

## Tax Credits on Federally Created Exchanges: Lessons from a Legislative Process Failure Theory of Statutory Interpretation

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Opponents to the Patient Protection and Affordable Care Act (ACA or Act) have mounted yet another seemingly formidable challenge to basic provisions of the Act, focusing on whether the Act authorizes insurance premium tax credits for individuals who obtain insurance on an American Health Benefit Exchange (Exchange) established by the federal government. The argument against construing the Act to allow such tax subsidies depends largely on applying technical tools of statutory interpretation, usually associated with the Textual school of interpretation, to various provisions of the Act to discern that the best objective reading authorizes premium tax credits only to individuals who purchase insurance on Exchanges established by the state in which the Exchange operates.

This issue has the potential to destabilize the operation of the ACA in the 36 states that did not set up their own Exchanges.<sup>1</sup> The Affordable Care Act has been described as a three legged stool that can stand only by imposing obligations on insurers and individuals, while providing subsidies to make

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1. Thirty-six states had not established their own exchanges as of November 7, 2014, when the Supreme Court granted certiorari to hear the issue addressed by this Essay. See Adam Liptak, *Justices to Hear New Challenge to Health Law*, NY TIMES (Nov. 7, 2014), [http://www.nytimes.com/2014/11/08/us/politics/supreme-court-to-hear-new-challenge-to-health-law.html?\\_r=0](http://www.nytimes.com/2014/11/08/us/politics/supreme-court-to-hear-new-challenge-to-health-law.html?_r=0).

insurance more affordable.<sup>2</sup> Eliminating any one of these three legs would undermine the operation of insurance markets and thereby doom the ACA to failure.<sup>3</sup> In addition, the ACA imposes an obligation on large employers,<sup>4</sup> which is crucial to maintain current broad based coverage of those who are employed as well as to reduce the net government cost of keeping insurance affordable.<sup>5</sup> The Act burdens insurers to provide insurance without regard to health related conditions of the insured.<sup>6</sup> Individuals with preexisting conditions cannot be denied insurance; in addition, insurance premiums can only take two health related factors into account: age and whether the individual smoked tobacco, and the ACA limits even the extent to which these factors can affect rates.<sup>7</sup> Insurers can only meet this burden at an affordable price if young, healthy individuals, who do not generate anywhere near the level of claims that older and infirm individuals do, can be induced to purchase insurance at rates above the expected cost of their claims, essentially providing a cross-subsidy of insurance for the elderly and frail.<sup>8</sup>

The ACA provides a premium tax credit to any individual whose household income is between 100% and 400% of the poverty level, and who purchases insurance on an Exchange.<sup>9</sup>

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2. Jonathan Gruber, *Health Care Reform Is a "Three-Legged Stool" The Costs of Partially Repealing the Affordable Care Act*, 1-2 (CTR. FOR AM. PROGRESS, Aug. 2010), available at [http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing\\_reform.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing_reform.pdf) ("Critics who propose to 'repeal and replace' the Affordable Care Act don't seem to understand that *all three legs of the stool are critical for reform*. Pulling out any of the legs while leaving one or two intact will critically undercut gains from reform.").

3. *Id.*

4. 26 U.S.C. § 4980H (2014).

5. See Riley Lovendale, Note, *Tax vs. Penalty, Round Two: Interpreting the ACA's Assessable Payment As a Tax for Federal Award Cost Allowances*, 55 B.C. L. REV. 947, 977 (2014) (claiming that the ACA's employer mandate was meant "explicitly to strengthen the private employer-provided health insurance market in order to achieve its goal of near-universal health coverage"); see also Katherine Pratt, *Funding Health Care with an Employer Mandate: Efficiency and Equity Concerns*, 39 ST. LOUIS U. L.J. 155, 156-57 (1994) (discussing an employer mandate as a means for the federal government to "fund" health care cost increases well before consideration of the ACA).

6. 42 U.S.C. § 300gg (2014).

7. *Id.* (further noting that rates can vary based on whether the plan is for an individual or family and the geographical area).

8. Gruber, *supra* note 2, at 2-3.

9. 26 U.S.C. § 36B (adding § 36B to the Internal Revenue Code).

Without this subsidy, many individuals would simply not be able to afford to purchase health insurance.<sup>10</sup> Even if an individual could afford insurance, she may choose not to purchase it if she perceives the benefit she will derive from it as less than its cost. Hence, premium tax credits increase the attractiveness of insurance to those who do not envision incurring significant health care costs.<sup>11</sup> The ACA further encourages individual purchase of insurance by requiring individuals to pay a penalty if they fail to purchase insurance.<sup>12</sup> But, individuals who would have to pay more than eight percent of their income to purchase the cheapest plan on their relevant Exchange are exempt from this penalty.<sup>13</sup> Without the premium tax credit, the cost of insurance for many individuals would exceed the eight percent trigger for the exemption, relieving them of their obligation to obtain insurance.<sup>14</sup> In short, without premium subsidies, millions of young and healthy Americans would not face penalties for failure to purchase insurance and many others would simply pay the penalties and not purchase it.

The ability of financially qualified individuals to obtain premium subsidies also affects employers' incentives to offer insurance to their workers under the Act. The ACA did not mean to alter the fundamental method by which the vast majority of individuals in the United States obtain health insurance – from their employers. But the incentives for

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10. See Brendan S. Mahar & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Insurance Under the ACA*, 31 YALE L. & POL'Y REV. 275, 294 (2013) (“The ACA addresses the affordability [of health insurance] through use of subsidies for those at low-income levels.”); Amy B. Monahan, *On Subsidies and Mandates: A Regulatory Critique of ACA*, 36 J. CORP. L. 781, 783 (2011) (“In order to make coverage more affordable, individuals with household income below 400% FPL are eligible for refundable tax credits that subsidize insurance purchase.”).

11. See David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669, 685 (2012) (noting that tax credits are carrots to encourage those who otherwise would not purchase insurance to do so).

12. 26 U.S.C. § 5000A(b)(1).

13. 26 U.S.C. § 5000A(e)(1)(A). The eight percent figure is calculated based on the individual's “required contribution,” which is essentially the individual's cost of insurance net of any premium tax credit. 26 U.S.C. § 5000A(e)(1)(B).

14. See Amy B. Monahan, *Fairness Versus Welfare in Health Insurance Content Regulation*, 2012 U. ILL. L. REV. 139, 144 (2012) (discussing the relationship of the ACA's premium subsidies to its individual mandate to purchase insurance).

employers to provide insurance as an employee benefit decreases if workers can obtain affordable insurance on the Exchanges. For this reason, the ACA subjects large employers – those with 50 or more full time workers or the equivalent – to monetary penalties for failing to provide adequate insurance to their full time employees.<sup>15</sup> But, the penalty provision is triggered only if an employee who is eligible to purchase insurance on an Exchange does so, and receives a subsidy under the Act.<sup>16</sup> Essentially, in states that have not establish their own Exchanges, limiting entitlement to tax credits removes any teeth from the sanction against large employers who flout the employer “mandate.”

It is no exaggeration to surmise that the economic viability of the ACA in the 36 states that have not created their own exchanges depends on the availability of subsidies to individuals who purchase insurance on federally created state Exchanges. Thus, the lack of availability of tax credits on federally created Exchanges would seriously undermine the most fundamental goal of the Act – universal health care coverage – and potentially entirely destabilize the market for individual insurance in those states. And the failure of the ACA in those states could seriously threaten to damn it politically in the 14 states that set up their own exchanges.

This Essay advocates that the question of whether individuals who purchase insurance on federally created exchanges are eligible for tax credits should be interpreted using a recently proposed method of reading statutes – the “legislative process failure theory of statutory interpretation.”<sup>17</sup> Under this theory, courts should not rely on traditional judicial methods of interpreting statutory provisions, especially technical application of Textualist tools of interpretation, when

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15. 26 U.S.C. § 4980H.

16. The ACA imposes penalties on a large employer if any of its employees purchase insurance on an Exchange and qualify for premium tax credits or reduced cost sharing. *Id.* Unlike the section governing premium tax credits, the section providing for cost sharing reductions does not expressly limit those subsidies to the Exchange established by the state. 42 U.S.C. § 18071. But, cost sharing subsidies are available only during coverage months, 42 U.S.C. § 18071(f)(2), and the reduced cost sharing provisions use the definition of coverage month specified in the section governing premium tax credits, 42 U.S.C. § 18071(f)(1). That definition refers explicitly to the Exchange established by the state under section 1311. *See* 26 U.S.C. § 36B(c)(2)(a).

17. This theory is set out in detail and defended in Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467 (2014).

those methods lead to a “best meaning” that likely was not the meaning that most legislators ascribed to the provision. In such instances, courts should pay more attention to contextual clues to legislators’ likely understanding of the statutory provision, including legislative history. With respect to tax credits for purchasers on federally created exchanges, this Essay concludes that the fact that virtually no one seemed to be aware, when the ACA was passed, that it could be read to preclude such subsidies strongly supports reading the statute to authorize them.

## I. PREMIUM TAX CREDITS UNDER THE AFFORDABLE CARE ACT

### A. THE TEXT OF THE PREMIUM SUBSIDY PROVISIONS OF THE ACA

There are three provisions of the ACA that directly relate to the question of whether individuals who enroll in insurance plans via federally created Exchanges may receive subsidies. First, Section 1311, which specifies requirements that Exchanges must meet under the Act, provides that “Each state shall . . . establish an American Health Benefit Exchange (referred to in this title as an ‘Exchange’).”<sup>18</sup> Second, if a state fails to do so, Section 1321 requires the Secretary of Health and Human Services to establish and operate “such Exchange” in that state, and requires federally run Exchanges to meet the requirements Section 1311 imposes on state-established Exchanges.<sup>19</sup> Third, Section 1401 provides for premium assistance tax credits for taxpayers with incomes between 100% and 400% of the poverty level.<sup>20</sup> The potential interpretive problem arises because of the interrelationship between tax credits and the Exchanges required by Section 1311. The amount of the tax credit depends on the monthly premiums the taxpayer pays for qualified health plans “enrolled in through an Exchange established by the State under 1311.”<sup>21</sup>

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18. 42 U.S.C. § 18031(b)(1) (2012). Section 1562 of the Act, codified at 42 U.S.C. § 300gg-91(d)(21) (2012), defines “Exchange” as “an American Health Benefit Exchange established under section 18031 of this title.”

19. 42 U.S.C. § 18041(c)(1) (2012).

20. 26 U.S.C. § 36B(c)(1) (2012).

21. 26 U.S.C. § 36B(b)(2)(A) (2012).

The IRS has issued regulations interpreting the ACA to authorize premium subsidies for individuals who obtain insurance on federally created Exchanges.<sup>22</sup> Because the ACA's provisions regarding the amount of credits to which an individual is entitled refers to plans "which were enrolled in through an Exchange established by the State under 1311,"<sup>23</sup> some opponents of the Act, most notably and comprehensively Jonathan Adler and Michael Cannon, have argued that subsidies are not authorized for taxpayers who enrolled in plans purchased on Exchanges established by the federal government under Section 1321.<sup>24</sup> The Fourth Circuit, considering a petition for review asserting that the regulations exceeded the IRS's authority, recently affirmed the IRS interpretation.<sup>25</sup> On the same day, however, a panel of the DC Circuit reversed the IRS interpretation.<sup>26</sup> Subsequently, the entire DC Circuit vacated its panel's decision, and scheduled the case for hearing en banc.<sup>27</sup> Shortly thereafter, the Supreme Court granted *cert* to hear the issue.<sup>28</sup>

At first blush, the language of the ACA suggests that federally created Exchanges are included in the term "American Health Benefit Exchange" as used in Section 1311. The key language is the provision in Section 1321 that if a state fails to establish a qualified Exchange, the federal government is responsible to set up "such Exchange,"<sup>29</sup> along with the provision in Section 1311 that "Exchange" refers to those required to be established by states.<sup>30</sup> The most natural reading of these two fairly straightforward provisions, suggests that a federally run Exchange in a state substitutes in all

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22. See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377, 30378 (May 23, 2012) (explaining why the IRS interpreted the ACA to authorize premium tax credits on federally facilitated Exchanges).

23. 26 U.S.C. § 36B(b)(2)(A).

24. See generally Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, 23 HEALTH MATRIX 119 (2013).

25. King v. Burwell, 759 F.3d 358, 375–76 (4th Cir. 2014) *cert. granted*, 135 S. Ct. 475 (2014).

26. Halbig v. Burwell, 758 F.3d 390, 412 (D.C. Cir. 2014) *reh'g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

27. Halbig v. Burwell, No. 14-5018, 2014 WL 4627181, at \*1.

28. King v. Burwell, 135 S. Ct. 475 (Nov. 7, 2014).

29. 42 U.S.C. § 18041(c)(1) (2012).

30. 42 U.S.C. § 18031(b)(1) (2012).

respects for a qualified Exchange established by the state.<sup>31</sup> This reading is also most consistent with the overall structure of the Act, and there is no provision of the Act that directly demands a different reading.<sup>32</sup>

If, however, one applies a technical reading of the Act, characteristic of the approach that Textualists use,<sup>33</sup> that initial impression becomes less certain. Section 1401 of the Act provides that the total annual credit to which a taxpayer is entitled is the sum of the credits for each “coverage month,” which means: “any month if— (i) as of the first day of such month the taxpayer . . . is covered by a qualified health plan . . . that was enrolled in through an Exchange established by the State under section 1311 . . . .”<sup>34</sup> The one other provision of Section 1401 specifying the amount of the tax credit also includes explicit reference to an “Exchange established by the state under [section] 1311.”<sup>35</sup> Using the canon that courts should not read language in a statute as mere surplusage,<sup>36</sup> a judge could credit the consistent inclusion of “established by the state under section 1311” in Section 1401 to conclude that the tax credit is available only in states that set up their own Exchanges.

By contrast, other provisions in Section 1401 that do not refer to tax credits simply use the term “Exchange,”<sup>37</sup> suggesting that the qualifier “established by the State under section 1311” was meant to distinguish state from federally established exchanges. Furthermore, Section 1421, which governs tax subsidies to small businesses that offer

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31. See *Halbig*, 758 F.3d at 412–27 (Edwards, J., dissenting).

32. In fact, Adler and Cannon themselves admit that, “[i]t may be somewhat surprising that the PPACA contains such a gaping hole in its regulatory scheme. We were both surprised to discover this feature of the law and initially characterized it as a ‘glitch.’ Yet *our further research* demonstrates that this feature was intentional and purposeful and that the IRS’s rule has no basis in law.” Adler & Cannon, *supra* note 24, at 123 (emphasis added).

33. See generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM L. REV. 70 (2006); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2006).

34. 26 U.S.C. § 36B(c)(2)(A) (2012).

35. 26 U.S.C. § 36B(b)(2)(A) (2012).

36. The canon disfavoring surplusage counsels that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted).

37. See, e.g., 26 U.S.C. § 36B(b)(3)(B)(i), (d)(3)(B), (e)(3) (2012).

contributions to their employees who enroll in a qualified health plan, uses the term “Exchange” without qualifying whether such Exchange is established by the state or the federal government.<sup>38</sup> Thus, relying on the canon that different language in different sections of a statute should be read to signal that Congress intended that the sections operate differently, Adler and Cannon argue that this inconsistency demonstrates that the small business subsidy, but not a taxpayer credit, was meant to be available in states where with federally run Exchanges.<sup>39</sup> Finally, Section 1321 explicitly provides that the Secretary shall ensure that federally established Exchanges meet those requirements imposed on Exchanges set up by the states,<sup>40</sup> but it does not mention the tax benefits that those Exchanges provide. Relying on the *expressio unius* canon,<sup>41</sup> one could conclude that the ACA meant to impose the same requirements on state and federally-run Exchanges, but not to confer the same benefits on them. For Adler and Cannon, these Textualist tools render the statutory meaning clear.<sup>42</sup>

The *Halbig* panel majority did not find these provisions quite as clear as did Adler and Cannon. But the panel used its own technical reading of the language of the Act to find problems with the government’s reliance on the use of the language “such Exchange” in Section 1321. First, the panel majority admitted that “‘such’ conveys what a federal Exchange is: the equivalent of the Exchange a state would have established had it elected to do so.”<sup>43</sup> The panel also accepted that Section 1321’s reference to the Exchange described under Section 1311, along with the reference of Section 1311 in the definition of Exchange, was sufficient to render federally established exchanges to be Exchanges under Section 1311. To quote the panel’s language:

If we import that definition into the text of section 1321, the provision directs the Secretary to “establish . . . such

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38. 26 U.S.C. § 45R (2012).

39. Adler & Cannon, *supra* note 24, at 133–42.

40. 42 U.S.C. § 18041(c) (2012).

41. The full maxim is, “*expressio unius est exclusio alterius*,” which means that “to express or include one thing implies the exclusion of the other, or of the alternative.” BLACK’S LAW DICTIONARY 661 (9th ed. 2009).

42. Adler & Cannon, *supra* note 24, at 143–48.

43. *Halbig v. Burwell*, 758 F.3d 390, 399 (D.C. Cir. 2014) *reh’g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

American Health Benefit Exchange established under [section 1311 of the ACA] within the State.” This suggests not only that the Secretary is to establish the type of exchange described in section 1311, but also that when she does so, she acts under section 1311, even though her authority appears in section 1321. Thus, section 1321 creates equivalence between state and federal Exchanges in two respects: in terms of what they are and the statutory authority under which they are established.<sup>44</sup>

But the panel did not see how the statutory provisions could allow a federally established Exchange to qualify as one established by a state.<sup>45</sup>

The panel’s reasoning, however, essentially ignores the canons of interpretation on which Adler and Cannon based their interpretation. Those canons would lead to the same conclusion with respect to inclusion of the phrase “under section 1311” as they would with respect to “established by a state.” Thus, the panel relied instead on a very fine parsing of complicated language in a manner that would not be obvious to one simply reading the statute.

The technical Textualist analysis gets even more complicated when one looks to other provisions of the ACA. Perhaps the most problematic provision for those who claim subsidies are not available to a purchaser on a federally created Exchange is use of the term “qualified individual,” in the section of the Act titled “Consumer Choice.”<sup>46</sup> A provision in that section reads: “In general The term ‘qualified individual’ means, with respect to an Exchange, an individual who— (i) is seeking to enroll in a qualified health plan in the individual market offered through the Exchange; and (ii) resides in the State that established the Exchange.”<sup>47</sup> As the United States argued in *Halbig*, if federally created Exchanges are different from those established by the state, Exchanges in the 36 states that did not set up their own Exchanges have no qualified individuals.<sup>48</sup> The government read this to mean that there

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44. *Id.* at 399–400.

45. *Id.* at 400.

46. 42 U.S.C. § 18032 (2012).

47. 42 U.S.C. § 18032(f)(1)(A) (2012).

48. See Brief for Members of Congress and State Legislatures as Amici Curiae Supporting Respondents, *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014) (No. 14-5018), 2014 WL 5585306; *Halbig*, 758 F.3d at 404.

would be no individuals who could purchase insurance on federally created Exchanges.<sup>49</sup>

The *Halbig* panel majority parried this argument by noting that, although the Act authorizes qualified individuals to purchase insurance on their relevant Exchange, nothing in the Act states that only qualified individuals can purchase insurance on Exchanges.<sup>50</sup> The panel supported its view that non-qualified individuals can purchase insurance on Exchanges by noting that the very provision cited by the government to support its argument makes clear that incarcerated individuals are excluded from being qualified individuals, but then implies that such individuals are allowed to enroll in plans purchased on an Exchange.<sup>51</sup> That provision excludes a person from being a qualified individual if the person is incarcerated “at the time of enrollment.”<sup>52</sup> The panel seemed to ignore the natural reading of that provision, which recognizes that the phrase, “at the time of enrollment,” signifies the point in time at which the Exchange must analyze whether an individual is excluded from the Exchange because he is incarcerated.<sup>53</sup> The panel, however, might have further supported its reading by referring to the last sentence in the section which states that an alien who is not lawfully in the United States “shall not be treated as a qualified individual and may not be covered under a qualified health plan in the individual market that is offered through an Exchange.”<sup>54</sup> If only qualified individuals are entitled to be insured under a plan purchased on an Exchange, then there is no need for the phrase indicating that such aliens may not be covered by such a plan. Moreover, this provision stands in contrast to that involving incarcerated individuals, which does not explicitly address the coverage of such individuals under a plan offered on an Exchange.

From a Textualist standpoint, however, the panel’s reading that non-qualified individuals may be covered by insurance offered on an Exchange poses a problem because it removes any significance from the term “qualified individual.” If any

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49. *Halbig*, 758 F.3d at 404.

50. *Id.* at 404–05.

51. *Id.* at 405.

52. *Id.*

53. Adrienne Kendall, *Statutory Interpretation and the Affordable Care Act Tax Credit Debate* 22–23 (2015) (unpublished manuscript on file with author).

54. 42 U.S.C. § 18032(f)(3) (2012).

individual, whether qualified or not, can purchase insurance on an Exchange, being a qualified individual makes no difference, yet the statute uses the term in several provisions.<sup>55</sup> Under the panel's reading, every one of these provisions would have the same legal effect if the phrase "qualified individual" were changed simply to "individual" or dropped from the provision entirely. In fact, several instances in which the statute uses the term strongly suggest that only qualified individuals can purchase insurance on Exchanges.<sup>56</sup> Thus, by declining to impute the word "only" to eligibility of qualified individuals to purchase insurance on Exchanges, the panel essentially read the term "qualified individual" out of the statute. Even worse, the panel's reading would allow any individual to purchase insurance on any Exchange, including those outside the state in which the individual resides, because the only restriction the ACA places on out of state participation in an Exchange applies to qualified individuals "with respect to an Exchange."<sup>57</sup> Therefore, in a bizarre twist, the panel's reading would seem to allow individuals in states that did not set up their own exchanges to obtain subsidies by purchasing insurance on an Exchange in a state that did establish its own Exchange.

#### B.LEGISLATIVE HISTORY REGARDING THE PREMIUM SUBSIDY PROVISIONS OF THE ACA

The Textualist paradigm of applying technical tools to find the objective meaning of statutory text suggests that the IRS interpretation may be a better reading of statute than that of Adler and Cannon, and the *Halbig* panel. But the meaning

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55. See, e.g., 42 U.S.C. § 300gg-15; 42 U.S.C. § 18931(c)(1)(F). The term does have significance independent of allowing an individual to purchase insurance on an Exchange in the part of Section 10103 of the Act that amends Section 2709 of the Public Health Services Act, which governs participation in medical clinical trials. But that Section explicitly includes a separate definition of "qualified individual." 42 U.S.C. § 300gg-8(b).

56. See, e.g., 42 U.S.C. § 18031(b)(c)(F) (2012) (allowing states to merge individual and small employer Exchanges to serve "qualified individuals and qualified employers"); 42 U.S.C. § 18031(d)(2)(A) (2012) ("An Exchange shall make available qualified health plans to qualified individuals and qualified employers."); 42 U.S.C. § 18051(e)(2) (2012) (providing that an individual eligible for state established basic health program for individuals not eligible for Medicaid "shall not be treated as a qualified individual under section 18032 eligible for enrollment in a qualified health plan offered through an Exchange established under section 18031.").

57. 42 U.S.C. § 18032(f)(1)(A) (2012) ("The term 'qualified individual' means, with respect to an Exchange, an individual who . . . (ii) resides in the State that established the Exchange . . .").

seems to be far from clear. Given the ambiguity of the Act, a judge might look to legislative history for guidance about whether Congress intended for purchasers of insurance on federally established Exchanges to be eligible for premium subsidies.<sup>58</sup> The *Halbig* panel, which found the text clear, did not find any legislative history relevant to this specific interpretative question. Adler and Cannon, however, claim that the legislative history supports their view of the unavailability of tax credits in states without state established Exchanges.<sup>59</sup> Ultimately, Adler and Cannon are on shaky ground in their reading of legislative history.

Adler and Cannon contend that Congress intentionally structured the ACA to deny benefits to taxpayers who enroll in insurance plans via federally run Exchanges to encourage states to establish exchanges.<sup>60</sup> The only direct evidence they find of such intent is a paper written by Professor Timothy Jost and posted to the internet “well before PPACA supporters first introduced any legislation.”<sup>61</sup> This paper shows a general awareness of the potential for conditioning tax subsidies on states setting up qualifying exchanges to encourage the states to do so.<sup>62</sup> But, it shows nothing more. The article was not part of the legislative process and actually proposed conditional authorization of taxpayer subsidies as an *alternative* to the federal government setting up a fallback program of

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58. See, e.g., *United States v. DiCristina*, 726 F.3d 92, 96–97 (2d Cir. 2013) *cert. denied*, 134 S. Ct. 1281 (2014) (“In the event that the text of a statute is not clear, a court interpreting the statute may consult the legislative history to discern ‘the legislative purpose as revealed by the history of the statute.’” (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 627 (1993))); *James v. Wadas*, 724 F.3d 1312, 1316 (10th Cir. 2013) (“[O]ur task is to determine Congress’ intent, beginning with the plain language of the statute itself . . . . If, however, the text is ambiguous, we inquire further to discern Congress’ intent looking to the legislative history and underlying public policy of the statute.” (citations omitted)); *Grant Thornton, LLP v. Office of Comptroller of the Currency*, 514 F.3d 1328, 1334 (D.C. Cir. 2008) (rejecting use of legislative history because the statute was “clear enough”); see also William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (“[Under] the Court’s ‘traditional’ approach: The plain meaning of a statute governs its interpretation, unless negated by strongly contradictory legislative history.”).

59. Adler & Cannon, *supra* note 24, at 148–57.

60. *Id.* at 142–43.

61. *Id.* at 143, 153–55 & n.129.

62. Timothy Stoltzfus Jost, *Health Insurance Exchanges: Legal Issues*, 37 J.L. MED. & ETHICS 53, 56 (2009).

administering exchanges.<sup>63</sup> In fact, Congress clearly chose to have HHS set up a fallback program. Of course, it is possible that Congress intended to both set up a fall back program and use conditional subsidies to encourage states to set up exchanges, but it is just as possible that it did not.

Adler and Cannon cite three pieces of legislative history that they argue directly support their interpretation. The first piece is the version of the health care bill that was passed by the Senate Health, Education, Labor and Pensions (HELP) Committee.<sup>64</sup> The provisions of that bill – the Affordable Health Choices Act of 2009 – was not the progenitor of the relevant sections of the ACA. Nonetheless, there is value in engaging its legislative history to show that it does not support Adler and Cannon’s conclusion that it evidences congressional intent to hold states hostage to tax credits in order to encourage them to establish “Gateways” – the bill’s equivalent to exchanges. That bill distinguished between a state that established its own Gateway (an establishing state), one that asked the federal government to establish a Gateway in the state (a participating state), and a state that refused to participate in the setting up of a Gateway in the state.<sup>65</sup> The bill would have denied tax credits to individuals in establishing states until three conditions were met: (1) the Secretary determined that the Gateway met the bill’s requirements, (2) the state had enacted legislation imposing regulations required by the bill on the state’s individual and small-group health insurance markets; (3) the state had enacted legislation making state and local governments subject to the employer insurance mandate.<sup>66</sup> For participating states, the bill denied tax credits until conditions 2 and 3 were met; for those states not participating, the bill would have denied tax credits until condition 3 was met.<sup>67</sup>

The notion that the tax credits were used to encourage states to cooperate in implementing the bill’s provisions is belied by the fact that the greater the state cooperation, the greater the number of conditions that had to be met before

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63. *Id.* (“Alternatively, [Congress] could . . . [offer] tax subsidies for insurance only in states that [comply] with federal requirements . . .”).

64. Adler & Cannon, *supra* note 24, at 154–56. (discussing the HELP Bill, Affordable Health Choices Act, S. 1679, 111th Cong. (2009)).

65. Affordable Health Choices Act, S. 1679, 111th Cong. § 3104(a)(1)-(2) (2009).

66. *Id.* at §3104(a)-(b).

67. *Id.* at §3104(a)-(c).

purchasers on the state's Gateway could receive the credits. This suggests that the impetus behind the conditions were to ensure that the insurance market in the state met the criteria set out by the bill before subsidies would flow to the state; it did not matter whether those criteria were met because of federal or state action. Under the ACA, however, once the federal government establishes an Exchange in a state, there is nothing more a state must do to ensure that the insurance markets meet the Act's goals. Hence, if anything, the structure of the tax credit provisions under the Affordable Health Choices bill suggests that federally created Exchanges would qualify for tax credits once they meet the criteria for Exchanges under the Act. This is precisely the same criteria that apply under the ACA for tax credits on state established Exchanges. The absence of separate treatment of tax credits for federally created Exchanges likely simply reflected the lack of need for separate provisions to govern such tax credits.

The second piece of legislative history that Adler and Cannon cite as direct support for their reading of the statute is a colloquy between Senator Max Baucus, chairman of the Finance Committee, and Senator John Ensign, a republican from Nevada.<sup>68</sup> The Finance Committee's reported bill, The Healthy Future Act of 2009, included the relevant language that became the ACA, so this colloquy is more directly on point in assessing the final statute.<sup>69</sup> The colloquy addressed the question of how the Finance Committee could have jurisdiction to impose conditions on how states set up their Exchanges. Senator Baucus responded that the key was tax credits.<sup>70</sup> The fact that qualified state Exchanges would receive tax credits meant that the conditions on qualification triggered federal government spending, giving the Committee jurisdiction. Adler and Cannon essentially argue that if the federal fallback program also would entitle taxpayer participants to tax credits,

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68. Adler & Cannon, *supra* note 24, at 155–57 (citing *Executive Committee Meeting to Consider Health Care Reform: Before the S. Comm. on Finance*, 111th Cong. 326 (2009)).

69. Adler & Cannon, *supra* note 24, at 154.

70. *Executive Committee Meeting to Consider Health Care Reform: Before the S. Comm. on Finance*, 111th Cong. 326 (2009), available at <http://www.finance.senate.gov/hearings/hearing/download/?id=c6a0c668-37d9-4955-861c-50959b0a8392>; see also *Executive Committee Meeting to Consider an Original Bill Providing for Health Care Reform: Before the S. Comm. on Finance*, C-SPAN (starting at 2:53:21) (Sept. 23, 2009), <http://www.c-spanvideo.org/program/289085-4>.

then the credits would be universally available and the state qualifications would not trigger tax credits, thereby denying the Finance Committee jurisdiction to impose conditions on states.<sup>71</sup>

Adler and Cannon, however, seem to have ignored the option of insurance purchased off any ACA Exchange. If such insurance does not have to meet conditions imposed on plans offered through qualified exchanges,<sup>72</sup> then it might underprice plans sold on qualified Exchanges even if the qualified Exchange is federally established. The tax subsidy may be crucial to allow plans on qualified Exchanges, whether federal or state run, to meet the regulations adopted under section 1311(c)(1) and still compete effectively. Most significantly, the conditions on state Exchanges would still place the legislation within the Finance Committee's jurisdiction because those conditions were not universal, but rather were granted only to qualified Exchanges (whether established by the state or HHS) and not to products sold outside of qualified Exchanges. In particular, the tax subsidies comprise a mechanism to ensure that plans sold through ACA Exchanges would be able to compete with plans sold on any competing exchange that would not have to comply with criteria set out in section 1311 and regulations under that section

The third potentially relevant piece of legislative history that Adler and Cannon discuss is a letter that the Texas Democratic Delegation to the House of Representatives sent to President Obama, Speaker of the House Nancy Pelosi, and House Majority Leader Steny Hoyer, expressing concern about the Senate bill as the basis for the ACA.<sup>73</sup> The gist of the letter is that the House Bill, which would have offered a federally run national health exchange to compete with state run exchanges, would protect against state recalcitrance in implementing the Act.<sup>74</sup> The letter expressed concerns that under the Senate bill, Texans would be "shortchange[d]" because the state would set up "weak, state-based health insurance exchanges."<sup>75</sup> It goes

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71. Adler & Cannon, *supra* note 24, at 157.

72. Those criteria are set out in 42 U.S.C. § 18031(c)(1), but are in addition to requirements adopted by the Secretary under that subsection.

73. See Adler & Cannon, *supra* note 24, at n.21, (discussing *U.S. Rep. Doggett: Settling for Second-Rate Health Care Doesn't Serve Texans*, MY HARLINGEN NEWS (Jan. 11, 2010), <http://www.myharlingennews.com/p=6426> (reprinting the letter) [hereinafter *Doggett Letter*]).

74. *Doggett Letter*, *supra* note 73.

75. *Id.*

on to describe in detail how the state could increase complexity and reduce purchasers' market leverage as well as set up "multiple exchanges," including only "one or two dominant insurers."<sup>76</sup> It does opine that under the Senate bill, "millions of people will be left no better off than before Congress acted," but it does so after noting that Texas has experienced difficult budget years and in response reduced its Medicaid program, implying that states will similarly weaken their investment in the exchanges.<sup>77</sup> The only mention of subsidies comes in one sentence near the end of the letter, which merely states that under the House bill: "A single, national health insurance exchange will not only administer federal affordability credits and receive federal start-up funds, but will also be charged with enforcing federal laws and regulations."<sup>78</sup> What is significant about the letter is its focus on fears that states would not adequately fund the operation of qualified Exchanges or hold them to the requirements of the Act, and its failure to mention differential availability of tax credits under the Senate bill.

## II. LEGISLATIVE PROCESS FAILURE THEORY OF STATUTORY INTERPRETATION

The analysis of relevant ACA provisions indicates that Textualist methods of statutory interpretation provide several countervailing arguments about whether the ACA permits tax credits for individuals who enroll in plans via federally created Exchanges. Therefore, reasonable judges could disagree about the resolution of that question, in which case the IRS should prevail under step two of Chevron.<sup>79</sup> Some judges, however, subscribe to a more active role at step one of Chevron. For example, Justice Scalia has stated that he is less likely than non-textual judges to find a statute to be ambiguous at step one of Chevron.<sup>80</sup> Essentially, if Scalia is fairly confident that he has found a best objective meaning, then he will find the statute unambiguous even if reasonable judges could disagree.

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76. *Id.*

77. *Id.*

78. *Id.*

79. Under Chevron, reviewing courts first determine whether Congress has spoken to the precise question the agency has addressed, and if not, they are to defer to the agency interpretation if reasonable. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

80. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989).

The legislative process failure theory of statutory interpretation, however, counsels that the tax credit provision of the ACA should be interpreted in light of the strong contextual evidence of legislators' likely subjective understanding of the tax credit provisions, even by a judge who otherwise would use technical interpretive tools. This Essay advocates that the question of whether individuals who purchase insurance on federally created exchanges are eligible for tax credits should be interpreted using a recently proposed method of reading statutes – the “legislative process failure” theory of statutory interpretation.<sup>81</sup> Under this theory, courts should not rely on traditional judicial methods of interpreting statutory provisions, especially technical application of Textualist tools of interpretation, when those methods lead to a “best meaning” that likely was not the meaning that most legislators ascribed to the provision.<sup>82</sup> In such instances, courts should pay more attention to contextual clues to legislators' likely understanding of the statutory provision, including legislative history. With respect to tax credits for purchasers on federally created exchanges, this Essay concludes that the fact that virtually no one seemed to be aware, when the ACA was passed, that it could be read to preclude such subsidies strongly supports reading the statute to authorize them.

#### A. JUDICIAL VERSUS LEGISLATIVE INTERPRETIVE METHODS

The legislative process failure theory of statutory interpretation is predicated on the observation that the courts and Congress comprise different interpretive communities that use different methods for attaching meaning to statutes.<sup>83</sup> Our constitutional system assigns the fundamental role of making law to the legislature. Hence, any interpretive method that undermines legislative supremacy in determining the meaning of statutes is constitutionally troubling.<sup>84</sup> Legislative

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81. See Seidenfeld, *supra* note 17, at 467.

82. *Id.* at 494–95.

83. *Id.* at 529.

84. See Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U.L. REV. 1239, 1251 (2002) (“The legitimacy of judicial power over statutory interpretation has long been thought to flow from this assumption that judges would implement Congress’s decisions.”); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 24–25 (2001) (proposing that the proper role for judges interpreting statutes is as faithful agents of the legislature); Daniel A. Farber, *Statutory Interpretation*

supremacy does not mandate that courts acquiesce in the legislative method for determining statutory meaning in every, or perhaps even many, cases. It does require, however, that the two branches coordinate their means of interpreting statutes to make their two distinct methods for determining meaning compatible.

Judges usually begin interpreting a statute by reading its text, and forming some notion of the most likely meaning, or perhaps rough probabilities that the words take on any of several possible meanings. Judges then look seriatim to other indications of statutory meaning.<sup>85</sup> These include semantic canons of interpretation, which describe some generalizable norms about how language ordinarily is used. They also include inquiries into the structure of statutes — for example how the precise wording fits within wording of other sections, or even other statutes, looking for telling similarities and differences from terms whose meanings are well accepted. Judges will also look to policy canons, which affect how the courts read statutes in order to effectuate underlying assumptions about how our legal system should operate. If these tools do not reveal a best objective meaning of the statutory language, judges might look at more contextual clues to find the best meaning of the language enacted into law. Textualists will stop there, while purposivist judges are willing to consult legislative history to determine a meaning that members of Congress likely gave to the statutory provision at issue.<sup>86</sup> But even judges willing to consider legislative intent rarely use intent or general purpose revealed in legislative history to override what they deem to be clear textual meaning derived by application of technical tools of interpretation.<sup>87</sup>

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*and Legislative Supremacy*, 78 GEO. L.J. 281, 284 (1989) (“Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that . . . courts are subordinate to legislatures.”).

85. Seidenfeld, *supra* note 17, at 495–96 (describing judicial methods of statutory interpretation as exercises in Bayesian probability updating).

86. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 37 (2006) (“[T]extualist scholars often criticize purposivists for employing context in order to adjust or even contradict a statute’s clear textual meaning”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2434 n.179 (2003) (“[T]he modern textualists’ concerns come into play only when courts use background statutory purpose to contradict or vary the clear meaning of a specific statutory provision.”).

87. See, e.g., *United States v. Moreno*, 727 F.3d 255, 259 (3d Cir. 2013) *cert. denied*, 134 S. Ct. 1278 (2014) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the

The important point is that judges approach interpretation by a comprehensive and coherent process that depends on specialized tools to update their assessment of the likelihood that the words have particular meaning.

Members of Congress do not rely primarily on judicial methods of interpretation. When enacting legislation, those legislators with an interest in the bill and an institutional role in helping draft it negotiate a bargain with others who have an interest in the legislation.<sup>88</sup> After a bargain is reached, legislators communicate that bargain to staff members who are tasked with drafting language to implement it.<sup>89</sup> After language is initially drafted, it is distributed to representatives of various affected interest groups — which may include groups representing private entities subject to the statute’s provisions, groups of individuals who are meant to be protected by the statute, administrative agencies, and members of White House staff.<sup>90</sup> These representatives then look closely at the language and try to ensure that it will not affect them in ways that differ from the original legislative bargain. This process of interest group vetting of bills is likely to catch many potential problems stemming from how the bills are worded.<sup>91</sup> Once those problems are brought to congressional staff’s attention, the language can be changed to better reflect the bargain to which the negotiating legislators agreed. Moreover, congressional staff members who draft the legislation take judicial tools of interpretation into account when reducing the bargain to statutory language.<sup>92</sup> Thus, with respect to any particular

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test is not absurd—is to enforce it according to its terms.”) (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, (2004)); *United States v. Desposito*, 704 F.3d 221, 226 (2d Cir. 2013) *cert. denied*, 133 S. Ct. 2402 (2013) (“In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning.”); *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 134 (1st Cir. 2012) (“We assume that the ordinary meaning of the statutory language expresses the legislature’s intent. . .”).

88. See Seidenfeld, *supra* note 17, at 496–97.

89. *Id.*

90. *Id.* at 497.

91. *Id.* at 497–98

92. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 928–30 (2013) (noting that although congressional staff members are not aware of many semantic canons by name, their consideration of the meaning of statutory language is consistent with most such canons); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 603 (2002) (reporting that attorneys in the Office of Legislative Counsel

interpretive question, the probability that judicial interpretation leads to a reading contrary to legislators' understanding of what they enacted is not great. But, the legislative process for determining statutory meaning during the drafting process never performs a step-by-step comprehensive judicial-type interpretative analysis on all, or even most, of the statutory provisions that Congress includes in a statute.<sup>93</sup> Therefore, situations will arise when the legislative process will not catch language that judicial methods of interpretation is likely to interpret contrary to the understanding of most legislators. When the interpretive mechanisms of the legislative and judicial communities produce different statutory meaning, the situation can be characterized as legislative process failure.

#### B. LEGISLATIVE PROCESS FAILURE AND THE NEED TO COORDINATE JUDICIAL AND LEGISLATIVE INTERPRETIVE METHODS

The legislative process failure theory of statutory interpretation asks how the legal system should address such failure. If Congress is the branch that gets to make the law, the law must comport with the intent of those who voted for it. As Joseph Raz reasoned: "It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make."<sup>94</sup> Therefore, legislative supremacy requires that the judiciary and Congress come to some accommodation to ensure that courts interpret statutes in accord with legislators' understanding. But, as John Manning has noted, such intent can be objective: the requisite legislative intent exists if "legislators intend to enact a law that will be decoded according to prevailing interpretive conventions."<sup>95</sup> In other words, legislative law-making supremacy is satisfied as long as Congress knows how courts

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felt that they had internalized the canons of interpretation).

93. "While staffers [of the Senate Judiciary Committee] are well aware of the general principles of statutory interpretation and do have in mind generally how a court would interpret language they are writing, in the ordinary course of drafting they do not spend substantial time anticipating or attempting to research the judicial application of particular interpretive law to the bill being drafted." Nourse & Schacter, *supra* note 92, at 600.

94. Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 258 (Robert P. George ed., 1996).

95. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 432–33 (2005).

will interpret statutes and can adjust its process to ensure that statutes will be interpreted as it intends.<sup>96</sup> But, there are reasons why the legislature cannot generally be expected to acquiesce in the judicial method of decoding statutory meaning.

Essentially, the difference between congressional and judicial interpretive conventions raises the question in any particular case: which institution should accommodate the other's decoding convention?<sup>97</sup> For the legislature to accommodate judicial interpretive methodology would obligate it to perform a judicial type analysis for every potentially problematic statutory provision. By doing so, Congress can check that the words it enacts, when interpreted by courts in particular cases, will implement the bargain it has struck. If Congress finds that the words of a bill fail to implement the bargain, it can change them. For the courts to accommodate the legislative methodology would require that courts give credence to context that reveals the most likely understanding of the legislators who voted for the statute. Which branch should accommodate the other should depend on the costs of each accommodation.

Textualists emphasize that there are costs of considering evidence of subjective intent that can be manipulated. For example, individuals involved in the drafting process may be able to salt legislative history with clues to support meaning inconsistent with the statute's underlying legislative bargain.<sup>98</sup> In addition, Textualists claim that a consistent set of rules tied to use of language constrain judicial interpretive discretion, and thereby reduce judges' ability to read statutes to further their personal policy preferences.<sup>99</sup> To the extent that context may be more difficult to read than text, it may allow judges to pick the meaning that they ideologically prefer. In many instances, however, rules about how to use context, including

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96. See Seidenfeld, *supra* note 17, at 500.

97. *Id.* at 501.

98. See John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1311–18 (2010) (detailing objections to use of broad statutory purpose as effectively overriding legislative bargains that are reflected in statutory text); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1305 (1990) (describing the textualist critique that crediting legislative history when interpreting statutes lowers the costs of special interest rent-seeking in the legislative process).

99. See, e.g., Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62, 65 (1988); see also Molot, *Rise and Fall*, *supra* note 86, at 9.

legislative history, may be sufficiently constraining, and such use may provide sufficiently clear evidence of a likely legislative consensus, that the relative costs of contextual inquiry into subjective understanding will not be great.<sup>100</sup>

On the other side of the ledger is the burden imposed on the legislature of having to resort to judicial type analysis of all statutory provisions of questionable meaning. Imposing this burden on Congress essentially mandates procedures for statutory enactment beyond those required by the Constitution that can greatly interfere with the legislature's law-making function.<sup>101</sup> In any particular case, it often takes some of the brightest legal minds many hours to apply judicial tools of construction to determine an objective best reading of a statute. And the court does so only in response to a legal complaint, which essentially signals a potentially problematic statutory provision for which the legislative and judicial interpretive approaches might lead to different meanings and focuses inquiry on a discrete interpretive question. Congress, however, must attach meaning at the time it enacts a statute; it cannot take advantage of the experience from application of the statute and a legal complaint to signal potential legislative process failures. But, without signals from those subject to the statute, Congress would have to perform a judicial-type analysis with respect to any term of the statute that potentially might lead to a difference between legislative and judicial understandings.<sup>102</sup> Essentially, requiring Congress generally to accommodate judicial-type decoding would place such a great burden on the legislative process that it would almost certainly shut that process down.<sup>103</sup>

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100. Many scholars reject the claim that Textualism is more constraining of judges than intent-based interpretation. See Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 206–07 (1999) (questioning whether textualism has increased predictability and certainty of statutory interpretation); Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L & COMP. L. REV. 1, 39–41 (1996) (concluding after analysis of several British cases that relying on legislative history to help identify statutory purpose can constrain judicial discretion).

101. Seidenfeld, *supra* note 17, at 503

102. Staff members from Office of Legislative Counsel, which is supposed to ensure that statutes implement the deals struck by the legislators, report that they do not have the time to perform “top-to-bottom review complete with comprehensive interpretive analysis of every bill the office helps to draft.” Nourse & Schacter, *supra* note 92, at 604.

103. See Seidenfeld, *supra* note 17, at 504; see also, Nourse & Schacter,

Balancing the error costs from reliance on contextual clues against the pragmatic costs of the legislature having to perform judicial analysis on all statutory provisions therefore strongly suggests that the courts should accommodate the non-sequential legislative process when the legislature is unaware that courts would likely interpret the language differently than legislators understood it.<sup>104</sup> The balance changes, however, when legislators have a clear signal that particular statutory text might not accurately reflect legislators' understanding. First, once the legislature identifies a problematic statutory provision the cost of legislative correction is, at most, comparable to that of the judiciary.<sup>105</sup> Attorneys in Legislative Counsel's Office can analyze the problematic provision just as a judge would to determine meaning, identify what might create the unintended meaning, and add language to clarify the meaning. Often, armed with this identification, Congress need not perform a judicial analysis at all; it need only add clarifying language – the kind of language that often gets inserted in legislative history. Although such drafting is not a trivial task, it becomes manageable once one identifies the precise bargain being struck and focuses on the particular provision meant to incorporate that bargain. Second, the costs of manipulation of contextual evidence increases when the legislature is aware of a process failure. Declining to change the language of a bill in the face of known process failure indicates a strong probability that the bill sponsors could not get the change passed using the Constitution's specified procedures for enacting legislation.<sup>106</sup>

The legislative process theory of statutory interpretation thus counsels that when the legislature is unaware of the potential for courts to interpret a statutory provision contrary to the bargain the legislature meant to strike, the courts should look for contextual indications of subjective legislative intent to guide them in determining the meaning that legislators likely ascribed to the language of the provision. When, however, the legislature is aware that a provision poses a likely legislative process failure, the courts should engage in judicial type inquiry into the objective meaning of the provision.

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*supra* note 92, at 619–20 (“[T]he sheer diversity of approaches to the drafting process, the multiplicity of drafters, and the different points in time at which text is drafted suggest the limited disciplinary effect of judicial rulings.”).

104. Seidenfeld, *supra* note 17, at 507–08.

105. *Id.* at 507.

106. *Id.* at 507–08.

### III. LEGISLATIVE PROCESS FAILURE THEORY APPLIED TO TAX CREDITS ON FEDERALLY CREATED EXCHANGES

Before turning to contextual evidence of legislators' understanding of the eligibility of federally created Exchanges for tax credits, one must answer two questions. First, what is the evidence of process failure – that is, that members of Congress likely understood the Act to authorize tax credits for buyers in a federally established Exchange, even if a Textualist analysis of the language might lead to the opposite conclusion? Second, what would explain Congress's failure to see the potential inconsistency between that understanding and a reading using a Textualist technical analysis that might lead to the opposite conclusion?

On the first question, one important bit of evidence is that a first-blush reading of the statute would support that understanding. Section 1321 seems to say that federally created Exchanges substitute for state established ones in all respects. To undermine that as the best reading of the statute, one has to note that section 1401 used the term "Exchange established by a state under section 1311," instead of simply refer to an Exchange, in the two provisions addressing premium tax credits.<sup>107</sup> But, that happenstance alone does not indicate with any clarity that the phrase "established by a state" was meant to be significant rather than reflecting a simple inadvertent inclusion of language unrelated to the legislative bargain about premium tax credits. To gain confidence that the phrase was meant to be significant, one would next have to verify that provisions of section 1401 that did not address tax credits did not include "established by a state" as a modifier of Exchange. Further, one would have to look at all the times outside of section 1401 that the statute used the phrase "established by the state" to see whether they too could be explained by some rational distinction between state and federal exchanges.<sup>108</sup> Such an inquiry is fraught with

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107. See *supra* notes 20, 35, 37 and accompanying text.

108. See, e.g., Jonathan H. Adler, *The Test to Textualism in King v. Burwell: A Reply to Abbe Gluck*, WASH. POST (Nov. 12, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/12/the-test-to-textualism-in-king-v-burwell-a-reply-to-abbe-gluck/> (relying on consideration of every use of the term "established by the State" and reporting that each "serve[s] to facilitate coordination between state exchanges and other programs or to provide incentives for state action"); see also Amy E. Sanders, Note, *A Gap in the Affordable Care Act: Will Tax Credits Be Available for Insurance Purchased Through Federal Exchanges*, 66 VAND. L. REV. 1259,

the need to think creatively about all the possible reasons one might want to distinguish between these types of exchanges. For example, in response to the government's argument that it makes no sense to limit a state's abilities to modify eligibility for its Medicaid programs forever if a state decided not to establish an Exchange, the *Halbig* panel majority came up with the response that such a limitation might make sense if the Exchange in the state was created by the federal government to make up for the fact that, under the panel's reading, individuals in that state would not be able to obtain premium tax credits<sup>109</sup>—an argument that seems a bit speculative in light of the fact that such tax credits were an important part of making health care affordable to many more people than those who might currently be receiving Medicaid benefits. Moreover, this technical inquiry to overcome the understanding that most likely would follow from a casual reading would have had to be made over the entirety of one of the most long and complex statutes in the history of congressional enactments.<sup>110</sup> One cannot reasonably expect members of Congress to perform such inquiries on an issue that, at the time of enactment, was not even on anyone's radar screen.

In addition, it seems odd that Congress would bury such an important distinction between Exchanges created by the federal and state governments in a technical provision that describes how to calculate the tax credit. And it seems odder still that it would do so in a manner that would require a complex analysis of the entire statute to conclude that such credits were available only on state established Exchanges. The Supreme Court has stated, in a different context, that Congress does not “hide elephants in mouseholes.”<sup>111</sup> If so, Congress would not resolve a major issue that drives an entire statute using subtle semantic signals in a section of the Act that specifies the details of calculating a tax credit. Yet it is precisely in such semantic technicalities that the *Halbig* panel

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1287–88 (2013) (identifying references to section 1311 that do not make sense unless applied to federal Exchanges established under section 1321).

109. See *Halbig v. Burwell*, 758 F.3d 390, 405–06 (D.C. Cir. 2014) *reh'g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

110. The Act runs 906 pages in the Statutes at Large, not including the subsequent amendments enacted nominally as part of the budget reconciliation process. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119-1024 (2010).

111. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

majority locates its inquiry into whether premium subsidies are available on federal created Exchanges.<sup>112</sup>

On the second question, there are good reasons to believe that Congress was unaware of the potential question regarding tax credits on federally created Exchanges. The Senate bill was drafted with the expectation that it would be merged with the “Affordable Care for America Act” that had passed the House, and which would have established a national insurance exchange from which states could opt out.<sup>113</sup> But Scott Brown’s election to the Senate assured a filibuster of any change to the Senate bill that might be made by a Conference Committee other than some modifications that could be squeezed into the budget reconciliation process.<sup>114</sup> This reality essentially forced the Democrats to enact the Senate Bill as the ACA, with no opportunity to clean up any sloppy drafting. Hence the Senate bill was not vetted as carefully as it might have been had those involved in its drafting expected it to become the law.

The fact that the legislative history is totally silent on this precise question also supports the inference that Congress was unaware that the language of section 1401 was problematic. For example, the letter from the Texas Congressional Delegation, which Adler and Cannon see as evidence that Congress intended to restrict premium tax credits to state established exchanges,<sup>115</sup> is best viewed as circumstantial evidence that the representatives did not envision that participation in federally run Exchanges would disqualify taxpayers from obtaining tax credits. Its detailed and comprehensive diatribe outlining the disadvantages of the Senate bill never mentions the loss of tax credits under federally run Exchanges as such a disadvantage.

Given the answers to these two preliminary questions, the legislative process theory of statutory interpretation counsels

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112. See *Halbig*, 758 F.3d at 399–402.

113. See Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 301 et seq. (as passed by House of Representatives, Nov. 7, 2009), available at <http://thomas.loc.gov/cgi-bin/query/C?c111:./temp/~c111iF4Up3>.

114. See Janet L. Dolgin & Katherine R. Dieterich, *Social and Legal Debate About the Affordable Care Act*, 80 U.M.K.C. L. REV. 45, 51 (2011); Jonathan Cohn, *How to Pass the Bill--Whatever Happens Tuesday*, NEW REPUBLIC (Jan. 17, 2010), <http://www.newrepublic.com/blog/the-treatment/what-do-if-coakley-loses-contd>; see also Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (amending the ACA, which had been based on the Senate Bill, in ways that escaped a filibuster because they could be construed as budget reconciliation).

115. See *supra* note 73 and accompanying text.

reliance on contextual evidence of the subjective meaning that legislators most probably ascribed to the ACA with respect to tax credits for federally created Exchanges. As noted in the discussion of legislative history above,<sup>116</sup> that history fails to discuss this precise issue at all, but it nonetheless illuminates the likely understanding of legislators on that issue. The general discussion of federally created Exchanges in the legislative history assumes that those Exchanges will substitute for one created by the state when the state fails or refuses to create an Exchange.<sup>117</sup> In addition, this assumption is also reflected in both scholarly and media accounts of how the ACA would operate.<sup>118</sup> Thus, the best evidence from the

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116. See *supra* notes 107–16 and accompanying text.

117. The legislative history does not reveal that much attention was paid to the federally created Exchange fallback, perhaps because most members of Congress expected states to establish their own Exchanges. See, e.g., 155 Cong. Rec. 33,004 (2009) (statement of Sen. Mary Landrieu) (“[T]here is no government-run public option in this bill. Instead, we reached an agreement to provide private health insurance plans to be sold nationwide. . . . Importantly, we ensured that at least one nonprofit plan will be offered in every State exchange and that the States cannot opt out at the whim of every Governor and legislature.”). Nonetheless, the few references to federally created exchanges manifest a general understanding that these exchanges would simply step into the shoes of those that otherwise would be established by the state. See, e.g., 155 Cong. Rec. 32,996 (2009) (statement of Sen. Orrin Hatch) (“[T]he legislation orders states to establish health benefit exchanges which will require states to pass legislation and regulations. If they do not, or even if the Secretary of Health and Human Services believes they will not by a certain date, the Secretary will *literally step into each state and establish and operate this exchange for [the states].*”) (emphasis added); 155 Cong. Rec. S13832 (daily ed. Dec. 23, 2009) (statement of Sen. Max Baucus) (“[O]ur bill fundamentally gives States the choice to participate in the exchanges themselves, or if they do not choose to do so, to allow the Federal Government to set up the exchanges . . . .”); S. Rep. No. 111-89, at 18–19 (2009) (“By no later than July 1, 2013, a state would be required to establish and have in operation one or more exchanges . . . that meet the requirements regarding the offer of QHBPs. If states do not establish these exchanges within 2 years of enactment (or if the Secretary determines the exchanges will not be operational by July 1, 2013), the Secretary would be required to contract with a nongovernmental entity *to establish the exchanges within the state*. States would be required to establish interim exchanges for use by state residents as soon as practicable in the period from January 1, 2010 to June 30, 2013. If these interim exchanges are not operational within a reasonable period after enactment, the Secretary would be required to contract with a nongovernmental entity *to establish state exchanges* during this interim period.”) (emphasis added).

118. See, e.g., Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 144–150 (2011) (“[R]esponsibility for the Exchanges is assigned first to states, with the federal government as a backstop, should states fail to comply.”);

legislative history and popular discussion of federally created exchanges is “the dog that didn’t bark”:<sup>119</sup> none of the few discussions about the relative advantages of a state establishing its own qualified Exchange versus letting HHS do so, whether in legislative history or in the media, mentioned differential availability of tax credits. Yet, this issue threatens to undermine entirely the operation of the ACA. Silence on this issue makes sense only as evidence that members of Congress did not understand section 1401 to operate as Adler and Cannon or the *Halbig* panel majority have argued.

In addition to the significance of Congressional and media silence about the precise issue, another contextual indication that Congress understood section 1401 to operate as the IRS

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Henry Aaron, *State Needs Action On Health Reform: Don't Accept One-Size-Fits-All Approach on Exchanges*, STAR TRIBUNE, <http://www.startribune.com/opinion/editorials/111293694.html> (last updated Dec. 5, 2010) (stating that federal dollars that the state would forego by not promptly establishing an exchange, but not mentioning lost subsidies as such costs); Robert Pear, *Health Care Overhaul Depends on State's Insurance Exchanges*, N.Y. TIMES, Oct. 24, 2010 at 23N (“Federal officials . . . will run the exchange in any state that is unwilling or unable to do so.”); Carrie Teegardin, *A New Way to Insure Public*, ATLANTA J. & CONST., Nov. 26, 2010, at A1 (“Officials in every state can design and run their own exchange, or simply punt the task to Washington.”). There is also some evidence, prior to the subsidy issue being raised in the IRS rulemaking, of a general expectation that subsidies would be available on federally established exchanges. For example, “neither the Congressional Budget Office score nor the Joint Committee on Taxation technical explanation of the Affordable Care Act discuss[ed] excluding those enrolled through a Federally-facilitated exchange.” Letter from Douglas H. Shulman, Comm'r, Internal Revenue Serv., to David Phil Roe, Representative, U.S. House of Representatives (Nov. 29, 2011), available at [http://roe.house.gov/uploadedfiles/irs\\_response\\_to\\_letter\\_on\\_ppaca\\_exchange.pdf](http://roe.house.gov/uploadedfiles/irs_response_to_letter_on_ppaca_exchange.pdf); see also Pear, *supra* (noting that “federal subsidies, to help pay for insurance, will be available only to people who enroll in health plans through an exchange,” and later stating that the federal government “will run the exchange in any state that is unable or unwilling to do so”); Doug Trapp, *California First to OK Insurance Exchange Outlined Under Health System Reform*, AM. MED. NEWS (Oct. 18, 2010), <http://www.amednews.com/article/20101018/government/310189955/1/> (“People earning between 133% and 400% of [the federal poverty level] will be eligible for private coverage subsidized on a sliding scale. . . . If states do not create an insurance exchange, the federal government will offer one in the state.”). *But see*, James Coburn, *Commission Wades Through New Health Regulations*, EDMOND SUN (Apr. 20, 2010), [http://www.edmondsun.com/news/local\\_news/commission-wades-through-new-health-regulations/article\\_dde2cf27-b941-54fe-8b3c-03dfac99413c.html](http://www.edmondsun.com/news/local_news/commission-wades-through-new-health-regulations/article_dde2cf27-b941-54fe-8b3c-03dfac99413c.html) (“There is no obligation for states to be in the health insurance exchange. . . . But none of the incentives or subsidies being offered are applicable without the exchange.”).

119. Cf. Sir Arthur Conan Doyle, *Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES 22 (1894), available at <https://books.google.com/>.

interpreted it is the lack of any plausible story about why Congress would limit subsidies to state created Exchanges. As Adler and Cannon suggest, the only reason for denying tax credits to purchasers on federally created Exchanges would be to encourage states to establish Exchanges.<sup>120</sup> Essentially, one could read section 1401 as creating a cudgel with which the federal government could threaten states, thereby inducing them to establish Exchanges. But, the ability to get one's way by carrying a big stick depends on others knowing that one wields it.<sup>121</sup> Hence, while an intent to encourage states to establish exchanges might make sense in the abstract, it is belied by Congress's failure to make the existence of this cudgel known.<sup>122</sup>

### CONCLUSION

What one makes of the contextual analysis this Essay provides drives the story one will derive from that analysis. One might conclude that the statutory provisions are too consistent to be the result of pure coincidence. Even so, the lack of any direct discussion of the different tax credit treatment of federally run Exchanges makes it highly unlikely that those who voted for the bill understood it to mandate denial of such credits. Two more likely scenarios are: that the sections were drafted by different groups of congressional staff members who failed to coordinate what they were doing – essentially that drafters of section 1401 believed that section 1321 would clarify that federally run Exchanges stand in for state run ones in

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120. Adler and Cannon report that initially they thought the wording of section 1401's tax credit provisions was inadvertent. Adler & Cannon, *supra* note 24, at 123. They claim to have found subsequently that restricting subsidies was meant to encourage states to establish their own exchanges. *Id.* at 151–54. No other possible rational for the distinction between credits on federally and state created Exchanges has been suggested.

121. Thus, President Theodore Roosevelt, who popularized the expression “speak softly but carry a big stick,” made sure to send the United States Navy around the world so that others knew of the United States' military capabilities. See Mike McKinley, *The Cruise of the Great White Fleet*, NAVY HIST. HERITAGE COMMAND (Dec. 18, 2014, 7:13 AM), <http://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/c/cruise-great-white-fleet-mckinley.html>.

122. This is in stark contrast to the Act's attempts to get states to expand Medicaid. In trying to induce states to adopt such an expansion, the statute explicitly expanded obligations of states under the existing Medicaid program, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2012), and the existing program clearly provided that states could lose all Federal contributions to Medicaid for failing to meet those obligations. 42 U.S.C. § 1396c (2012).

every respect while drafters of section 1321 believed that section 1401 would directly indicate inclusion of federally run Exchanges;<sup>123</sup> alternatively, that those who actually chose the language of the Senate bill meant to exclude tax credits for purchasers on federally run exchanges, but did not want to reveal this intent for fear that the full Senate would not accept it. As recent studies demonstrate, it may be easier for legislative staff and interest groups to hide their own agendas in the text of a complex bill than to hide it in legislative history.<sup>124</sup> In either case, the story told by contextual analysis leads to rejection of a technical reading of the ACA that would deny tax credits to purchasers on federally run exchanges.

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123. *Cf.* Gluck & Bressman, *supra* note 92, at 954 (reporting that congressional staffers are well aware of the canons of consistent usage of terms within a statute and reading statutes to avoid superfluities, but reject such canons as unreliable because they do not reflect the fragmented nature of how statutory text is drafted).

124. *See id.* at 967–68 (“[S]taffs who draft legislative history may be tied more closely to elected members than the staffers who draft statutory text.”); Nourse & Schacter, *supra* note 92, at 585 (statutory text is principally drafted by congressional staff).