court rules in favor of the administration.”).

353. See *id.* (“Many of ObamaCare’s defenders have assumed that if the Court rules to maintain the subsidies, everything will just go on as usual and there will be no problem.”).

354. *Id.*; see also Lyle Denniston, *Argument Preview: Now, the Third Leg of the Health-Care Stool*, SCOTUSBLOG (Mar. 1, 2015, 12:04 AM), <http://www.scotusblog.com/2015/03/argument-preview-now-the-third-leg-of-the-health-care-stool/> (“That third leg was so important to the entire enterprise, it seemed, that the Supreme Court agreed to rule on its legality even when there was then no split among lower courts on that question. One might suggest that at least some of the Justices were eager to confront the issue.”).

355. See Albright, *supra* note 352 (explaining the destruction of the Exchanges).

356. See Philip Klein, *Obamacare’s Big Question Mark*, WASH. EXAMINER (June 4, 2015, 1:03 PM), <http://www.washingtonexaminer.com/obamacares-big-question-mark/article/2565614> (“But as of now, HHS says that just 10.2 million signed up and paid premiums (which only met HHS’s downwardly revised target).”); see also Logan Albright, *Regardless of Court’s Decision, ObamaCare Is Falling Apart*, FREEDOMWORKS (June 8, 2015), <http://www.freedomworks.org/content/regardless-courts-decision-obamacare-falling-apart> (“The fact of the matter is that ObamaCare is so badly broken that no amount of subsidies will be able to keep it afloat forever.”).

357. Albright, *supra* note 352 (asserting that it is only a matter of time before the states cannot afford to continue on with the ACA).

358. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 150 (2d Cir. 2015).

359. *Id.*

360. *Id.* at 155.

of sufficient knowledge and skill to make the calls that it did.³⁶¹ The Second Circuit even recognized that it did not need to resolve any alleged ambiguity like *King*, but will resort to the interpretive rule adopted by the appropriate agency.³⁶² But the fact that the Court in *Berman* considered “provide . . . to the Commission” as an ambiguity is a problem.

Additionally, in September 2015, the Third Circuit stated that the starting point for all statutory interpretation and construction is the text of the statute.³⁶³ While this is true, and agreed upon generally, the court then went on to use *King* as an example of how to proceed when the text is ambiguous.³⁶⁴

Law has a fluid nature of justice. It instills faith in rising lawyers that they will, one day, have the tools to argue fairly and intelligently for the sake of justice. The area of law is grey—constantly having to adapt to advancing technologies and changing circumstances. But there is a great risk in losing faith in the very texts that are intended to guide citizens' conduct, especially if these guidelines can be changed and interpreted as drastically as they were in *King*. Upholding the ACA is a fantastic outcome for the sake of the millions of American citizens that purchased affordable health insurance through a federally established Exchange, but the manner in which this was decided is inherently problematic. If “established by the State” can have another meaning besides the one so clearly written, this sets a dangerous precedent for textual interpretation and application in the future.³⁶⁵

CONCLUSION

To echo the above, *King* had an arguably good outcome, but it came at a cost. The typical separation of powers approach was substituted for an illustration of the supreme power of the highest court.

It is difficult to see, now, how exactly *King* will affect textual commitment, or the lack thereof, moving forward. It is clear, though, that the majority of the Supreme Court Justices are in favor of keeping the ACA, and it is unfortunate that they went about keeping it through displaying such a grave disregard for plain textual interpretation. Despite the dramatizations in Justice Scalia's dissent, his points were well-founded and served to unveil that the judiciary has no problem exercising its broad powers. We now have cases that are calling such clear language

361. *Id.*

362. *Id.*

363. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 611 (3rd Cir. 2015).

364. *Id.* at 618.

365. *Id.*

like “established by the State” an ambiguity, which is a significant problem in legislative interpretation that will be faced by future courts. The Supreme Court rewrote the law to conform to the Executive’s vision of healthcare, and it effectively swept the rug out from under the powers inherent in Congress. This decision showed just how powerful the Supreme Court can be—and currently is—and how consistent judicial interpretation can take a backseat when coined “important policy issues,” like healthcare, are on the line.