CHAPTER 1

THE CONGRESS

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Some courses will discuss **King v. Burwell**, the 2015 challenge to the Affordable Care Act, at the end of Chapter 1 as an introduction to basic statutory interpretation. Other courses may read *King* later, at the end of Chapter 6, as the most recent culmination of the Court's interpretive evolution over the course of the Roberts Court. For purposes of the topics covered in Chapter 1, *King* is most significant for what it tells us about the "new normal" in *congressional lawmaking*. Whatever one thinks of the *King* opinion, it is extremely significant both for the fact that the *King* court, for the first time in recent memory, at least tried to take into account the circumstances of a statute's legislative process in interpreting it but, at the same time, the Court failed to fully understand the modern legislative context in our highly charged, politically polarized environment. We explain some of the process in a note at the end of this chapter on the Legislative Process and the ACA, and offer more on these points in Chapter 6.

DAVID KING ET AL. V. SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

United States Supreme Court, 2015.
___ U.S. ___, 135 S.Ct. 2480, 192 L.Ed.2d 483.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market. First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.

In addition to those reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not.

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.

[I.A] The Patient Protection and Affordable Care Act, 124 Stat. 119, grew out of a long history of failed health insurance reform. [We have omitted several detailed pages of discussion about policy history and the Massachusetts model on which the ACA was based.] 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 [which requires insurers to accept all customers and charge them the essentially the same rates.] Second, the Act generally requires individuals to maintain health insurance coverage. * * * In Congress's view, that coverage requirement was "essential to creating effective health insurance markets." * * * 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. * * *

These three reforms are closely intertwined. As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. § 18091(2)(I). And the 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. * * *

[I.C] In addition to those three reforms, the Act requires the creation of an "Exchange" in each State where people can shop for insurance, usually online. 42 U.S.C. § 18031(b)(1). An Exchange may be created in one of two ways. First, the Act provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." *Ibid.* Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services "shall . . . establish and operate such Exchange within the State." § 18041(c)(1). 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. The Act initially provides that tax credits "shall be allowed" for any "applicable taxpayer." 26 U.S.C. § 36B(a). The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act [hereinafter 42 U.S.C. § 18031]." 26 U.S.C. §§ 36B(b)–(c) (emphasis added).

The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges. 77

Fed. Reg. 30378 (2012). * * * At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34States have elected to have HHS do so. * * *

[II] When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*, 467 U.S. 837. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. *Id.*, at 842–843. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Ibid.*

This is one of those cases. 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. *Utility Air Regulatory Group v. EPA*, 573 U.S. ___, ___ (2014) (slip op., at 19) (quoting *Brown & Williamson*, 529 U.S., at 160). It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. See *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006). This is not a case for the IRS.

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. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S., at 132.

[II.A] We begin with the text of Section 36B. * * * Section 18031 provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." § 18031(b)(1). Although phrased as a requirement, the Act gives the States "flexibility" by allowing them to "elect" whether they want to establish an Exchange. § 18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary "shall . . . establish and operate *such Exchange* within the State." § 18041(c)(1) (emphasis added).

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").

* * * At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines "State" to mean "each of the 50 States and the District of Columbia"—a definition that does not include the Federal Government. 42 U.S.C. § 18024(d). But when read in context, "with a view to [its] place in the overall statutory scheme," the meaning of the phrase "established by the State" is not so clear. *Brown & Williamson*, 529 U.S., at 133 (internal quotation marks omitted).

After telling each State to establish an Exchange, Section 18031 provides that all Exchanges "shall make available qualified health plans to qualified individuals." 42 U.S.C. § 18031(d)(2)(A). Section 18032 then defines the term "qualified individual" in part as an individual who "resides in the State that established the Exchange." § 18032(f)(1)(A). 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. But the Act clearly contemplates that there will be qualified individuals on *every* Exchange. * * * This problem arises repeatedly throughout the Act. See, *e.g.*, § 18031(b)(2)(allowing a State to create "one Exchange . . . for providing . . . services to both qualified individuals and qualified small employers," rather than creating separate Exchanges for those two groups).

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. The Act defines the term "Exchange" to mean "an American Health Benefit Exchange established under section 18031." § 300gg–91(d)(21). If we import that definition into Section 18041, the Act tells the Secretary to "establish and operate such 'American Health Benefit Exchange established under section 18031.'" That suggests that Section 18041 authorizes the Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an "Exchange" at all. See *Halbig*, 758 F. 3d, at 399–400 (acknowledging that the Secretary establishes Federal Exchanges under Section 18031).

This interpretation of "under [42 U.S.C. § 18031]" fits best with the statutory context. * * * If Federal Exchanges were not established under Section 18031, therefore, literally none of the Act's requirements would apply to them. Finally, the Act repeatedly uses the phrase "established under [42 U.S.C. § 18031]" in situations where it would make no sense to distinguish between State and Federal Exchanges. See, *e.g.*, 26 U.S.C. § 125(f)(3)(A) (2012 ed., Supp. I) ("The term 'qualified benefit' shall not include any qualified health plan . . . offered through an Exchange

established under [42 U.S.C. § 18031]"). . . . 26 U.S.C. § 6055(b)(1)(B)(iii)(I) (2012 ed.) (requiring insurers to report whether each insurance plan they provided "is a qualified health plan offered through an Exchange" established by the State). * * *

The upshot of all this is that the phrase "an Exchange established by the State under [42 U.S.C. § 18031]" is properly viewed as ambiguous. * * * The conclusion that Section 36B is ambiguous is further supported by several provisions that assume tax credits will be available on both State and Federal Exchanges. For example, the Act requires all Exchanges to create outreach programs that must "distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B." § 18031(i)(3)(B). * * * And the Act requires all Exchanges to report to the Treasury Secretary information about each health plan they sell.

* * * Petitioners and the dissent respond that the words "established by the State" would be unnecessary if Congress meant to extend tax credits to both State and Federal Exchanges. Brief for Petitioners 20. But "our preference for avoiding surplusage constructions is not absolute." *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004); see also *Marx v. General Revenue Corp.*, 568 U.S. ___, ___ (2013) (slip op., at 13) ("The canon against surplusage is not an absolute rule"). And specifically with respect to this Act, rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute.

The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) 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." Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 L. Lib. J. 131, 163 (2013). And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. *Id.*, at 159–167. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. Cf. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L.Rev. 527, 545 (1947) (describing a cartoon "in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.' ").

Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group*, 573 U.S., at ___ (slip op., at 15) (internal

quotation marks omitted). After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase "an Exchange established by the State under [Section 18031]" is unambiguous.

[II.B] Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." * * * Here, the statutory scheme compels us 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. See *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").[3] * * *

It is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, ___ (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (slip op., at 60) ("Without the federal subsidies . . . the exchange would not operate as Congress intended and may not operate at all."). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well.

* * * Section 18041 refutes the argument that Congress believed it was offering the States a deal they would not refuse—it expressly addressed what would happen if a State *did* refuse the deal.

[II.C] Finally, the structure of Section 36B itself suggests that tax credits are not limited to State Exchanges. Section 36B(a) initially provides that tax credits "shall be allowed" for any "applicable taxpayer." Section 36B(c)(1) then defines an "applicable taxpayer" as someone who (among other things) has a household income between 100 percent and 400 percent of the federal poverty line. Together, these two provisions appear to make anyone in the specified income range eligible to receive a tax credit. * * *

We have held that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). But in

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[3] The dissent notes that several other provisions in the Act use the phrase "established by the State," and argues that our holding applies to each of those provisions. But "the presumption of consistent usage readily yields to context," and a statutory term may mean different things in different places. *Utility Air Regulatory Group v. EPA*, 573 U.S. ___, ___ (2014) (slip op., at 15) (internal quotation marks omitted). That is particularly true when, as here, "the Act is far from a *chef d'oeuvre* of legislative draftsmanship." *Ibid.*

petitioners' view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. 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.

[II.D] Petitioners' arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase "an Exchange established by the State under [42 U.S.C. § 18031]" may seem plain "when viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole." *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 343 (1994). In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase. * * *

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—"to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

* * * Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges. "[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." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) (internal quotation marks omitted). Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

* * * I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.

* * * Reading the rest of the Act also confirms that, as relevant here, there are *only* two ways to set up an Exchange in a State: establishment by a State and establishment by the Secretary. §§ 18031(b), 18041(c). 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. That is a stark violation of the elementary principle that requires an interpreter "to give effect, if possible, to every clause and word of a statute." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). In weighing this argument, it is well to remember the difference between giving a term a meaning that duplicates another part of the law, and giving a term no meaning at all. Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void). Lawmakers do not, however, tend to use terms that "have no operation at all." *Marbury v. Madison*, 1 Cranch 137, 174 (1803). So while the rule against treating a term as a redundancy is far from categorical, the rule against treating it as a nullity is as close to absolute as interpretive principles get. The Court's reading does not merely give "by the State" a duplicative effect; it causes the phrase to have no effect whatever.

Making matters worse, the reader of the whole Act will come across a number of provisions beyond § 36B that refer to the establishment of Exchanges by States. Adopting the Court's interpretation means nullifying the term "by the State" not just once, but again and again throughout the Act. * * *

Equating establishment "by the State" with establishment by the Federal Government makes nonsense of other parts of the Act. The Act requires States to ensure (on pain of losing Medicaid funding) that any "Exchange established by the State" uses a "secure electronic inter face" to determine an individual's eligibility for various benefits (including tax credits). 42 U.S.C. § 1396w–3(b)(1)(D). How could a State control the type of electronic interface used by a federal Exchange? The Act allows a State to control contracting decisions made by "an Exchange established by the State." § 18031(f)(3). Why would a State get to control the contracting decisions of a federal Exchange? The Act also provides "Assistance to States to establish American Health Benefit Exchanges" and directs the Secretary to renew this funding "if the State . . . is making progress . . . toward . . . establishing an Exchange." § 18031(a). Does a State that refuses to set up an Exchange still receive this funding, on the premise that Exchanges

established by the Federal Government are really established by States? It is presumably in order to avoid these questions that the Court concludes that federal Exchanges count as state Exchanges only "for purposes of the tax credits." *Ante,* at 13. (Contrivance, thy name is an opinion on the Affordable Care Act!)

It is probably piling on to add that the Congress that wrote the Affordable Care Act knew how to equate two different types of Exchanges when it wanted to do so. The Act includes a clause providing that "[a] *territory* that . . . establishes . . . an Exchange . . . shall be treated as a State" for certain purposes. § 18043(a) (emphasis added). Tellingly, it does not include a comparable clause providing that the *Secretary* shall be treated as a State for purposes of § 36B when *she* establishes an Exchange.

* * * The Court persists that these provisions "would make little sense" if no tax credits were available on federal Exchanges. Even if that observation were true, it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined up perfectly with each other. This Court "does not revise legislation . . . just because the text as written creates an apparent anomaly." *Michigan v. Bay Mills Indian Community*, 572 U.S. ___, ___ (2014) (slip op., at 10). At any rate, the provisions cited by the Court are not particularly unusual. Each requires an Exchange to perform a standardized series of tasks, some aspects of which relate in some way to tax credits. It is entirely natural for slight mismatches to occur when, as here, lawmakers draft "a single statutory provision" to cover "different kinds" of situations.

* * * Least convincing of all, however, is the Court's attempt to uncover support for its interpretation in "the structure of Section 36B itself." The Court finds it strange that Congress limited the tax credit to state Exchanges in the formula for calculating the *amount* of the credit, rather than in the provision defining the range of taxpayers *eligible* for the credit. Had the Court bothered to look at the rest of the Tax Code, it would have seen that the structure it finds strange is in fact quite common. Consider, for example, the many provisions that initially make taxpayers of all incomes eligible for a tax credit, only to provide later that the amount of the credit is zero if the taxpayer's income exceeds a specified threshold. See, *e.g.,* 26 U.S.C. § 24 (child tax credit); § 32 (earned-income tax credit); § 36 (first-time-homebuyer tax credit). * * * For what it is worth, lawmakers usually draft tax-credit provisions the way they do—*i.e.*, the way they drafted § 36B—because the mechanics of the credit require it. Many Americans move to new States in the middle of the year. Mentioning state Exchanges in the definition of "coverage month"—rather than (as the Court proposes) in the provisions concerning taxpayers' eligibility for the credit—accounts for taxpayers who live in a State with a state Exchange for a part of the year, but a State with a federal Exchange for the rest of the year.

[III] For its next defense of the indefensible, the Court turns to the Affordable Care Act's design and purposes. * * *

This reasoning suffers from no shortage of flaws. To begin with, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that § 36B is unclear? To mention just the highlights, the Court's interpretation clashes with a statutory definition, renders words inoperative in at least seven separate provisions of the Act, overlooks the contrast between provisions that say "Exchange" and those that say "Exchange established by the State," gives the same phrase one meaning for purposes of tax credits but an entirely different meaning for other purposes, and (let us not forget) contradicts the ordinary meaning of the words Congress used. On the other side of the ledger, the Court has come up with nothing more than a general provision that turns out to be controlled by a specific one, a handful of clauses that are consistent with either understanding of establishment by the State, and a resemblance between the tax-credit provision and the rest of the Tax Code. If that is all it takes to make something ambiguous, everything is ambiguous. * * *

[IV] Perhaps sensing the dismal failure of its efforts to show that "established by the State" means "established by the State or the Federal Government," the Court tries to palm off the pertinent statutory phrase as "inartful drafting." This Court, however, has no free-floating power "to rescue Congress from its drafting errors." *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004). Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the law, as it is where the Affordable Care Act "creates three separate Section 1563s." But the Court does not pretend that there is any such indication of a drafting error on the face of § 36B. The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges*, 4 Wheat., at 203. But § 36B does not come remotely close to satisfying that demanding standard. 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. Let us not forget that the term "Exchange established by the State" appears twice in § 36B and five more times in other parts of the Act that mention tax credits. What are the odds, do you think, that the same slip of the pen occurred in seven separate places? No provision of the Act—none at all—contradicts the limitation of tax credits to state Exchanges. And as I have already explained, uses the term "Exchange established by the

State" beyond the context of tax credits look anything but accidental. If there was a mistake here, context suggests it was a substantive mistake in designing this part of the law, not a technical mistake in transcribing it.

[V] The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution. Art. I, § 1. * * * We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that "[o]ur task is to apply the text, not to improve upon it." * * *

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." First of all, what makes the Court so sure that Congress "meant" tax credits to be available everywhere? Our only evidence of what Congress meant comes from the terms of the law, and those terms show beyond all question that tax credits are available only on state Exchanges. More importantly, the Court forgets that ours is a government of laws and not of men. * * *

Even less defensible, if possible, is the Court's claim that its interpretive approach is justified because this Act "does not reflect the type of care and deliberation that one might expect of such significant legislation." It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly. It is up to Congress to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.

Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges. If Congress values above everything else the Act's applicability across the country, it could make tax credits available in every Exchange. * * * And if Congress thinks that the present design of the Act works well enough, it could do nothing.

* * * Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft-Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed ("penalty" means tax, "further

[Medicaid] payments to the State" means only incremental Medicaid payments to the State, "established by the State "means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.

NOTES ON KING

1. *What Does* King *Tell Us About the Status of the Textualism vs. Purposivism Debate?* Much of this coursebook covers the interpretive battles that have raged over the past several decades between the Court's textualists, led by Justice Scalia, and the Court's purposivists, led by Justices Breyer and Stevens. Whether you read *King* in Chapter 1 or in Chapter 6, it should be evident that the Chief Justice seems to be trying to walk the line between the two camps, perhaps even charting a third way. What does he mean when he says "A fair reading of legislation demands a fair understanding of the legislative plan"? Why does he not use the word "purpose"? From where does the Chief Justice derive his understanding of the ACA's "plan" (*hint:* not from legislative history!). For those of you who have already read further into this book, you will also find *King* oddly free of most of the canons of statutory interpretation that make up the doctrines of the course. What to make of that?

One of us has suggested that *King* marks something of a middle way: a return to the Legal-Process-era sensibility (which not coincidentally had its heyday during the Chief's own years at Harvard Law). Congress tries to be rational and the Court is a competent partner able to understanding Congress's complex work. "Plans" are the work of rational people. "Plans" are meant to be understood by others. This is a 180-degree turn from textualism's view of Congress as impenetrable. But textualism and Justice Scalia's enormous influence on the Court's interpretive approach also is evident in *King*. The Chief Justice's opinion focuses exclusively on the ACA's enacted text (including its *enacted* statements of purpose) and structure. The difference is that, unlike some other Roberts Court statutory interpretation opinions, the *King* opinion takes a macro, not micro, view of the text. It is big-picture textualism and includes a functional understanding of how the different parts of a mega-statute work together. For more, see Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 Harv. L. Rev. 62 (2015).

Is *King* a watershed moment? Might it mark a new direction in the Court's interpretive jurisprudence? It is too soon to tell. Some more recent cases also included in this Supplement—including *Yates* and *Lockhart*, both in Chapter 5—cast some doubt on this proposition.

2. *The Importance of the Whole Act: The Textual Argument for the Court's Result.* Query whether a textualist, uninterested in the notion of a "plan," could have resolved the case quite easily based on the whole text of the statute, in the government's favor. Political opponents of the health care law

relied on a single word in a 900-plus-page statute, isolating that word, and proclaiming that its meaning was plain, and plainly contrary to the Act's survival. The opponents' chosen word "state" appears in a tax provision providing the law's tax credits to health care exchanges "established by the State," when in fact many exchanges had been established by the federal government because states had failed to create such exchanges. The Court acknowledged the "strong" textualist claim of the law's opponents.

Opponents of the health care law were trying to persuade the Supreme Court that the health care tax credits only applied to state, not federal, exchanges, but their method creates that interpretation. *The isolation of the text,* its displacement from the rest of the statute, implicates exclusivity—that "only" states may create exchanges. Neo-Gricean linguistic theory supports this claim. When one says "some of the students did well," the implicature is that not "all" the students did well, the background unstated contrast set being "some" as eliminating the possibility of "all." In *King v. Burwell,* the unexpressed contrast set is "state versus federal." The phrase "established by the State," taken in isolation, rejects the federal exchange reading by implication from the choice of text. Implications are cheap, they are silent, inviting the interpreter to add meaning, to read "established by the State," as "established *only* by the State." On neo-Gricean theory, see John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 Va. L. Rev. 1063 (2015).

This might be particularly unwise in complex statutes where one is trying to make sense of the *relationship between several provisions in a law*. In isolating a few words from the tax section ("established by the State"), the interpreter risks changing the meaning of the whole text, as we have seen above (to mean "*only* by the state"). Moreover, the very fact of isolation may defeat relationships created in other parts of the statute. The federal exchange provision directed that the federal exchange *substituted* for the state exchange "within the State" when the state failed to create its own exchange. By focusing on the tax provision's language, without regard to the exchange provisions, the "substitute relationship" text—that providing that the federal government may substitute for a state—is eliminated. See generally Victoria F. Nourse, *Misreading Law, Misreading Democracy*, ch. 4 (Harvard Press 2016).

3. *"Superstatute" Theory in* King. Chapter 9 introduces the concept of "superstatutes"—major legislative enactments that introduce new normative and institutional frameworks that fundamentally change whole fields of law. Eskridge and Ferejohn have argued that superstatutes deserve special interpretive treatment. See William N. Eskridge, Jr. and John Ferejohn, *Super-Statutes*, 50 Duke L. Rev. 1215 (2001). Look at the end of Justice Scalia's dissent in *King* in light of superstatute theory. Did the ACA get special treatment because the Court saw it as a superstatute? Should it have?

NOTES ON THE LEGISLATIVE PROCESS AND THE ACA

Here is the Supreme Court's account of how Congress drafted and passed the Affordable Care Act (punctuated by a cartoon!):

> The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) 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." Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 L. Lib. J. 131, 163 (2013). And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. Id., at 159–167. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. *Cf.* Frankfurter, Opinion of the Court Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 545 (1947) (describing a cartoon "in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.' ")

As noted, *King* is significant for being a rare modern instance in which the Court at least attempts to consider a statute's legislative-process realities in its interpretation but, even so, the Court's account has some important inaccuracies: (1) the Affordable Care Act (ACA) was not passed in the dark without debate—there were two years of debate; (2) the ACA did not bypass all filibuster or amendment—there were multiple filibusters, just not one for the reconciliation bill; and (3) it is not true that "much" of the bill was passed by reconciliation; the reconciliation bill, which was a separate bill, affected only a small minority of provisions, almost all of which were irrelevant to the question in *King*. Regardless, the opinion implies there was something illegitimate about the ACA's process, but every President since Reagan has used reconciliation for major tax cuts, health reform and similar matters; there is nothing new or sneaky about it.[1]

The Supreme Court's account in *King* begins to, but does not fully acknowledge, the modern congressional lawmaking context. The Court incorrectly implies that the ACA's process was uniquely unorthodox. One must throw away the *Schoolhouse Rock!* view of legislative procedure and replace it with the "new normal": Lengthy, omnibus bills are inevitable; committee avoidance for highly salient issues is the norm; filibusters are launched multiple times on a single bill; and, finally, as we see in *King*, questions about reconciliation and fast track rules muddy the waters. The Gluck-Bressman survey of congressional drafters, teeing off Barbara Sinclair's pioneering work

[1] Megan Suzanne Lynch, Cong. Research Serv., R40480, *Budget Reconciliation Measures Enacted into Law: 1980–2010* (Sept. 2, 2010) (listing 20 major uses of reconciliation).

in this area, documents both the rise of these deviations from the "textbook process" and also the fact that such deviations are universally recognized as the new normal in Congress.[2] *See also* Gluck, O'Connell and Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 Colum. L. Rev. 1789 (2015) (detailing the wide array of unorthodox procedures, their links across legislation and administrative law, and their implications for doctrine). This landscape of unorthodox lawmaking plays a part of the story of how the Affordable Care Act was passed.

1. *"Three Separate Section 1563s" or Sloppy Drafting.* In *King*, the Chief Justice begins by noting that the ACA's "inartful drafting" was reflected in "3 section 1563s." The fact that the bill might have had 3 section 1563s most likely has nothing to do with a failure of deliberation, but of drafting by Senate and House professional scriveners. Senators do not number the bill; the legislative counsels' offices dot the "i"s and cross the "t"s. They have no substantive authority to "inartfully" craft policy.[3] See Gluck, *Imperfect Statutes, Imperfect Courts*, 129 Harv. L. Rev. 62 (2015) (arguing that real issue in the case was not that the statute was not deliberated but that it was not properly cleaned up).

The new orthodoxy means that "normal" bills will be complex and, as complexity increases, so will errors. The new filibuster-normal means that bills will be longer. Getting sixty votes is likely to increase the chances for subject matter different from the main bill (germaneness only kicks in once cloture is voted). If the bill is headed toward cloture, those with unrelated bills are encouraged to add their own bills to avoid filibuster on their favored project, further lengthening the overall, now omnibus, bill. As political controversy increases, filibusters increase, warring parties may choose not to share the latest bill drafts with expert drafters, and this in turn increases the likelihood of scrivener's errors.[4]

2. *Multiple Filibusters.* The *King* opinion states that the ACA "bypassed" the traditional legislative process, including deliberation, filibuster and amendment. This is wrong. The bill went through at least five congressional committees and was filibustered several times and debated for hundreds of pages in the Congressional Record. The Hein company has published a legislative history in 9 volumes, each volume about 2 and a half inches thick.[5] Senators from both sides of the aisle agreed that there had been lengthy committee deliberations over two years. Indeed, after the Senate committees failed to reach agreement, a bipartisan Senate Gang of Six met for months to hammer out a solution, but they failed to reach consensus.[6] When

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[2] Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation and the Canons—Parts I and II, 65 & 66 Stan. Law Rev. 901 & 726 (2013 & 2014).

[3] Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 588–89 (2002).

[4] *Id.*

[5] Health Care Reform: A Legislative History of the Patient Protection and Affordable Care Act, Public Law No. 111–148 (2010) (Bernard D. Reams & Michael P. Forrest eds, 2011).

[6] 155 Cong. Rec. 28,701 (statement of Sen. Snowe) (Nov. 20, 2009); *id.* at 28,811 (statement of Sen. Grassley) (Nov. 30, 2009); *id.* at 28,809 (statement of Sen. Baucus) (Nov. 30, 2009).

the bill was brought to the floor, there was a lengthy, intense and contentious—even dramatic—Senate debate.[7]

Using the method of reverse engineering,[8] we focus on the final, crucial, filibuster phase. The Senate dominates this discussion because, under the "new normal," the difficulty of reaching 60 votes in the Senate makes it the more powerful chamber. Large numerical majorities in the House can effectuate nothing if the Senate cannot reach 60 votes. And if obtaining 60 votes proves extremely difficult, the House is left with a *fait accompli*, whether to accept or reject the bill as written in the Senate where the 60th vote for cloture might not remain available to agree to possible House changes. Conferences have dried up because the Senate's procedures allow for the filibustering of the three motions necessary to convene a conference, disagreeing to any House amendment, agreeing to a request for conference, and the naming of conferees.

According to Professor Nourse's research, and review by the Senate Parliamentarian at the time, on November 19, 2009, the Senate Majority Leader made a motion to proceed to H.R. 3590, and facing unified minority opposition to the motion, filed a cloture motion on it. On November 21, cloture was invoked on that motion to proceed, and the bill was only then before the Senate for debate and amendment. At that time, the Majority Leader proposed the Senate leadership amendment to H.R. 3590, merging the bills from two Senate committees. Opponents objected to the motion to proceed.[9] By November 21, cloture had been invoked on the motion to proceed on that bill. The Majority Leader revealed that a letter had been circulated among opposition Senators instructing them in how "to bring the Senate to a screeching halt," including the forced reading of amendments, the manipulation of points of order, and how to stop a conference.[10] Over a period of two weeks, motions were made to recommit the bill to committee (a motion that kills the bill); opposing Senators demanded the reading of lengthy amendments, and filibustered a defense appropriations bill set to expire in days. The Majority Leader held the Senate in after midnight to vote on the defense bill, with the Minority Leader stating "We are, of course, prepared to talk around the clock."[11]

On Friday, December 19, the Senate adjourned until 6:45 am on Saturday morning to vote on the defense bill. That day, the Majority Leader introduced and posted on the internet the final "managers' amendment" to the health care bill. Almost every major bill has a managers' amendment (typically, managers'

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[7] *See id.* at 32,906 (Dec. 21, 2009) (Senate meeting at midnight).

[8] Chapter 6 of this coursebook.

[9] 155 Cong. Rec. 28,350 (Nov. 19, 2009) (unanimous consent agreement governing debate on the motion to proceed).

[10] *Id.* at 29,295–96 (Dec. 3, 2009) (reprinting letter).

[11] *Id.* at 32, 617 (statement of Sen. McConnell) (Dec. 17, 2009); *see id.* at 31,974 (statement of Sen. Sanders on withdrawing his amendment because opponents were requiring that it be read) (Dec. 16, 2009); *id.* at 31,979 (vote on motion to commit); *id.* at 32,661–32,664 (debate about the defense bill) (Dec. 16, 2009); *id.* at 32,664 (Dec. 16, 2009) (cloture vote on defense bill).

agreements involve technical corrections to the bill). When the managers' amendment was brought up, the Minority Leader objected to a motion to dispense with the reading of the amendment. The clerks began to read each line of the managers' amendment, and did so for 7 to 8 hours.[12] That day, the Majority Leader then sent three cloture motions to the desk, one for the managers' amendment to the Reid substitute, one for the Reid substitute, and one for the amended bill, H.R. 3590. The cloture process, however, takes time: upon a single objection from a single Senator, hours and hours of Senate time may be required. On Sunday, December 20, debate continued until 11:30 pm. On Monday, the Senate reconvened at 12:01 am in the middle of a snowstorm. Cloture was invoked on the managers' amendment. But the bill would take four more days to pass, several votes, and another cloture motion, as Senators made points of order under the Senate Rules, the Budget Act, and the Constitution, each requiring a vote.[13]

On December 23, the Majority Leader filed a cloture motion on H.R. 3590 to defeat a filibuster on the underlying bill, H.R. 3590. At 6:45 am the next morning, the Senate reconvened on Christmas Eve, December 24, 2009, with the Vice President of the United States in the chair as presiding officer, for the final vote in favor of the ACA, H.R. 3590, the bill now known as the Patient Protection and Affordable Care Act.[14] On March 21, the House concurred in the Senate's amendment to H.R. 3590, thereby passing that bill, and it was enacted into law when the President signed it on March 23, 2010, becoming Public Law 111–148. The Reconciliation bill, as discussed below, was passed one week later.

3. *"Behind Closed Doors" and Leadership Drafting.* The *King* Court's version of the ACA debate states that the bill was drafted "behind closed doors," in some uniquely secret way. As we have seen, the implication of this claim—that there was no debate on the bill—is untrue. It is true that the bill's opponents repeated the "closed door" claim over and over again.[15] From November 17 until December 24, Senators used this phrase over one hundred times.[16]

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[12] *Id.* at 32,739 (Dec. 19, 2009) (statement of Sen. McConnell) ("I know it has been a challenging experience to have to read for the last 7 or 8 hours.").

[13] *Id.* at 32,905 (Senate recesses at 11:30 pm) (Dec. 20, 2009); *id.* at 32,906 (Senate called to session at 12:01 am) (Dec. 21, 2009); *id.* at 32,912 (cloture vote) (Dec. 21, 2009); *id.* at 32,906 (snowstorm) (statement of Sen. Alexander) (Dec. 21, 2009); *id.* at 33,077 (point of order under the Budget Act) (Dec. 23, 2009); *id.* at 33, 084 (point of order under the Senate rules) (Dec. 23, 2009); *id.* at 33,100 (point of order based on constitutional liberty) (Dec. 23, 2009); *id.* at 33,105 (point of order under the Tenth Amendment) (Dec. 23, 2009); *id.* at 33,109 (cloture vote) (Dec. 23, 2009).

[14] *Id.* at 33,109 (cloture vote) (Dec. 23, 2009); *id.* at 33,168 (6:45 am start of day; Vice President presiding) (Dec. 24, 2009); id. at 33,169–70 (final vote) (Dec. 24, 2009).

[15] *See, e.g.*, *id.* at 28,286 (Sen. McConnell, twice); *id.* at 28,291–92 (Sen. Barrasso, twice); *id.* at 28,305 (Sen. Hutchison); *id.* at 28,345–46 (Sen. Grassley, three times); *id.* at 28,357 (Sen. Thune); *id.* at 28,602 (Sen. Hatch, twice) (all Nov. 19, 2009).

[16] This research is based on a search for the specific phrase "closed doors" in each of the four parts of Volume 155 of the Congressional Record in the Hein on Line database, parts 21 through 24, covering the debate from Nov. 17, 2009 until Dec. 24, 2009. One must search each of the 4 parts under the "full volume" tab, then open the page results to find the number of times the word is actually used. As noted above, in some cases, a single Senator used these particular words more

What were these Senators talking about? They were talking about the "new normal"—leadership drafting. There is no secret about how this works, because similar practices have occurred in Congress for the past five decades. When consensus fails on a particularly controversial matter, the Majority Leader and the committee chairs sit down and work to create a bill that will garner 60 votes. They work from bills that have passed and bills that have emerged from committee. This leadership group cannot create an entirely new bill out of whole cloth. Why? Any resulting bill will lose the votes of those who had worked on the bill (in this case some for months and years) and so, as a practical matter, would not yield 60 votes. Precedent, both substantive and procedural, is important in the Senate: after staking out a claim on a particular issue, Senators will be unlikely to change their votes.

This process is no secret to the members of the Senate and has been no secret since the passage of the Civil Rights Act of 1964. Bypassing committee consideration is often a mark of too much, not too little, debate. The ACA did not bypass committee in any event; its text comes from the merged drafts of the work of two Senate committees, Finance and Health, Education, Labor and Pensions (HELP). But there are many examples of legislation that bypassed committee procedure because it was too difficult to reach consensus within the committee process. Take the federal death penalty or the Brady gun-check bill—neither of these bills were drafted in committee. Why? Such controversial measures would have died in committee, not by virtue of the Chairman's ire, but because of endless committee debate.

4. *The Role of Reconciliation.* Finally, let us move to the crux of the argument that Congress did something sneaky or unconventional in passing the law through reconciliation. As a technical matter, this claim confuses two different laws. The ACA itself, Public Law 111–148, became law on March 23, 2010. Although the Supreme Court says "much" of the law was passed by reconciliation, in fact, Public Law 111–148 was not passed by reconciliation. Seven days later, the President signed a different, much smaller law, running about 55 pages of bill text (44 pages of which dealt with health care[17]), the Health Care and Education *Reconciliation* Act, Public Law 111–152. As its title reveals, it was that law, not the ACA, that was enacted using the *reconciliation* process under the Budget Act of 1974, procedures permitting passage by a simple majority vote in the Senate. It may well be that House members viewed the Reconciliation bill as central to their support for the ACA, because it amended the ACA in discrete places, but they had to trust that the Senate would pass the same bill.

At the outset, lest anyone think that there was something odd about using reconciliation in considering the second law, one must note this simple fact: almost *every major tax or health or budget bill with substantial budgetary effects that has passed the Senate, over the past thirty-four years, has gone*

than once in a speech. The total number of instances was over 140 based on a count performed on June 23, 2016. If one adds "closed door," the singular, the number increases.

[17] As reprinted in the Congressional Record, the text of the Reconciliation bill in its entirety was 156 Cong. Rec. 4445–4460, or 15 pages.

through reconciliation. Reconciliation is the process authorized by section 310 of the Budget Act. That law requires that Congress, by concurrent resolution, direct certain committees to report revenue and/or spending legislation to help achieve budgetary levels set out in that concurrent resolution. When it passes legislation, these budget targets must be "reconciled."[18]

Republican and Democratic congressional majorities alike have used the reconciliation process to help Presidents of their respective parties achieve their policy objectives. President Reagan was the first President to reap the benefits of the procedure, as it was used seven times during his time in office to pursue, among other things, deficit reduction and tax reform. Presidents Carter, George H.W. Bush, and Clinton all benefited from the use of reconciliation. President George W. Bush signed 4 reconciliation bills, including one enacting a ten year tax cut agenda. Indeed, where budget matters are concerned, it may well be that without reconciliation the government could not operate, given the kind of filibuster possibilities available in the Senate.[19]

More importantly, nothing in *King v. Burwell* depended upon the reconciliation law. The reconciliation measure did not change the central language at issue in *King v. Burwell.* Those provisions had been in the bill at least since November 19, 2009—requiring state exchanges and providing for a federal exchange in the event that the states did not create an exchange—and were in the ACA the President signed on March 23, 2010, Public Law 111–148. The Reconciliation bill, Public Law 111–152, signed by the President on March 30, 2010 did not affect that language. Nor did it change the language providing the taxpayer subsidy, only the formula for eligibility. In other words, even if the much smaller reconciliation bill had significantly changed the 906 page ACA,[20] reconciliation was irrelevant to the issue in *King.* That language was law in Public Law 111–148 days before the Senate passed the reconciliation bill.[21] (In fact, the only provision of the reconciliation bill that had any relevance to *King* at all was a provision requiring federal exchanges to report the tax subsidies they distributed to the government—a provision that clearly operated in the Government's favor because it made clear that the expectation was that the federal exchanges would indeed have subsidies, as the Court noted.)

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[18] Lynch, *supra* note 1.

[19] *Id.* at 5–12.

[20] Throughout the health care debate, there were questions about the actual length of the bill. The Public Law 111–148 is 906 pages. As printed in the Congressional Record, when passed by the House, the ACA was 242 pages (smaller type). See 156 Cong. Rec. 4202 to 4444 (Mar. 21, 2010). Bill text uses bigger font and fewer lines per page; hence the fact that the *bill* as opposed to the *law* was over 2000 pages. The bill corresponding to Public Law 111–148 is about 2,400 pages on Congress.gov if one looks for H.R.3590 in the 111th Congress.

[21] Compare ACA, Public Law No. 111–148 sec. 1311(b), 1321(c), 124 Stat. 119, 173, 186 (2010), codified at 42 U.S.C. sec. 18031(b)(1), 18041(c)(1) with 155 Cong. Rec. 28,397 (sec. 1311(b)(1) ("Each State shall, . . . establish an American Health Benefit Exchange . . . "); *id.* at 28,400 (sec. 1321(c)(1)("Failure to Establish Exchange . . . (1) . . . the Secretary shall . . . establish and operate such Exchange within the State . . . ") (Nov. 19, 2009).

Of course, it would be disingenuous to believe that there was no reason for linking ACA passage to the later Reconciliation bill. House members wanted to amend the Senate amendment to the underlying bill, H.R. 3590. In the Rules committee, which sets the House agenda for floor debate, opponents sought mightily to offer amendments.[22] If the House wanted to amend the Senate amendment substantively, it would face an inevitable flurry of Senate filibusters to a conference, either against a Senate motion to agree to the house amendments, or on the three separate motions necessary to go to a conference. Then-Minority Leader McConnell was clear on the last day of Senate debate on December 24, 2009: he vowed to "stop this bill from becoming law."[23] Soon, the Democrats, who had exactly 60 votes for the ACA, would no longer have the votes to break a filibuster at that point: Senator Ted Kennedy died in November 2009 and was replaced two months later with Republican Scott Brown. Thus, the House was going to have to pass the Senate bill or there would be no ACA. The only way around that, for budgetary matters, was to introduce and pass a House reconciliation bill containing only provisions having a budgetary effect, and that bill would have to pass the Senate. Reconciliation was already authorized by the budget resolution, but to reassure members, the House leadership linked the votes in a single Rule.[24] First the House would have to pass the ACA, then if the ACA was passed, the House would vote on a much smaller reconciliation measure which made various fiscal amendments. That reconciliation bill would then have to go to the Senate. The House leadership had to convince its members to trust that the Senate would pass that reconciliation bill without significant amendment.[25]

This explains why Public Law 111–148 was signed into law on March 23, and the Reconciliation law, Public Law 111–152, was signed into law by the President seven days later. There was no guarantee, as leaders of the House explained, that the House would in fact pass the ACA, or if it did, that the Reconciliation bill would pass and then survive the Senate. In that sense, although the agenda was set, and some members may have voted in the hope that both would pass, there was no logical necessity that reconciliation was necessary to pass the ACA.[26] The ACA had already been signed into law when the Reconciliation bill passed the Senate.

Some have speculated that the use of reconciliation was motivated solely by the loss of a 60th Democratic vote in the Senate. The story may be more complex. There is some evidence that the leadership of the House and Senate agreed that there would be no conference regardless given the difficulties of passage, and the ease of blocking a conference committee. Like the Civil Rights Act of 1964, the House appeared to be faced with a *fait accompli*. Hopes for any

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[22] See H.R. Rep. 111–448 at 2–21 (Mar. 21, 2010) (showing results of 64 committee votes).

[23] 155 Cong. Rec. 33,168 (Dec. 24, 2009).

[24] H. Con. Res. 1203 (Mar. 20, 2010).

[25] See 156 Cong. Rec. 4105 (statement of Rep. Issa) (Mar. 21, 2010).

[26] 156 Cong. Rec. 4105 (statement of Rep. Dreier) ("We have heard all about this reconciliation package. . . . But is it not true that this rule guarantees that the only thing that will be law is the Senate bill. . . ?") (Mar. 21, 2010).

kind of an unofficial conference or compromise House-Senate bill were scotched when Scott Brown took office in January 2010, with the Senate Democrats losing their 60th vote. At that point, the only option for House input was to focus on budget-related changes using reconciliation.

3. RETHINKING CONGRESS'S RULES

Pages 125–126: Delete the final paragraph on page 125 and the first paragraph on page 126.