Washington and Lee Law Review

Volume 75 | Issue 1 Article 9

1-1-2018

Canons of Construction for Dysfunctional Statutes: A Comment on Bennett

Paul G. Mahoney
University of Virginia School of Law

Canons of Construction for Dysfunctional Statutes: A Comment on Bennett

Paul G. Mahoney*

I. Introduction

Shaun Bennett's *Whistling Loud and Clear: Applying* Chevron *to Subsection 21F of Dodd–Frank* meticulously analyzes a securities law problem of considerable complexity. Bennett wrote it after the Supreme Court had granted certiorari in *Digital Realty Trust, Inc. v. Somers*,[1] but before the Court's decision in the case. Just before the Note and this Comment went to press, the Court issued its opinion.[2]

The Note discusses the so-called "whistleblower" provision of Section 922 of the Dodd–Frank Wall Street Reform and Consumer Protection Act,[3] codified as Section 21F of the Securities Exchange Act of 1934.[4] Paragraph (a) of that provision defines a "whistleblower" as someone who provides information relating to a violation of the securities laws *to the SEC*. Paragraph (h) provides various protections to whistleblowers, including protection against termination of employment.

The interpretive problem before the Court arose because certain employees who reported alleged securities law violations to their employers, but not to the SEC, have sought whistleblower status and protection against termination under Section 21F. The

---

* David and Mary Harrison Distinguished Professor, University of Virginia School of Law. I thank Aditya Bamzai, John Harrison and Julia Mahoney for helpful comments.

1. Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1050–51 (9th Cir. 2017), *rev'd*, No. 16-1276 (U.S. Feb. 21, 2018).

2. Dig. Realty Tr., Inc. v. Somers, No. 16-1276. (U.S. Feb. 21, 2018).

3. Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–50 (2010) (codified at 15 U.S.C. § 78u-6 (2012)).

4. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a–78qq (2012)).

Second, Fifth, and Ninth Circuits resolved those claims in three distinct ways. The Second Circuit deferred to an SEC rule extending protection against discharge to employees who report securities law violations to their employer, whether or not they also report to the SEC.[5] The Ninth Circuit did not defer to the SEC's rule but still found that the statute's protections apply to the same broad class of employees.[6] The Fifth Circuit, by contrast, took the more traditional position that the term, once defined, has the defined meaning throughout the relevant statutory provision.[7] The Court granted certiorari in the Ninth Circuit case to resolve the conflict.

Bennett argues in favor of limiting the statute's protections to employees who report to the SEC, the position that prevailed at the Supreme Court. The Note also gives some suggestions to Congress should it find the result unpalatable as a matter of policy. The Note is analytically sharp but careful, takes a clear position, and argues persuasively for it.

Bennett can take considerable satisfaction from the Supreme Court's opinion in *Somers*, which reached the result for which he argued, and for broadly similar reasons. I will accordingly focus my commentary on what *Somers* left unresolved. The opinion took pains to declare that there was no conflict between the statutory language and statutory purpose.[8] This allowed the Court to sidestep controversial issues raised in prior cases involving the construction of statutory definitions. One is a securities law case, *Gustafson v. Alloyd Co, Inc.*[9] Another is *King v. Burwell*,[10] which the Ninth Circuit concluded gave it authority to rewrite the defined term "whistleblower" to reflect a supposedly broader statutory purpose. I will suggest that *Somers*, although it does not explicitly engage with either case, requires a slight updating of priors regarding the reach and impact of both.

---

5. Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015).

6. *Somers*, 850 F.3d at 1050–51, *rev'd*, No. 16-1276 (U.S. Feb. 21, 2018).

7. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 630 (5th Cir. 2013).

8. *See Somers*, slip op. at 11 (stating that "Dodd–Frank's purpose and design corroborate our comprehension" of the definitional provision).

9. 513 U.S. 561 (1995).

10. 135 S. Ct. 2480 (2015).

II. Gustafson *and the Definition of "Prospectus"*

Somers was not the first case to invite the Court to rewrite an explicit definition contained in a securities statute. The Court had already done so in *Gustafson*, producing what knowledgeable commentators have called "the worst securities law opinion ever written."[11] I will compare the issues before the Court in *Gustafson* and *Somers* and speculate that the near-universal criticism that greeted the former decision influenced the way the Court approached the latter.

With various exceptions and exemptions, the Securities Act of 1933 requires an issuer making a public offering of securities to file a registration statement containing specified information.[12] The statute also limits the ways in which issuers, underwriters, and dealers may solicit potential buyers of those securities. At the time of the *Gustafson* decision, the statute limited the written solicitations they could provide investors to the information contained within the registration statement at the time of the solicitation, again with certain exceptions and exemptions.

As a drafting matter, the statute does this in three separate steps (I use the present tense throughout for simplicity, although both Congress and the SEC have altered the regulatory scheme in various ways since *Gustafson*). First, Section 2(a)(10) broadly defines the term "prospectus" to include any written communication "which offers any security for sale"; the term "offer" is in turn defined to include any "solicitation."[13] A prospectus is therefore any written communication that solicits the purchase of a security.

Next, Section 5(b)(1) makes it illegal, after filing a registration statement, to "transmit any prospectus . . . unless such prospectus

---

11. Steve Thel, *Free Writing*, 33 J. CORP. L. 941, 943 (2008); *see also* Stephen M. Bainbridge, *Securities Act Section 12(2) After the* Gustafson *Debacle,* 50 BUS. LAW. 1231, 1231–32 (1995) (calling *Gustafson* "the most poorly-reasoned . . . securities opinion in recent memory"); Edmund W. Kitch, Gustafson v. Alloyd Co.*: An Opinion that Did Not Write*, 1995 SUP. CT. REV. 99, 124.

12. Securities Act of 1933, ch. 38, § 5(a), 48 Stat. 74, 77 (codified as amended at 15 U.S.C. § 77e(a) (2012)).

13. *Id.* § 2(10), 48 Stat. at 75 (codified as amended at 15 U.S.C. § 77b(a)(10) (2012)); *id.* § 2(3), 48 Stat. at 74 (codified as amended at 15 U.S.C. § 77b(a)(3) (2012)).

meets the requirements of section 10."[14] In other words, not just any written solicitation may be used after filing; the statute imposes limits. Finally, Section 10 details what those limits are.[15] In general, a written solicitation must contain the information in the registration statement at the time of use in order to be what securities lawyers call a "conforming" prospectus, or a prospectus that can be used without violating Section 5(b).

Although divided into these three steps, the scheme is simple enough for a student in the first week of a basic securities regulation class to grasp. In general, participants in a registered offering may not use written soliciting material (prospectuses) except for conforming prospectuses, and conforming prospectuses are the ones filed as part of the registration statement and described in Section 10.

Gustafson did not involve the registration and prospectus requirements, but instead a liability provision. Sections 11 and 12 of the Securities Act impose civil liability for materially misleading statements.[16] The former is limited to misstatements contained in a registration statement. Section 12(a)(2) imposes civil liability on any person who offers or sells a security "by means of a prospectus" that contains materially misleading information.[17] Unlike Section 11, it is not limited on its face to situations in which the issuer has filed a registration statement.

So what does Section 12(a)(2) cover? First, in a registered offering, because of differences in the dates as of which the registration statement itself and the Section 10 prospectus speak, the latter could conceivably contain information in addition to or different from the former. Section 12(a)(2) covers any such supplemental or corrective information in the Section 10 prospectus.

---

14. *Id.* § 5(b)(1), 48 Stat. at 77 (codified as amended at 15 U.S.C. § 77e(b)(1) (2012)).

15. *Id.* § 10, 48 Stat. at 81 (codified as amended at 15 U.S.C. § 77j (2012)). Subsection (a) relates to prospectuses used after the effective date of a registration statement, whereas subsection (b) empowers the SEC to allow an incomplete prospectus prior to effectiveness. *Id.*

16. *Id.* §§ 11, 12, 48 Stat. at 82–84 (codified as amended at 15 U.S.C. §§ 77k, 77*l* (2012)).

17. *Id.* § 12(2), 48 Stat. at 84 (codified as amended at 15 U.S.C. § 77*l*(a)(2) (2012)).

Second, an issuer may sell securities in an exempt transaction, most notably a so-called "private placement" exempted under Section 4(a)(2).[18] Those transactions typically involve the preparation of a written selling document called a "private placement memorandum." A private placement memorandum is not a Section 10 prospectus and cannot be because there is no registration statement. But it is nevertheless a written document that solicits the purchase of a security and therefore a "prospectus" as defined in Section 2(a)(10). Section 12(a)(2) would therefore appear to impose civil liability on an issuer or broker who sells a security using a private placement memorandum that contains a material misstatement, and before *Gustafson* the securities bar understood it to do so.

A third situation is more complicated. The principal way the Securities Act distinguishes distributions, which must generally be registered, from secondary trading, which need not be registered, is through another exemption, this one contained in Section 4(a)(1).[19] The details are unimportant, but a secondary market sale described in Section 4(a)(1) need not be registered.

While run-of-the-mill secondary trades take place on impersonal stock exchanges and other markets, buyers and sellers sometimes negotiate larger trades face-to-face. A large secondary transaction might involve a written stock purchase agreement containing company-specific representations, making it look like a private placement except that the seller is not the issuer of the securities. This was the case in *Gustafson*, which involved a sale of all the stock of a company by its owner. The sale was exempt under Section 4(a)(1).

How, if at all, does Section 12(a)(2) apply to that situation? Before *Gustafson*, there were two principal points of view. One is that the plain language of the statute, including the definition of "prospectus" to include any written soliciting material, means that a disappointed purchaser in a secondary market transaction can sue the seller based on misleading factual statements in any written documents used to solicit the sale.[20] The second view is

18. *Id.* § 4(1), 48 Stat. at 77 (codified as amended at 15 U.S.C. § 77d(a)(2) (2012)).

19. *Id.* (codified as amended at 15 U.S.C. § 77d(a)(1) (2012)).

20. Pac. Dunlop Holdings Inc. v. Allen & Co., 993 F.2d 578, 583, 594 (7th Cir.

that the purpose of the statute is to regulate primary distributions, not secondary trading. Imposing civil liability for secondary trading is both inconsistent with the statutory purpose and unnecessary, because the Securities Exchange Act, which mostly regulates secondary markets, has its own civil liability provisions.[21] Under this view, the term "prospectus" as defined in Section 2(a)(10) should be understood to mean any written soliciting material used in the context of a primary offering.[22]

This was the split before the Court in *Gustafson*. One expected the decision to go in one of two directions:

> The term "prospectus" is defined as "any" written solicitation of a securities transaction, without exception. Therefore, section 12(a)(2) reaches secondary transactions. If that is bad from a policy perspective, Congress should fix it.
>
> Because the principal purpose of the statute is to regulate primary transactions, the definition of "prospectus" is implicitly limited to any written material used to solicit a primary transaction. Therefore, section 12(a)(2) does not reach secondary transactions.

Instead, the Court unexpectedly decided:

> The term "prospectus" means any written solicitation used in a *public* offering. Therefore, § 12(a)(2) does not reach secondary transactions. Nor does it reach private placements (which are primary offerings but not public offerings).

The Court's majority concluded that the key to understanding the term "prospectus" is not the definitional Section 2(a)(10), but the operational Section 10. In order to avoid conflict between the two, the definition of "prospectus" must be limited to a document of a type described in Section 10. Because such a document exists

---

1993).

21. *See* Securities Exchange Act of 1934, ch. 404, § 10(b), 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b) (2012)) (authorizing SEC to regulate "deceptive" practices); Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5(b) (2017) (making it unlawful in certain circumstances to "make any untrue statement of a material fact"). The federal courts have recognized a private right of action under Rule 10b-5. *See* Basic Inc. v. Levinson, 485 U.S. 224, 230–31 (1988) (stating that "[j]udicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists" under Rule 10b-5).

22. Ballay v. Legg Mason Wood Walker, Inc., 925 F.2d 682, 693 (3d Cir. 1991).

only in a registered public offering, that limitation must apply to the term "prospectus" in Section 12(a)(2).

Gustafson states:

> Although § 10 does not define what a prospectus is, it does instruct us what a prospectus cannot be if the Act is to be interpreted as a symmetrical and coherent regulatory scheme . . . .[23]

The case has accordingly come to stand for the proposition that statutes must be interpreted as a whole, not piecemeal.[24] This is ironic, because the *Gustafson* majority utterly misunderstood the overall structure and scheme of the Securities Act.

The Securities Act is a "coherent regulatory scheme" in which Section 5 plays the pivotal role. It and the anti-fraud provision in Section 17 impose obligations on sellers of securities. The remainder of the statute implements Section 5 by providing definitions, exceptions, exemptions, liability and enforcement provisions, grants of rulemaking authority, and formulas for compliance with Section 5's prohibitions. Section 10 comes into play only when cross-referenced by Section 5(b), and Section 5(b) comes into play only when there is a registered public offering. It is therefore entirely unsurprising that Section 10 refers only to public offerings, and its doing so creates no conflict at all with Section 2(a)(10), which is of broader applicability.[25] The Court's reading of the statute was little short of bizarre.

Gustafson was remarkably cavalier about the fact that the term "prospectus" was assigned a meaning in a section captioned "Definitions." It gave the definition no priority over other provisions of the statute that might bear on what Congress meant. Indeed, the analytical portion of the *Gustafson* opinion opens with the words "We begin with § 10," notwithstanding the fact that the issue was the meaning of a term defined in Section 2 of the statute.[26] The *Somers* opinion approached the interpretive question quite differently. It begins by affirming that "[w]hen a

---

23. Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995).

24. *See, e.g.*, Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 290 (2010) (quoting *Gustafson* for this proposition).

25. My colleague Ed Kitch provided a more detailed version of this argument shortly after the Court decided *Gustafson*. *See generally* Kitch, *supra* note 11.

26. *Gustafson*, 513 U.S. at 568.

statute includes an explicit definition, we must follow that definition, ... This principle resolves the question before us."[27]

The *Somers* Court went on to insist that there is no conflict between the language and purpose of Section 21F. *Somers* does not, therefore, explicitly contradict *Gustafson*. The difference in approach is nevertheless striking. One hopes that the Court learned its lesson after *Gustafson*. A generalist court faces a daunting task in elucidating the "scheme" of a long, complex regulatory statute. It is therefore a bad idea to disregard a statutory definition without extremely compelling reasons. This is the view that Justice Thomas's concurrence in *Somers*, joined by Justices Alito and Gorsuch, expresses.[28] Because the statutory language at issue in *Somers* is clear, the concurrence argues, any resort to the apparent purpose is inappropriate.

III. Chevron*,* King*, and* Somers

The employee in *Somers* argued that the Court should defer to the SEC's interpretation of Section 21F's "whistleblower" definition under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* [29] As Bennett carefully describes it, where a statute's meaning is clear, there is no room for the administering agency to depart from that plain meaning. It is a predicate to the application of so-called *Chevron* deference that "the statute is silent or ambiguous with respect to the specific issue."[30]

The argument for finding the definition of "whistleblower" ambiguous is that applying its plain meaning would offer employees less protection than Congress arguably intended.[31] The Court did not reach the question whether this asserted policy incongruity constitutes "ambiguity" for *Chevron* purposes because it concluded that there was in fact no such incongruity: the

27. Dig. Realty Tr., Inc. v. Somers, No. 16-1276., slip op. at 9 (U.S. Feb. 21, 2018). (internal quotation marks omitted) (citation omitted).

28. *Id.* at 1–2 (Thomas, J., concurring in part and concurring in the judgment).

29. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

30. *Id.* at 843.

31. *See Somers*, slip op. at 13–17 (summarizing the employee's and Solicitor General's arguments in favor of finding the statutory language ambiguous).

statute's purpose was to encourage reporting to the SEC, and thus tying protection to reporting furthers the statutory scheme. Does the result give us any hint, however, of how the Court might deal with similar claims in the future?

At least one member of the Court appears to reject outright the idea that conflict between purported policy goals and statutory language is "ambiguity" for *Chevron* purposes. Concurring in *Scialabba v. Cuellar de Osorio*,[32] the Chief Justice argued that "[c]ourts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency."[33] Congress sometimes explicitly assigns regulatory responsibility. Section 14(e) of the Securities Exchange Act, for example, gives the SEC the authority to define "fraudulent, deceptive, or manipulative" devices in connection with tender offers.[34] Other times, Congress says less than it might have in the expectation that the agency can flesh out the details. For ease of explication, I will refer to these forms of statutory incompleteness as "Type I ambiguity." In the Chief Justice's view, *Chevron* stands for the proposition that agencies may resolve Type I ambiguity on a delegation theory.

By contrast, a particular term in a statute may stand in direct conflict with another term, with the overall purpose of the statute, or with another applicable statutory rule. Congress may have been careless in the drafting. Alternatively, it may have intentionally failed to resolve a conflict between members' competing policy preferences as expressed in different sections of the statute, thereby punting a politically intractable problem to the executive branch or the courts. Again, for ease of explication, I will refer to these forms of conflict as "Type II ambiguity." The *Scialabba* concurrence argues that Type II ambiguity is *not* a reason to defer to the agency's interpretation: "Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense."[35] This implies that

---

32. 134 S. Ct. 2191 (2014).
33. *Id*. at 2214 (Roberts, C.J., concurring in the judgment).
34. 15 U.S.C. § 78n(e) (2012).
35. *Scialabba*, 134 S. Ct. at 2214 (Roberts, C.J., concurring in the judgment).

when a statute "doesn't make sense," that is, when it contains Type II ambiguity, it is for the court, not an agency, to decide what to do about it.[36]

King v. Burwell accordingly posed a doctrinal challenge for the Chief Justice. The Patient Protection and Affordable Care Act[37] (ACA) provides certain tax credits to taxpayers purchasing insurance through "an Exchange established by the State."[38] The question before the Court was whether the tax credits are also available to purchasers on an exchange established by the federal government. The Internal Revenue Service concluded that they are.[39] Moreover, it would be difficult to accomplish the goals the President and the Congressional leadership set for ACA if the subsidies were available in fewer than half of the states. This conflict between statutory language and Congress's presumed intent—and not the IRS's position—was the practical motivation for concluding that the phrase "established by the State" actually means "established by the State or the federal government."

This was an instance of Type II ambiguity—the words of the statute conflicted with the aims that the statute's supporters claimed for it. As such, the Chief Justice viewed it as an inappropriate issue to delegate to the IRS. However, his *Scialabba* concurrence did not command a majority and he did not invoke it in *King*. Instead, his majority there cited *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*[40] for the narrower proposition that, "in extraordinary cases," ambiguity does not equal delegation to an agency.[41] Extraordinary cases are

---

36. The Court recently denied a petition for certiorari expressly raising the question, whether direct conflict between two statutory provisions is "ambiguity" for purposes of *Chevron*. *See* Petition for Writ of Certiorari at 12, Perez-Guzman v. Sessions, No. 17-302 (U.S. Aug. 24, 2017) ("This Court should grant review to clarify whether *Chevron* applies to unambiguous but conflicting statutes."), *cert. denied*, 138 S. Ct. 737 (2018). The lower court's decision is reported at *Perez-Guzman v. Lynch*, 835 F.3d 1066 (9th Cir. 2016).

37. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 18001 (2010)).

38. 26 U.S.C. § 36B(b)(2)(A).

39. *See* 26 C.F.R. § 1.36B-2(a)(1) (2017) (extending tax credit to certain persons enrolled in health plans "through an Exchange"); 45 C.F.R. § 155.20 (defining "Exchange" to include those "operated by a State . . . or by HHS").

40. 529 U.S. 120 (2000).

41. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (citation omitted).

those in which the ambiguity goes to a major, rather than an interstitial, policy question. The Chief Justice explained that *King* was such an extraordinary case: "Whether those credits are available on Federal Exchanges is . . . central to this statutory scheme."[42] Having therefore concluded that the conflict between ACA's clear statutory language and apparent purpose was not a license for an *agency* to repair it, the Court concluded that it was nevertheless a license for the *Court* to repair it.

The Ninth Circuit relied on *King* in rewriting Dodd–Frank's "whistleblower" definition itself while not deferring to the SEC's rewrite.[43] As Bennett argues, however, *Somers* differs from *King* in that it does not involve a major policy question. The availability of whistleblower protection to an employee who reports only internally is not as important to the overall scheme of the Dodd–Frank Act as the availability of subsidies on federal exchanges is to ACA. This suggests that there was no extraordinary circumstance in *Somers* to preclude an ordinary application of *Chevron*. The Court's conclusion that the statutory language was consistent with the statutory purpose meant that there was no ambiguity for the SEC to resolve, so its regulatory rewrite of the statutory language could not stand.

The unresolved question after *Somers*, then, is how a majority of the Court will approach future cases involving Type II ambiguity. *King* appeared to signal that the federal courts have broad latitude to rewrite ill-conceived statutory language that fails to advance the purposes the statute's proponents identified for it. Justice Scalia's *King* dissent, on the other hand, suggests that the decision was an anomaly driven by the Court's desire not to interfere with ACA.[44] Justice Thomas's *Somers* concurrence takes the position that Type II ambiguity is insufficient to give either the administering agency or the courts license to "fix" a statute.

---

42. *Id.* at 2489.

43. Somers v. Dig. Realty Tr. Inc., 850 F.3d 1045, 1049 (9th Cir. 2017).

44. *See King*, 135 S. Ct. at 2497 (Scalia, J., dissenting) ("But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.").

IV. How Do You Construe a Dysfunctional Statute?

This unresolved question is important because, as *Somers* illustrates, the Court is likely to confront more and more cases asking whether the word "blue" actually means "orange." We should discuss the elephant in the room: Congress no longer legislates carefully, and what it produces is often an incoherent mess.

Consider the present controversy. The Sarbanes-Oxley Act of 2002[45] (SOX) gives a right of action to employees of publicly traded companies who allege discharge or other discrimination because of certain whistleblower activities. The plaintiff must seek relief from the Secretary of Labor before filing suit. There is a ninety-day statute of limitations. A successful plaintiff may recover compensatory damages.

The Dodd–Frank Act gives a right of action to employees, not limited to those of publicly traded companies, who allege discharge or other discrimination because of similar whistleblower activities. The employee may file suit without first seeking administrative relief. The statute of limitations is substantially longer than ninety days. The available damages are greater than compensatory. Dodd–Frank accompanies these whistleblower protections with a bounty system that affirmatively encourages whistleblowing.

What explains this combination of provisions? If Congress intended to make SOX's whistleblower protection more robust, why didn't it simply amend or replace the SOX provision? If, as the Court suggested, it simply intended to encourage employees to report securities law violations to the SEC, why didn't it just add a bounty provision rather than including protections against discharge that largely overlap those in SOX?[46]

The simple answer is we don't know. It is also clear that we cannot infer much from what Congress did or didn't do to harmonize the Dodd–Frank and SOX provisions. The legislative

---

45. Pub. L. No. 107-204, § 806, 116 Stat. 745 (codified as amended at 18 U.S.C. § 1514A (2012)).

46. Note that Congress did not include the same overlapping provision in the nearly identical whistleblower provisions that Dodd–Frank adds to the Commodity Exchange Act. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 748, 124 Stat. 1376, 1739 (2010) (codified at 7 U.S.C. § 26 (2012)).

process that produced Dodd–Frank was not the one described in high school civics textbooks.[47] There are many possible explanations for Congress's inability in recent years to use "the traditional legislative process":[48] the partisanship of our era, the members' need to engage in constant fundraising, or the tendency to outsource legislative drafting to lobbyists and think tanks, among others. Whatever the cause, the effect is the same. Major legislation is generally overstuffed, poorly organized, and internally inconsistent, not to mention inconsistent with other statutory provisions on related issues.

Without saying so explicitly, the federal courts are developing canons of construction for dysfunctional statutes. The *King* opinion nearly says as much. It excuses the sloppiness of the statute by describing the unprecedented process of its enactment, before concluding that it is the Court's job to drag ACA across the finish line.[49] The Court will eventually have to give better guidance to lower courts faced with conflicts between what high-profile statutes actually say and what Congress believes they say.

In his reminiscences on the Securities Act of 1933,[50] James Landis, who left his position as a professor of legislation at Harvard Law School to lead the White House team shepherding the statute through Congress, described his meetings with Middleton Beaman, a career staffer in charge of legislative drafting in the House of Representatives:

> I had thought I knew something of legislative draftsmanship until I met him. The next days were spent in continuous conference with him and [his assistant]. For days Beaman

---

47. *See generally* ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T (2014) (describing the enactment of Dodd–Frank).

48. King v. Burwell, 135 S. Ct. 2480, 2492 (2015) (quoting John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 L. LIBR. J. 131, 163 (2013)).

49. *Id.* at 2496. The Court could not bring itself to acknowledge that the very clause of the statute at issue in *King* was missing a word. The Court quotes the statute as providing subsidies to persons acquiring insurance from "an Exchange *established by the State* under section 1311 of [ACA]". *Id.* at 2487 (emphasis in original). In fact, the text as enacted by Congress omitted the word "section"; it says, "an Exchange established by the State under 1311 of [ACA]." 26 U.S.C. § 36B(b)(2)(A) (2012).

50. Pub. L. No 73-22, 48 Stat. 74.

> would not allow us to draft a line. He insisted instead on exploring the implications of the bill to find exactly what we had or did not have in mind.[51]

The resulting statute occupies a svelte twenty-two pages in the Statutes at Large.[52] Beaman and his staff worked on it during a profound national emergency, while Congress was simultaneously considering statutes comprehensively regulating banking and agriculture.[53] Whatever their other demerits, those statutes are well-crafted legal documents.

No one lavished the same care on ACA or Dodd–Frank. The *King* opinion, however, thrust the Court into Beaman's institutional role. The Court decided that it understood precisely what Congress and the Executive actually wanted to achieve and cleaned up the language that Congress enacted accordingly.

The *Somers* opinion suggests that the Court's editorial assistance will be available only in rare circumstances. As such, it supports Justice Scalia's essentially political understanding of the *King* result. ACA was President Obama's signature legislative accomplishment and its repeal was the central promise of many Republican congressional and presidential campaigns. The Chief Justice, rightly or wrongly, appears to have believed that the Court would be accused of taking sides politically if it applied the statute Congress wrote rather than the one the President described to the public. An obscure provision of Dodd–Frank did not receive the same concierge-level treatment.

In my view, this is all to the good. The Court should refuse to play along when Congress cannot enact legislative language sufficient to achieve what it wants. Deprived of the luxury of knowing that the Court will bail it out when necessary, Congress would have an incentive to resume paying attention to the language of the statutes it enacts.

Had the Court, in *National Federation of Independent Business v. Sebelius*,[54] decided that the word "penalty" does not

---

51. James M. Landis, *Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 37 (1959).

52. Securities Act §§ 1–41, 48 Stat. at 74–95 (codified as amended at 15 U.S.C. §§ 77a–77aa95).

53. *See generally* Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31; Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162.

54. 567 U.S. 519 (2012).

mean “tax” merely because it is convenient for it to do so, ACA’s individual mandate would not have survived. The statute might then have collapsed without the Court having to engage in the even greater interpretive gymnastics of *King*. Congress would have learned an important and valuable lesson: the process that produced ACA is no way to enact a statute that restructures one of the nation’s largest industries and creates enormous uncertainty about cost and access to health care providers for millions of households.

Perhaps, then, Justice Scalia was right. *Somers* may signal that traditional rules of statutory construction apply apart from ACA. The Court did precisely what Bennett suggested and declined to rewrite Section 21F of the Exchange Act, a statute that is clear on its face, even if it is not the statute the 111th Congress wishes it had enacted. If the Court refuses to enable dysfunction, we may see less of it.