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THE LIMITS OF *READING LAW* IN THE AFFORDABLE CARE ACT CASES

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Introduction

One of the most highly lauded legacies of Justice Scalia's decades-long tenure on the Supreme Court was his leadership of a movement to tether statutory interpretation more closely to statutory text. His dissents in the Affordable Care Act cases—*National Federation of Independent Business v. Sebelius*[1] and *King v. Burwell*[2]—demonstrate both the nature and the limits of his success in that effort.

These were two legal challenges, one constitutional and the other statutory, that threatened to bring down President Obama's signature legislative achievement, the Patient Protection and Affordable Care Act. Both times the Court swerved away from a direct collision. And both times Justice Scalia accused the Court majority—led by Chief Justice Roberts—of twisting the statutory text.[3]

Justice Scalia was right about the twistifications. But that does not mean he was right to condemn them both. Sometimes the governing law of interpretation calls on judges to adopt an interpretation other than the one that most straightforwardly follows from the application of standard interpretive conventions to statutory text.[4]

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* Professor of Law, University of Richmond School of Law. I thank the editors of the *Notre Dame Law Review* and participants in this symposium on Justice Scalia's legacy in the federal courts.

1 132 S. Ct. 2566 (2012). The dissent in this case was a joint dissent authored at least in part by Justice Scalia. *Id.* at 2642 (Scalia, J., Kennedy, J., Thomas, J., & Alito, J., dissenting). From the language of the statutory interpretation section, it appears that Justice Scalia was at least a contributing author, and perhaps the sole author, of that section.

2 135 S. Ct. 2480 (2015).

3 *Id.* at 2496–507 (Scalia, J., dissenting); *NFIB*, 132 S. Ct. at 2642–77 (Scalia, J., dissenting).

4 The phrase "law of interpretation" has recently been in wider circulation as the title of an insightful article about the law of interpretation. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079 (2017). By using the phrase, I do not mean to adopt all of the particulars of Baude's and Sachs's outlook. I do mean,

NFIB v. Sebelius was just such a case. The Supreme Court had to choose between two interpretations of a provision regarding mandatory insurance coverage.[5] The most straightforward interpretation—as a requirement to have the right kind of insurance, backed up by a financial penalty for noncompliance—would have resulted in a holding of unconstitutionality.[6] A textually inferior interpretation—as a tax on not having the requisite insurance—would have avoided such a holding.[7] Under the Court's precedent governing that kind of choice, the Court was required to choose the constitutionally salvific interpretation—even over the textually superior one—as long as it was "reasonable" and "fairly possible" to read it that way.[8] And it was.

In *King v. Burwell*, by contrast, the law of interpretation did not authorize the Justices to opt for the textually inferior interpretation. Chief Justice Roberts found ambiguity in unambiguous statutory text and then resolved that ambiguity by reference to an interpretation that would make the "legislative plan" work.[9]

Because Chief Justice Roberts avoided explicit reference to legislative purpose and legislative history—two hallmarks of the "bad old days" before the rise of Scalian textualism[10]—he was constrained to generate ambiguity through textual analysis. And it is precisely because of this constraint that careful opinion readers can see where his reasoning comes up short. This is a testimony to Justice Scalia's success in leading the Court away from a more purposive approach toward a more textualist approach. But Justice Scalia and his textualism were still losers in *King*. Scalia's need to dissent in that case shows not only the limits of textualism's ascendancy, but also the need for a sounder jurisprudential footing for textualist interpretive practice.

The interpretive intentionalism elaborated by Richard Ekins in recent years would have provided a jurisprudential foundation that enabled engagement of Roberts on his own terms.[11] A comparison of Ekins's account of legislative intent with Roberts's conception of the legislative plan enables one to understand why the plan legislated by Congress—not the altered plan

though, to affiliate my usage with Baude's and Sachs's insofar as they use "law of interpretation" to describe a body of customary general law.

5 *NFIB*, 132 S. Ct. at 2593–98.

6 *Id.* at 2593.

7 *Id.* at 2593–98. To come within Congress's authority, it was necessary for the Supreme Court not only to treat the mandate as a tax, but also to conclude that it was not a direct tax requiring apportionment by population. *Id.* at 2598–99.

8 *Id.* at 2593–97.

9 King v. Burwell, 135 S. Ct. 2480, 2489–96 (2015).

10 *See* Paul D. Clement, Remarks at Proceedings of the Bar and Officers of the Supreme Court of the United States (Nov. 4, 2016), https://www.supremecourt.gov/pdf/ScaliaBarMeetingRemarks_v6.pdf (describing an interaction at oral argument regarding the "bad old days" of implying causes of action as having ended when Justice Scalia joined the bench).

11 *See generally* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012).

advanced by the Obama Administration and accepted by the Court majority—should have been treated as authoritative in *King*.[12]

A jurisprudentially grounded theory of interpretation—whether textualist, intentionalist, pragmatist, or what have you—matters in a peculiarly important way in actual adjudication. It does not legally control, at least not directly. The law of interpretation does. But the law of interpretation is largely unwritten and largely uncodified. It yields no uniquely correct directive in some cases. And there are more of these "hard cases" the further one goes into the courts and up the appellate hierarchy.

In these hard cases, a jurisprudentially grounded theory of interpretation orients attention and choice. The orientation it provides is just that. It is about the object of interpretation, more about interpretive outlook than algorithm. And its implementation is never pure, in the sense of being unconstrained by prior authoritative settlements and institutional considerations. But by providing an account of the central case or ideal type of legislation and interpretation and adjudication, jurisprudentially grounded theory not only orients interpreters in particular cases. It also explains how changes in the law of interpretation may be justified and provides a basis for evaluating changes over time.

This Essay's exposition proceeds in three Parts. The first presents *NFIB v. Sebelius* as an illustration of the law of interpretation—as distinct from any particular theory of interpretation—at work. The decisive judicial activity was "interpretation" in only a loose, nonfocal use of the term. The second Part examines *King v. Burwell*. The dueling opinions in this case show how the success of Scalian textualism in practice has left it theoretically impoverished in answering appeals to the legislative plan on their own terms. The third Part introduces the intentionalism elaborated by Richard Ekins as an improved jurisprudential foundation for an approach to statutory interpretation in theory that dovetails significantly with Justice Scalia's textualism in practice. I conclude with the contention that Justice Scalia's leadership moved the law of interpretation closer to the central case of statutory interpretation appropriate for our constitutional order. He thereby lawfully improved that law over the course of his judicial tenure even though—over time—this involved transforming rather than simply transmitting the law of interpretation that had been handed down to him.

I. The Law of Interpretation at Work in *NFIB v. Sebelius*

The Supreme Court's legal assessment of 26 U.S.C. § 5000A in *NFIB v. Sebelius* shows how specific guidance supplied by the law of interpretation can override the orientation supplied by a general theory of statutory interpretation. The statutory text in question—§ 5000A—was the home for the part of the Affordable Care Act commonly known as the individual mandate.[13] This was a mechanism for inducing insurance coverage. Just how to understand

12 *See infra* Part III.

13 *NFIB*, 132 S. Ct. at 2580.

or describe that mechanism is the interpretive issue that divided the Court. Was the "individual mandate" a requirement enforced by a penalty for noncompliance, or was it instead a tax on going without the required coverage?

The driver of this interpretive inquiry was a prior constitutional analysis. If § 5000A was a requirement enforced via a financial penalty for noncompliance, it would be unconstitutional because it would be outside of Congress's regulatory authority under the Commerce and Necessary and Proper Clauses.[14] But if § 5000A was only a tax on going without the required insurance, it would be within Congress's tax-laying authority (as long as it was not a direct tax).[15]

Chief Justice Roberts, writing for a majority of the Court, went with the "just a tax" interpretation.[16] This was not "[t]he most straightforward reading," Chief Justice Roberts openly acknowledged, but it was a "reasonable one."[17] And that was enough.

Everyone knew there was a thumb on the interpretive scale; both the majority and dissenting opinions acknowledged as much. The requirement-enforced-by-penalty interpretation would result in constitutional invalidation, while the tax interpretation could bring the provision within Congress's taxing power (as long as it was not a direct tax). This state of affairs triggered the principle that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[18] The interpretive question before the Court, then, was not whether the saving construction "is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one."[19] For its part, the dissent agreed with the "fairly possible" standard as well.[20] The differences came in application.

Chief Justice Roberts's investigation of whether it was "fairly possible" to treat § 5000A as a tax drew a "functional approach" from Supreme Court precedent policing the tax/penalty line.[21] This approach looks at how the provision functions rather than how Congress labeled it. Roberts identified a number of features that made it "fairly possible" to view § 5000A as a tax: the amount due was close to, and sometimes lower than, the price of insurance (in contrast with a prohibitively high penalty masquerading as a "tax"); there was no scienter requirement (in contrast with many requirements backed up by penalties); and the IRS was prohibited from using certain enforcement tools, including criminal prosecutions (in contrast with other requirements labeled as "taxes" but held to be penalties).[22] Roberts also noted that the

14 *Id.* at 2584–93.

15 *Id.* at 2593–98.

16 The provision's constitutionality then depended on the Court's further determination that the tax imposed was not a "direct tax" that would have had to have been apportioned a certain way. *Id.* at 2598.

17 *Id.* at 2593–94.

18 *Id.* at 2594 (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

19 *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

20 *See id.* at 2651 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting).

21 *Id.* at 2595 (majority opinion).

22 *Id.* at 2595–96.

Court had previously upheld many taxes that were also designed to influence conduct.[23]

The joint dissent had a number of strong counterarguments. Perhaps the strongest was that § 5000A had separate exemptions from the insurance requirement and from the financial penalty, suggesting that the two had distinct legal effect (rather than being combined to operate as a tax on not having compliant insurance).[24] Another strong argument was that the Court had never previously taken something denominated a "penalty" and treated it as a tax; the functional approach from the Court's precedent had only been used to take something denominated a "tax" and treat it as a disguised penalty.[25]

The joint dissent's problem was that, once there was a foothold in precedent for a functional approach to decide how to characterize something as either a tax or a penalty, the "fairly possible" standard was not a difficult one to meet. Indeed, the tax-like features of § 5000A had led some observers (including me), and some lower court judges (including Judge Kavanaugh of the D.C. Circuit, for example), to believe that the Court might not have been permitted to get to the merits because the challenge was blocked by the Tax Anti-Injunction Act.[26]

The resolution of the tax/penalty interpretive question in *NFIB* shows the limits of any general theory of statutory interpretation in contrast with specific controlling requirements from the law of interpretation. The decisive principle of interpretation in *NFIB* was the very low "fairly possible" threshold that the "just a tax" interpretation had to cross in order to become the interpretation the Justices were required to adopt. That principle is an implementing rule for a constitutional-doubt canon that Justice Scalia and his coauthor, Bryan Garner, endorse in *Reading Law*.[27] But it is not really a rule for "reading law" as much as it is for determining the legal effect of statutory language through application of a legal principle.[28]

In his earlier book, *A Matter of Interpretation*, Justice Scalia criticized "substantive" canons like the constitutional-doubt canon as placing "a thumb of

23 *Id.* at 2596.

24 *Id.* at 2653 (Scalia, J., Kennedy, J., Thomas, J., & Alito, J., dissenting).

25 *Id.*

26 *See, e.g.*, Seven-Sky v. Holder, 661 F.3d 1, 22 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); Kevin C. Walsh, *The Anti-Injunction Act, Congressional Inactivity, and Pre-Enforcement Challenges to § 5000A of the Tax Code*, 46 U. RICH. L. REV. 823, 824 (2012). In *NFIB*, the Supreme Court held that the Tax Anti-Injunction Act did not pose a barrier because, in contrast with the functional approach for the constitutional avoidance analysis, the "penalty" label chosen by Congress controlled that statutory analysis. 132 S. Ct. at 2582–84.

27 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–51 (2012).

28 *Id.* at 249 (contending that a "more plausible basis for the rule" than as an assessment of probable meaning "is that it represents judicial policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly, or perhaps a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch").

indeterminate weight" on the interpretive scale.[29] He had a point; the canon does place a thumb on the scale. "Indeterminate weight" is too strong, though. The Court's precedents setting the "every reasonable construction" and "fairly possible" standards provided some guidance regarding the weight in *NFIB*. The case was not one in which the Justices first had to decide whether the statute was ambiguous, which is a matter about which reasonable judges can often disagree.[30] Rather, the Justices were told to see if the saving construction was "reasonable" and "fairly possible."[31] And given all the tax-like characteristics of the required payment, including how it was assessed and collected, that standard was pretty easily met. If anything, the Supreme Court's determination that the challenge in *NFIB* could go forward despite the Anti-Injunction Act is more open to criticism than the majority's determination that it was "fairly possible" to treat § 5000A as imposing a tax. The constitutional-doubt canon does not derive from a theory of statutory interpretation, but instead from an account of constitutional adjudication or of constitutional implementation. It is a contingent feature of the constitutional order in the United States, not a necessary feature of every system in which judges assess the constitutionality of statutes. Whatever objections may fairly be made to the constitutional-doubt canon as a matter of policy or of separation of powers law, though, it is reasonably well-established in the law of interpretation in the United States at present.

As the law of interpretation develops over time, it may even turn out that *NFIB* becomes authority for a refinement of the constitutional-doubt canon. In *NFIB v. Sebelius*, the canon lowered the cost of developing constitutional doctrine, and this may be one permissible consideration in evaluating the constitutional-doubt canon's fit with the rest of the system. One feature of the constitutional analysis that none of the opinions mentions, though, is the way in which the constitutional line transgressed by the mandate-as-requirement was a function of new doctrinal line-drawing with respect to the Commerce Clause and the Necessary and Proper Clause. Perhaps the judicial thumb should be even heavier than usual when the constitutional problem to be avoided results from a doctrinal line newly drawn in the very same case in which the constitutional-doubt canon is being applied. Or perhaps not. The salient point for present purposes is that the right interpretive rules are a function not simply of interpretive theory but of law, and the ingredients include separation of powers considerations specific to the judicial function in addition to more standard considerations related to legislation and interpretation.

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29 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28 (Amy Gutmann ed., 1997).

30 *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134–44 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

31 *NFIB*, 132 S. Ct. at 2594 (first quoting Crowell v. Benson, 285 U.S. 22, 62 (1932); and then quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

II. A TEST OF TEXTUALISM IN *KING V. BURWELL*

In contrast with *NFIB v. Sebelius*, *King v. Burwell* is a case in which the law of interpretation did not authorize abandonment of the most straightforward reading of the statutory text. The back-and-forth between Chief Justice Roberts and Justice Scalia in this case shows the substantial advances made by textualism as well as its vulnerability from its lack of conceptual resources to confront arguments from legislative intent on their own turf.

The interpretive question in *King* was whether an insurance exchange established by the federal government as a fallback or stand-in for a state-established insurance exchange counted as an "Exchange established by the State under [42 U.S.C. § 18031]."[32] If such federally-created exchanges did not count as "established by the State" within the meaning of this provision, participants in such exchanges would not be eligible to receive tax credits to subsidize the purchase of health insurance coverage.[33]

It would be more tedious than useful to summarize here the many arguments on both sides of the interpretive dispute. Even a capsule description of the basic orientation of the opinions risks misleading. But it is still possible to get a basic idea of the differing approaches of Chief Justice Roberts and Justice Scalia by focusing on a few considerations. First, Justice Scalia thought that the statutory language "established by the State" was unambiguous.[34] Chief Justice Roberts, by contrast, found the provision ambiguous based on a variety of considerations arising out of relationships of this text with other pieces of statutory text.[35] Second, Roberts resolved the ambiguity in favor of an understanding that included federally-established exchanges.[36] Although Scalia thought there was no ambiguity to resolve, he advanced arguments to show why Congress might reasonably have limited the tax credits only to state exchanges.[37] Third, Chief Justice Roberts did not defer to the IRS or any other agency regarding the availability of tax credits.[38] Applying what has been dubbed the Major Questions Doctrine, Chief Justice Roberts determined that Congress did not intend the availability or unavailability of tax credits on federally-established exchanges to depend on agency interpretation.[39]

In my view, Justice Scalia was right. There was no ambiguity to resolve. It is a testimony to the strides made by Scalia's brand of textualism that Chief Justice Roberts invoked neither legislative history nor "purpose" when wrestling with the seemingly unambiguous statutory text. But Roberts was still able to bring functional considerations and practical consequences into his

32 King v. Burwell, 135 S. Ct. 2480, 2487 (2015) (emphasis omitted) (quoting 26 U.S.C. § 36B(b)(2)(A) (2012)).

33 *Id.*

34 *Id.* at 2497 (Scalia, J., dissenting).

35 *Id.* at 2492 (majority opinion).

36 *Id.* at 2496.

37 *Id.* at 2504 (Scalia, J., dissenting).

38 *Id.* at 2489 (majority opinion).

39 *Id.*

framing of the issues and subsequent analysis. The organizing idea of his opinion for the Court is that "[a] fair reading of legislation demands a fair understanding of the legislative plan."[40] And while it appears as if the statutory analysis begins with the text, the analysis-opening statement that "[w]e begin with the text" does not show up until page nine of a twenty-one page slip opinion.[41] The preceding portion's background framing of the facts and the law nestles the textual analysis within a broader understanding of the "series of interlocking reforms designed to expand coverage in the individual health insurance market."[42]

Chief Justice Roberts never quite says it, but the sense that seemingly pervades his opinion for the Court is that the legislators who voted for the Affordable Care Act simply could not have wanted participants in the federally-established exchanges to be ineligible for tax credits. He comes close at times, but never speaks in terms of subjective intent. In generating the purported ambiguity of "established by the State," for example, Roberts uses statutory text to suggest that "the Act indicates that State and Federal Exchanges should be the same," which they obviously would not be if tax credits "were available only on State Exchanges."[43] And in resolving the purported ambiguity in favor of the more permissive reading allowing tax credits on federally-established exchanges, Roberts invokes precedent stating that "[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."[44]

Justice Scalia's dissent includes a portion that persuasively answers the claim that allowing tax credits only on exchanges established by the State is incompatible with the rest of the law.[45] "No law pursues just one purpose at all costs," Scalia wrote, and "the Affordable Care Act displays a congressional preference for state participation in the establishment of Exchanges."[46] Although the Court's precedent does authorize judicial correction of drafting errors, that is not a free-floating power. It kicks in only "when it is patently obvious to a reasonable reader that a drafting mistake has occurred."[47] That standard was nowhere close to being met. Nor was the statutory language eligible for an absurdity-based escape from the obvious import of the enacted text. That path is open to the interpreter only when the "absurd result" is "a consequence 'so monstrous, that all mankind would,

40 *Id.* at 2496.

41 King v. Burwell, No. 14–114, slip op. at 9 (U.S. June 25, 2015).

42 *King*, 135 S. Ct. at 2485.

43 *Id.* at 2491.

44 *Id.* at 2492 (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

45 *Id.* at 2502–05.

46 *Id.* at 2504.

47 *Id.* at 2504–05.

without hesitation, unite in rejecting the application.'"[48] Because it was "entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges"—this demanding standard for departure from the text was not satisfied.[49]

In contrast with the applicable law of interpretation in *NFIB v. Sebelius*, which required a thumb on the scale in favor of the saving construction from the outset, the law of interpretation in *King v. Burwell* required judges to keep their hands off unless the purported drafting mistake or absurdity rose to a very high level of unreasonableness. Like the constitutional-doubt canon, these rules authorize departure from the most straightforward reading of the statutory text. But their thresholds for departure are very high, and should not have been crossed in *King*.

The idea that the statute was ambiguous in a manner fit for reasonable resolution by an agency required something of a lower threshold showing. But Chief Justice Roberts was right that the availability of tax credits on federally-established exchanges was not something that Congress left for agency resolution. He was wrong that the statute actually authorized such credits.

The strength of Justice Scalia's textualism can be seen in Judge Griffith's opinion for the D.C. Circuit in resolving a challenge identical to the one later resolved by the Supreme Court in *King*.[50] Judge Griffith refused to ignore the statutory text "in favor of assumptions about the risks that Congress would or would not tolerate—assumptions doubtlessly influenced by hindsight."[51] This move would in effect substitute the court's judgment for Congress's, but "[t]he role of th[e] [c]ourt is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'"[52]

This D.C. Circuit decision contrasts with the Fourth Circuit decision reviewed by the Supreme Court in *King*.[53] In that opinion, Judge Gregory acknowledged the strength of the textual argument, but concluded that the statute was ambiguous and resolved the case based on agency deference under *Chevron*.[54] Judge Griffith, by contrast, invoked the Court's recent statement that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[55] He then added: "And neither may we."[56]

It is sound practice for readers of judicial opinions to get their guard up whenever a court invokes *Marbury v. Madison* to say it is just doing its duty to

48 *Id.* at 2505 (quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203 (1819)).

49 *Id.*

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

51 *Id.* at 411.

52 *Id.* (second, third, and fourth alterations in original) (quoting Burrage v. United States, 134 S. Ct. 881, 892 (2014)).

53 King v. Burwell, 759 F.3d 358 (4th Cir. 2014).

54 *Id.* at 368–72.

55 *Halbig*, 758 F.3d at 411 (quoting Util. Air Reg. Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2446 (2014)).

56 *Id.*

say what the law is. The invocation is sometimes an indication that something else is going on. And so it was when Chief Justice Roberts quoted *Marbury* in *King*.[57] That quotation came shortly after his quotation of language from an earlier case cautioning that "[r]eliance on context and structure in statutory interpretation is a 'subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.'"[58] This quotation was cleaned up from its actual context. In it, Justice Frankfurter warned against a different practice, one that accurately describes the interpretive approach of the *King* majority, "wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute."[59]

The Justices in the *King* majority would not have engaged in that enterprise if they had shared Justice Scalia's confidence in relying on the simple words "established by the State."[60] In the end, though, there was nothing "subtle" about the Court's functional rewriting of the statute. It really seems best understood as a purposivist enterprise shaped by the conviction that the statutory language "established by the State" was an oversight that should have been cleaned up by Congress. In effect, the Court decided to correct a legislative mistake even while disclaiming that it was doing just that.

III. AN INTENTIONALIST IMPROVEMENT ON TEXTUALIST PRACTICE IN *KING*

Justice Scalia's dissent in *King* would have been stronger if he had been able to confront Chief Justice Roberts's "legislative plan" appeal head-on by reference to the actual legislative intent that should count for statutory interpretation.[61] But Scalian textualism has no place for legislative intent, which it treats as a dangerous fiction.

Textualist critics of legislative intent are right inasmuch as many who use the concept get it wrong in a particular way—by viewing it as a kind of aggregate, as the sum of or overlapping content of individual mental states of legislators voting in favor of enacting a proposal. To understand legislative intent as an aggregate is not the only way to do it, though; nor is it the best. And the idea of legislative intent is valuable because it helps explain why the act of legislating is reasonable. Rather than discarding the concept entirely, a better response is to replace a defective concept of legislative intent with a correct one.

The scholarship of Richard Ekins helps show the way. In his book *The Nature of Legislative Intent*, Ekins sets forth an approach to statutory interpretation that one reviewer has dubbed "Intentionalism Justice Scalia Could

57 King v. Burwell, 135 S. Ct. 2480, 2496 (2015).

58 *Id.* at 2495–96 (quoting Palmer v. Massachusetts, 308 U.S. 79, 83 (1939)).

59 *Palmer*, 308 U.S. at 83.

60 *King*, 135 S. Ct. at 2496–97 (Scalia, J., Thomas, J., & Alito, J., dissenting).

61 *See id.* at 2496 (majority opinion).

Love."[62] It is a promising place to start in putting textualist practice on a firmer jurisprudential footing.

According to Ekins, legislative intent is an actual group intent to take a particular action that changes the content of the law in response to reasons for action. The legislature exercises legislative authority through the making and promulgation of a choice, and interpreters should "aim to understand the reasoned choice that finds expression in [the legislature's] intended meaning."[63] That "intended meaning" is how the legislature "formulates the set of propositions it intends to introduce into the law."[64]

The search for this intended meaning does not call for investigation into the legislators' internal mental states, although the intention that counts is subjective. The intent that Ekins identifies in a particular legislative act is a function of the standing intent of the legislative body to enact into law the propositions of law that follow from the enactment of legislative proposals for action voted on by the legislative body. It is the "fully actual and subjective"[65] intention common to *all* legislators, and not just those in the majority, to act jointly on the "open proposal" before the legislature as the legislators vote on it.[66] At the same time that Ekins insists on the legislators' actual subjective intention regarding the enactment (or not) of the open proposal at the time of voting, he acknowledges a sense in which the content of the legislative proposal at the time of voting can "be said to be objective."[67] "What is open to them," Ekins writes, "may, at the risk of confusion, be said to be objective, because the content of the proposal turns on how it is reasonably to be understood."[68]

By supplying more precise content to the idea of legislative intent that should be operative in statutory interpretation, Ekins's intentionalism speaks some of the same language as Chief Justice Roberts in his invocation of the "legislative plan."[69] At the same time, Ekins's use of "legislative plan" is more precisely specified than Roberts's. Ekins aims the interpreter toward the full content of the complex means-end relationships within the actual proposal enacted by the legislators' votes.

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62 *See* Hillel Y. Levin, *Intentionalism Justice Scalia Could Love*, 30 CONST. COMMENT. 89 (2015). One reason for this designation is that Ekins argues against judicial reliance on legislative history. *Id.* at 96–97. More generally, Ekins's identification of an objective understanding of the content of the legislative proposal open for adoption by the legislature coheres with textualists' insistence on the reasonable import of statutory text at the time of adoption, considered apart from the subjective perceptions of individual legislators. As we shall see, however, there are aspects of Ekins's intentionalism that Justice Scalia would not love. *See id.* at 97 (discussing Ekins's limited allowance of "equitable interpretation").

63 EKINS, *supra* note 11, at 247.

64 *Id.* at 246.

65 *Id.* at 231.

66 *Id.* at 271.

67 *Id.* at 231.

68 *Id.*

69 *Id.* at 275.

As applied to *King*, it may seem strange that a form of interpretive intentionalism could ground a conclusion that the relevant intended meaning regarding the availability of tax credits was something that not a single legislator may have subjectively intended at the time of voting. But that may show only that legislators were not doing their job that well. By voting for or against the Affordable Care Act, legislators in the House of Representatives and in the Senate signified by their "yes" or "no" votes an actual intention that the proposal open for adoption be enacted (or not) into law. Legislators voting "yes" may also have had the subjective intention that there be additional clean-up of the proposal in a conference committee that never ended up meeting.[70] But they nonetheless all voted for the plan as set forth in the actual proposal that they voted to enact into law.

Because the object of interpretation for the intentionalism developed by Ekins is "the reasoned choice that finds expression in [the legislature's] intended meaning," the interpreter should be open to the possibility that the two diverge.[71] That is, "in some exceptional, *unforeseen* cases the reasoned choice on which the legislature acts [may come] apart from the legislature's intended meaning."[72] Ekins argues that, in such circumstances, "the reasoned choice is authoritative and should be taken to qualify or extend the law otherwise made out by the intended meaning."[73] The interpreter "should *recognize* exceptions or extensions to the statute's intended meaning in such cases," Ekins contends, because "what the legislature acts to make law is the set of propositions articulated in its intended meaning, taking that meaning as qualified by reference to its reasoned choice, a qualification which is apparent in exceptional cases."[74]

Now we have come to an aspect of Ekins's intentionalism that Justice Scalia would emphatically not love: openness to "equitable interpretation."[75] Depending on how narrowly or broadly one defines the set of circumstances in which recourse can be had to the reasoned choice behind or underneath the intended meaning of the legislature's words, the availability of "equitable interpretation" could end up giving away much of the interpretive formalism that Scalian textualism provides.

The most important qualification that Ekins places on the availability of equitable interpretation is that it be limited to "exceptional, *unforeseen* cases."[76] Only in such cases, he contends, "is it possible for intended mean-

70 *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 78 (2015) (explaining that senators may have thought that their vote was a preliminary one that would move the legislation to the House and to a two-chamber conference committee before a final vote by each chamber, but this did not happen because an intervening election reduced the Senate Democrats' super-majority and the House had to accept the Senate version as final).

71 EKINS, *supra* note 11, at 247.

72 *Id.* at 275.

73 *Id.*

74 *Id.*

75 *Id.* at 275–84.

76 *Id.* at 275.

ing and reasoned choice to diverge."[77] It is reasonable, I contend, for the interpreter to limit "exceptional, unforeseen cases" to those that result from "[t]he legislative predicament" of needing "to make law despite limited foresight."[78] This qualification would not include mistakes that result from simple inattention to the details of a complex legislative proposal. As Ekins argues, "it is reasonable to presume that enactments are drafted (and considered, adopted) with the specific intention that the legislature's intent in enacting them be sufficiently intelligible to any competent lawyer who reads them, without reference to the deliberative record."[79] After all, "the intention of the assembly is constituted by the proposal for action that is open to the legislators and on which they jointly act."[80]

This formulation makes clear why "equitable interpretation" would have been inappropriate in *King v. Burwell*. The idea that the actual plan voted on by Congress is one that included tax credits for participants in federally-established exchanges was not a straightforwardly apparent interpretation of the proposal open for consideration. Legislators may have subjectively intended to make credits available on federal and state exchanges alike—if they even subjectively thought about it then at all. But any "competent lawyer" who examined the open proposal that Congress adopted as the Affordable Care Act would have recognized that the plan expressed in the legislation would need to be changed to accomplish that objective.[81]

The mismatch between legislators' subjective beliefs about the availability of tax credits and what the legislation actually provided—if mismatch there was—stemmed from inattention rather than lack of foresight. The need for a rule about the availability of tax credits was both anticipated by Congress and addressed in the legislation. Individual legislators may not have attended to this detail themselves, and none of them may have anticipated the extent to which states would be unwilling to cooperate by setting up exchanges. But the legal content of the proposal they enacted into law does not depend on the extent of individual inattention or poor predictions about the extent to which fallback federal exchanges provided by the legislation would be needed. To paraphrase Chief Justice Roberts, a fair reading of legislation requires a fair reading of the *legislated* plan. The Court should have acted as if Congress had fully accomplished the legislative deed.

Conclusion

Whether Chief Justice Roberts or Justice Scalia had more legally sound opinions in each of the Affordable Care Act cases are ultimately questions of law, not theory. The same is true for the question whether any of the Justices are right or wrong in any of the cases they decide. And judges should not

77 *Id.* at 276.
78 *Id.*
79 *Id.* at 270.
80 *Id.* at 269–70.
81 *Id.* at 270.

confuse theories of statutory interpretation with the law of statutory interpretation. The proper legal disposition in *NFIB v. Sebelius*, for example, turned not on textualism but on the "reasonable" and "fairly possible" standards supplied by precedent implementing the constitutional-doubt canon.[82]

While the difference between law and theory of law is real, the two are not always separate. The law of interpretation is largely uncodified and has pieces that can point in different directions in cases. Chief Justice Roberts and Justice Scalia both accurately quoted precedents on interpretation in their opinions in *King v. Burwell*, for instance. In doing so, they were not only marshaling authorities for resolving that particular case, but also drawing on and building up more general approaches to statutory interpretation. This is how the law of interpretation develops.

Over the course of his judicial career, Justice Scalia transformed the way that lawyers and judges approach the enterprise of statutory interpretation.[83] Given this remarkable success, is there not something odd about harping here on dissents from two "big cases" in recent years and advancing a form of intentionalism as better grounding in theory for securing the advances made by Justice Scalia's textualism in practice? Not at all. Indeed, it is a tribute to Justice Scalia's legacy that this is exactly how he would have it (though he would undoubtedly have preferred to have seen his opinions carry the day in more big cases).

Evaluation of judicial development of the law of interpretation requires reference both to the actual legal regime in which the judges operate, as well as central-case or ideal-type accounts of adjudication and interpretation and legislation appropriate for those regimes. The actual legal regime may depart from the central case in ways that actors within the system must treat as authoritative. When that happens, of course, the judge must follow along. But the choice is not always clear-cut, particularly in cases that end up being resolved at the Supreme Court of the United States.

The tension between central-case judging and judging within the confines of the separation of powers of one's actual regime can be seen in both *NFIB v. Sebelius* and *King v. Burwell*. Justice Scalia's *King* dissent was correct because it was closer to the central case of interpretation—relying not on some gestalt conception of a workable plan, but rather on an understanding of the legislative proposal open for adoption and then intentionally adopted into law through the act of voting. The *NFIB v. Sebelius* interpretation by Chief Justice Roberts was correct for a different reason. It took the right output from a straightforward interpretive approach and then placed a heavy thumb on the scale to yield a different operative understanding. This was a

82 NFIB v. Sebelius, 132 S. Ct. 2566, 2594 (2012).

83 Because of Justice Scalia's intellectual leadership regarding the law of interpretation, "the connection between statutory text and judicial interpretations of it has tightened substantially . . . . That is no small legacy." BAR OF THE SUPREME COURT OF THE U.S., RESOLUTIONS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES IN APPRECIATION AND GRATITUDE FOR THE LIFE, WORK, AND SERVICE OF JUSTICE ANTONIN SCALIA (2016), https://www.supremecourt.gov/pdf/Scalia_Resolution.pdf.

departure from the central case of interpretation, but one required by the applicable law of interpretation.

If the law of interpretation changed for the better on Justice Scalia's watch, as I have suggested, that is because it moved closer to the central case of interpretation. That central case—I have suggested, following Ekins—is intentionalist, not textualist. This kind of intentionalism in theory, though, looks a lot like textualism in practice.

The law of interpretation shifts over time. And individual judges can lead these shifts even while maintaining their obligation to follow the law of interpretation in making their decisions. That is what Justice Scalia did for textualism over the course of his judicial career. Yet a return to the "bad old days" is possible today or tomorrow or the next. The challenge for judge and theorist alike is to move the practice of statutory interpretation under law closer to the central case of statutory interpretation today even while staying within the law of interpretation from yesterday. We know this is possible because we have seen it done.