UNFAIR COERCION, OR GREATER DEFERENCE? TWO NEW SIDES OF KING V. BURWELL

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I. INTRODUCTION

Litigation challenging the legality of an Internal Revenue Service rule that became final on May 2012[1] has traveled a long, winding, and contentious path. The IRS rule authorized the distribution of federal premium assistance tax credits in all health benefits exchanges under the Patient Protection and Affordable Care Act of 2010 (the "ACA"). However, potential legal problems with reconciling various sections of the final legislation involving those tax credits were identified as early as December 6, 2010.[2] On September 19, 2012, the first of four different legal challenges to the IRS rule was filed in federal district court in

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[1] 26 C.F.R. §§ 1.36B-1(k), 1.36B-2(a) (2012); Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,378 (May 23, 2012).

[2] *See* Thomas P. Miller, *Who's in Charge? More Legal Challenges to the Patient Protection and Affordable Care Act*, AM. ENTERPRISE INST. (Dec. 6, 2010), http://www.aei.org/press/whos-in-charge-more-legal-challenges-to-the-patient-protection-and-affordable-care-act/.

Oklahoma.[3] In 2013, subsequent lawsuits were filed in three different federal district courts in the District of Columbia, Virginia, and Indiana.[4] After a mixed record of wins and losses in those lower courts,[5] *King v. Burwell* became the first case to reach the Supreme Court.[6]

Oral argument for *King* on March 4, 2015, covered the primary issues outlined in the briefs of the respective parties, involving the construction and interpretation of the law's text (*e.g.*, "an exchange established by the State under [Section] 1311"), the legislative intent of the Congress that passed the ACA, and whether the various statutory provisions might be sufficiently ambiguous to require greater deference to the IRS under step two of review under the so-called *Chevron* doctrine.[7]

However, two less-discussed issues were injected into the case during oral argument by somewhat unexpected remarks by Justice Anthony Kennedy and Chief Justice John Roberts. Justice Kennedy was concerned that the petitioners' preferred reading of the statute could raise serious constitutional problems that involved coercion of, if not lack of fair notice to, state governments of the heavy burdens they would face if they decided not to establish their own ACA-qualified health benefits exchanges.[8] Chief Justice Roberts hinted that any decision to uphold the IRS rule due to ambiguity in the statute and deference to the executive branch under *Chevron* analysis might leave the issue of tax credit subsidies in federal exchanges subject to reinterpretation by a future administration.[9]

Part II of this essay examines the nature of Justice Kennedy's federalism concerns and their possible implications both for the

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3 Amended Complaint for Declaratory and Injunctive Relief, Oklahoma *ex rel.* Pruitt v. Sebelius, No. CIV-11-030-RAW, 2012 WL 10478689 (E.D. Okla. Sept. 19, 2012).

4 Halbig v. Burwell, 758 F. 3d 390 (D.C. Cir. 2014); King v. Burwell, No. 14-1158 (4th Cir. 2014); Complaint for Declaratory and Injunctive Relief and Judicial Estoppel, Indiana v. IRS, No. 13-1612 (S.D. Ind., Oct. 8, 2013).

5 *Halbig*, 758 F.3d at 390; King v. Sebelius, 997 F. Supp. 2d 415 (E.D. Va.) *aff'd sub nom.*, 739 F.3d 358 (4th Cir. 2014) *cert. granted*, 135 S.Ct. 475, 190 L. Ed. 2d 355 (2014); Oklahoma *ex. rel.* Pruitt v. Burwell, No. CIV-11-30-RAW, 2014 WL 4854543 (E.D. Okla. Sept. 30, 2014); Motion to Dismiss, Indiana v. I.R.S., No. 13-1612 (S.D. Ind. Aug. 28, 2014); *see* Halbig v. Sebelius, 27 F. Supp. 3d 1 (D.D.C. 2014).

6 King v. Burwell, 759 F.3d 358 (4th Cir. 2014) *cert. granted*, 135 S.Ct. 475, 190 L. Ed. 2d 355 (2014).

7 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

8 Transcript of Oral Argument at 16 & 49, King v. Burwell, 135 S.Ct. 475 (Mar. 4, 2015) (No. 14-114).

9 *Id.* at 76. (Chief Justice Roberts asked Solicitor General Verrilli, "If you're right – if you're right about *Chevron*, that would indicate that a subsequent administration could change that interpretation?")

upcoming ruling in *King v. Burwell* and related areas of federal-state relations. Part III will outline the likely issues behind Chief Justice Roberts' remarks, in light of other recent Supreme Court decisions involving subsequent revisions and "interpretive" changes in federal rules and regulations, as well as what they may or not be signaling. Part IV concludes that the shape-shifting nature of the legal arguments concerning the ACA, as revealed once again in *King*, leaves both sides of these issues equally likely to be surprised by the final Court ruling, probably in late June.

II. THE NEW FRONTIER OF COERCIVE FEDERALISM

During oral argument in *King v. Burwell* on March 4, 2015, Justice Kennedy followed up on a point first raised by Justice Sotomayor about the federal government potentially coercing states in an unconstitutional manner if the Court accepted the petitioners' preferred reading of the ACA. The petitioners argued that the language "established by the State" in Section 1401(b)(2)(A) of the ACA meant that only state-established exchanges could gain the benefits of federal premium assistance tax subsidies. Although predicted by some Court observers as a likely supporter of the petitioners' position, Justice Kennedy observed:

> Let me say that from the standpoint of the dynamics of Federalism, it does seem to me that there is something very powerful to the point that if your argument is accepted, the States are being told either create your own Exchange, or we'll send your insurance market into a death spiral . . . .It seems to me that under your argument, perhaps you will prevail in the plain words of the statute, there's a serious constitutional problem if we adopt your argument.[10]

During a later portion of oral argument, Justice Kennedy elaborated on the possible effects of any such unconstitutional coercion in interpreting the ACA's statutory text "[I]t does seem to me that if Petitioners' argument is correct, this is just not a rational choice for the States to make and that they're being coerced . . . .And that you then have to invoke the standard of constitutional avoidance."[11] Invoking this standard could lead the Court to read the applicable statutory text in favor of the federal government's (respondents') position.

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[10] *Id.*at 16.
[11] *Id.* at 49.

The Kennedy line of argument did not arrive out of thin air. Although some of the elements of "clear notice" and "cooperative federalism" as part of the statutory interpretation were mentioned in the respondents' main brief,[12] these issues and others of constitutional avoidance and how to interpret statutory text when a federalism question is at issue were highlighted most prominently in an amici curiae brief submitted by four professors who teach and write about federalism, constitutional law, and legislation.[13]

As articulated in a number of related articles[14] and presentations[15] by the theory's primary advocate, professor Abbe R. Gluck of Yale Law School, the drastic penalty that the petitioners' reading would impose on the states did not meet the requisite standard of clarity and fair notice to the states. Because Congress failed to state clearly any intent to withhold subsidies from states that did not establish their own exchanges, the ACA statute should be construed to provide those subsidies to federal exchange states as well.[16]

Coercion or Choice?

However, raising these issues is not the same as winning the final argument that the ACA statutory provisions in question must necessarily be interpreted as authorizing tax credits in federal exchanges. A different view of federalism could conclude that the ACA offered a different kind of choice to state governments: Establish their own health insurance exchange or rely on the federal government to do so—under different terms for each option. States deciding to establish their own exchanges would gain the benefit of tax credit subsidies for their eligible residents who enrolled in its coverage, but they also would trigger application of

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12 Brief for the Respondents at 38-41, King v. Burwell, 135 S.Ct. 475 (Jan. 21, 2015) (No. 14-114), 2015 WL 349885.

13 Brief for Professors Thomas W. Merrill, Gillian E. Metzger, Abbe R. Gluck, and Nicholas Bagley as Amicus Curiae Supporting Respondents 4–5, 8–9, 11–18, 20, & 23–24, King v. Burwell, 135 S.Ct. 475 (Jan. 28, 2015) (No. 14-114), 2015 WL 456257.

14 Abbe R. Gluck, *How State's Rights Shapes King v. Burwell*, POLITICO, (Mar. 5, 2010), *available at* http://www.politico.com/magazine/story/2015/03/king-vs-burwell-states-rights-115813.html#.VQHxvmNTfAw; Abbe R. Gluck, *King v. Burwell Isn't About Obamacare*, POLITICO.(Feb. 27, 2015), *available at* http://www.politico.com/magazine/story/2015/02/king-v-burwell-states-rights-115550.html#.VQHymWNTfAw.

15 Thomas P. Miller, *Friends and Foes of King v. Burwell: Several More Interesting Legal and Policy Arguments*, AM. ENTERPRISE INST. (Feb. 23, 2015), http://www.aei.org/events/friends-foes-king-v-burwell-several-interesting-legal-policy-arguments/.

16 Gluck, *King v. Burwell Isn't About Obamacare*, *supra* note 14; Gluck, *How State's Rights Shapes King v. Burwell*, *supra* note 14.

the employer mandate to noncomplying larger businesses in their state, extend the individual mandate's requirements to many more of those residents, invite much greater federal involvement in their insurance markets, and undertake the costs of establishing a state exchange.[17]

This type of choice does not trigger the same concerns about coercion of states in the ACA's Medicaid expansion provisions that were ruled unconstitutional in *NFIB v Sebelius* three years ago.[18] That ruling represented the first significant extension of the Supreme Court's *Pennhurst* "Clear Notice," or anti-retroactivity doctrine, which held that Congress must express clearly its intent to impose conditions on the grant of federal funds to state governments.[19] By requiring notice of the nature of the states' obligation in accepting federal program funding, this rule protects states against federal bait-and-switch tactics that might later impose a more onerous set of requirements on states already locked into the program.[20]

James Blumstein of Vanderbilt Law School was the primary architect of the legal argument that succeeded in persuading the Supreme Court to find the mandatory expansion of Medicaid under the ACA unconstitutional and then restructure it as a voluntary option for state governments.[21] He recently distinguished the coercion in the Medicaid expansion limited in *NFIB* from the incentives to states to establish exchanges in *King*.

First, the states in *NFIB* were threatened with the loss of all of their preexisting Medicaid funding if they failed to expand as directed by the ACA.[22] The Court's remedy protected all of the states' money under "old" Medicaid. Second, in *King*, the federal government was not using

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[17] Brief of the Galen Institute and State Legislators as Amici Curiae, in Support of Petitioners, King v. Burwell, 135 S.Ct. 475 (Dec. 29, 2014) (No. 14-114), 2014 WL 7463544; C. Boyden Gray, Adam White & Adam Gustafson, *Did the Challengers in King Really Ignore Federalism? Their Response*, VOLOKH CONSPIRACY, WASH. POST (Mar. 3, 2015), http://www.washingtonpostcom/news/volokh-conspiracy/wp/2015/03/03/did-the-challengers-in-king-really-ignore-federalism-their-response/. Gray, White, and Gustafson further contend that, in the ACA, Congress failed to adhere to the "clear statement rule" in the event that it might have wished to modify the longstanding arrangement under which health insurance remains an area of traditional state concern; at least in terms of states that *declined* to establish their own exchanges. Brief of the Galen Institute at 15–21; *see also* Gregory v. Ashcroft, 501 U.S. 452 (1991).

[18] Jonathan H. Adler, *James Blumstein on the King Oral Argument,* VOLOKH CONSPIRACY, WASH. POST (Mar. 5, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/05/james-blumstein-on-the-king-oral-argument/.

[19] Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 25 (1981).

[20] Adler, *James Blumstein on the King Oral Argument*, *supra* note 18.

[21] Brief of James F. Blumstein as Amicus Curiae in Support of Petitioners at 2, Fla. v. Dep't of Health & Human Serv. (Jan. 17, 2012) (No. 11-400), 2012 WL 195306.

[22] Adler, *James Blumstein on the King Oral Argument*, *supra* note 18.

"its power over a preexisting program to leverage participation in a new program or an unforeseeable expansion of an existing program."[23]

Although the majority of the Court in *NFIB* was divided in its rationales for ruling against the terms of the Medicaid expansion, the more narrow plurality opinion also found that the large expansion in effect represented an entirely new program in nature and scope.[24] Hence, this Court plurality ruled that states did not have adequate notice when they first signed up for (original) Medicaid decades ago that they would be required to expand its scope of coverage by the ACA, as an unanticipated add-on. The excessive loss of funds did not constitute unconstitutional coercion in and of itself.[25]

Blumstein observes that the state exchanges in *King* involve an entirely new program. A proper reading of the ACA provisions provides notice to states that they will have to establish an exchange in order to gain subsidies for their residents. Moreover, the Obama Administration's unilateral extension of the original deadline for establishing a state exchange[26] means that states are still not foreclosed from reconsidering their original decision and allowing their residents to qualify for federal tax credit subsidies. Any alleged lack of notice can be remedied.[27] Blumstein concludes that under the petitioners' interpretation of the ACA's subsidy provision, states are the gatekeepers to the federal subsidy and get to strike their own policy balance between allowing residents to receive tax credits when purchasing state-exchange-based insurance and providing businesses in their state with a better business climate (*e.g.*, relief from the ACA's employer mandate).[28] Although the federal government could not mandate the states to establish exchanges,[29] it could try to induce them to do so with the incentive of federal subsidies.

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[23] *Id.*

[24] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2630 (2012); *see also* Mayhew v. Burwell, 772 F.3d 80 (1st. Cir. 2014).

[25] *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2630; *see also Mayhew*, 772 F.3d 80..

[26] CTRS. FOR MEDICARE AND MEDICAID SERVICES, FREQUENTLY ASKED QUESTIONS ON EXCHANGES, MARKET REFORMS, AND MEDICAID, Dec. 10, 2012, https://www.cms.gov/CCIIO/Resources/Files/Downloads/exchanges-faqs-12-10-2012.pdf.

[27] Jonathan H. Adler, *James Blumstein on the Administration, the IRS and the ACA: Will the Courts Rein in the President's Pen?*, VOLOKH CONSPIRACY, WASH. POST (Feb. 27, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/27/the-administration-the-irs-and-the-aca-will-the-courts-rein-in-the-presidents-pen/.

[28] Adler, *James Blumstein on the King Oral Argument*, *supra* note 18.

[29] *Id.*; Adler, *James Blumstein on the Administration, the IRS and the ACA: Will the Courts Rein in the President's Pen?*, *supra* note 27; *see* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1311, 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 18031 (2012)).

Avoiding Spillover Effects

The petitioners have other rebuttals to the coercive federalism claims of the federal government and its allies in *King*. For example, the *NFIB* decision regarding Medicaid found no constitutional problems with conditioning new federal funds (at an even higher matching rate than the existing Medicaid program) upon states agreeing to participate in the expanded portion of the Medicaid program.[30] Similarly, there should be no constitutional problems if the ACA provisions are read as authorizing the federal government to offer new tax subsidies to residents in states that agree to participate in a new program by establishing their own ACA-qualified exchanges. Offering to hand out new money is not the same as threatening to take away existing funding.

On the other hand, striking down this conditional offer of funding as unconstitutionally coercive to states might well jeopardize a host of other existing federal-state grant-in-aid programs based on some form of conditionality (*e.g.*, No Child Left Behind[31]). Perhaps that accounts for how Solicitor General Donald Verrilli responded, when asked by Justice Alito during oral argument whether he agreed that "If we adopt Petitioners' interpretation of this Act, is it unconstitutionally coercive?," Verrilli said, "I think that it would be—certainly be a novel constitutional question, and I think that I'm not prepared to say to the Court today that it is unconstitutional."[32]

Moreover, any possible ruling that the statutory text clearly limits the ACA premium subsidies only to state-established exchanges, but does so in a way that is unconstitutionally coercive, is more likely to result in invalidating those tax credits for all fifty states, rather than authorizing them to be extended (contrary to congressional intent) even to states that have declined to receive them, by failing to establish their own exchanges.[33] Indeed, such an interconnected scheme of coercion could inevitably put in jeopardy the related ACA provisions for federal insurance regulation in Title I of the ACA (*e.g.*, guaranteed issue and adjusted community rating) that could cause the coercion due to the prospects of death spirals in the insurance markets of states without

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30 *Mayhew*, 772 F.3d at 91–92.

31 No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (codified at 20 U.S.C. § 6301 (2001)).

32 Transcript of Oral Argument at 48-49, *supra* note 8.

33 Joshua Blackman, *Federalism Will Sink, not Save, Obamacare*, NAT'L REV., (Mar. 10, 2015), http://www.nationalreview.com/article/415130/federalism-will-sink-not-save-obamacare-josh-blackman.

exchange tax credits.[34] After all, Justice Kennedy previously joined three other justices in *NFIB* in concluding that (1) the unconstitutionally coercive Medicaid provisions could not be severed and the entire Medicaid expansion must be stricken down, and (2) unconstitutional invalidity of both the Medicaid expansion and the individual mandate required invalidating the entire law as non-severable.[35]

Before going too far down the fair notice trail, it is also important to remember that seven states filed amici briefs in support of the petitioners in *King*, essentially saying that they were aware of how the tax credit subsidies were conditioned under the ACA and that they still chose not to establish their own state exchanges.[36] States knew, or should have known, before the initially extended deadline date of December 14, 2012, for deciding whether to establish exchanges under the ACA, that the IRS rule had been challenged in public comments when first proposed in August 2011 and the State of Oklahoma had challenged the final rule in federal district court on September 19, 2012.[37]

Regulating State Residents vs. Conditioning Funding for State Governments

Finally, the degree to which unconstitutional coercion claims can be stretched to cover particular states claiming injury due to the ACA's exchange funding provisions remains in doubt. The primary obstacle is that the alleged coercion involves the threat of imposing a federal scheme of regulation on states that fail to establish their own exchange. Under the petitioners' preferred reading of the ACA statute, this means that those states' residents do not gain the benefit of federal tax credits,

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34 Joshua Blackman, *Avoiding Constitutional Avoidance*, VOLOKH CONSPIRACY, WASH. POST (Mar. 4, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/04/avoiding-constitutional-avoidance.

35 *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. 2566.

36 Brief of the State of Oklahoma, Alabama, Georgia, Nebraska, South Carolina, and West Virginia, as Amici Curiae Supporting Petitioners at 15, King v. Burwell, 135 S.Ct. 475 (Dec. 29, 2014) (No. 14-114), 2014 WL 7463546. Brief of Amici Curiae State of Indiana and 39 Indiana Public School Corporations in Support of Petitioners at 21, King v. Burwell, 135 S.Ct. 475 (Dec. 29, 2014) (No. 14-114), 2014 WL 7463545.

37 David Oedel, *A Response to Justice Kennedy from the Heart of Georgia*, MACON MONITOR (Mar. 9, 2015), http://maconmonitor.com/2015/03/09/a-response-to-justice-kennedy-from-the-heart-of-georgia-what-would-georgia-do-if-the-supreme-court-ruled-against-forcing-federal-subsidies-through-state-health-insurance-exchanges-t/ (citing 2011-36 I.R.B.; Amended Complaint for Declaratory and Injunctive Relief, *supra* note 3). The deadline subsequently was unilaterally postponed. *See* CTRS. FOR MEDICARE AND MEDICAID SERVICES, *supra* note 26.

but their states' insurance markets nevertheless may be subject to destabilizing burdens of other ACA insurance regulation.

The first rebuttal to this scenario of unconstitutional coercion imposed on non-complying states is that it does not fit the model of past Supreme Court findings of conditional federal spending programs that may be constitutionally problematic. Several legal scholars have noted that *New York v. United States* has already distinguished between the latter and other congressional efforts (such as in the ACA) to use federal regulatory authority to encourage state cooperation.[38] The key portion of the Court's opinion by Justice O'Connor in *New York* explained:

> The affected States are not compelled by Congress to regulate, because any burden caused by the State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile.[39]

Jonathan Adler of Case Western Reserve Law School observes that the practice of incentivizing states to cooperate with a state implementation plan in accord with particular federal regulatory goals, under the threat of imposing "differential, and more draconian, regulatory burdens on private firms within non-cooperating states," is a common practice in regulatory extensions of the Clean Air Act.[40] This practice of burdening a state's residents, rather than its government, has yet to be challenged successfully as unconstitutionally burdensome for the latter. Ilya Somin of George Mason Law School adds that "current state coercion precedents apply only to conditions attached to *federal spending grants to state governments*."[41] However, the ACA exchange

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38 *See infra* notes 39–42 and accompanying text.

39 New York v. United States, 505 U.S. 144, 174 (1992).

40 Jonathan Adler, *Could King v. Burwell Overturn Parts of New York v. United States?*, VOLOKH CONSPIRACY, WASH. POST (Mar. 5, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/05/could-king-v-burwell-overturn-parts-of-new-york-v-united-states/.

41 Ilya Somin, *Federalism Arguments in King v. Burwell*, VOLOKH CONSPIRACY, WASH. POST (Mar. 7, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/07/federalism-arguments-in-king-v-burwell/ (emphasis added).

coverage provisions in question in *King* involve the threat of increased regulation, imposed on the residents of a given state, as an incentive for that state to agree to similar regulation on its own (including the ACA's employer mandate and a more comprehensive individual mandate). Moreover, the tax credit grants in *King* instead go to private individuals (actually, to private insurers by way of private individual enrollees in qualified, exchange-based coverage).

Political Accountability

If the ACA's exchange coverage provisions are read as treating federal exchanges as also eligible for tax credit subsidies, then non-complying states would end up with an even larger federal role in their health insurance markets than they tried to choose to avoid. Expanding the scope of federal involvement in more traditional areas of state-level regulation, rather than restricting it when states chose that option, does not seem like much relief from the original version of the purported coercion.[42]

One of the core premises of the finding of coercion behind the Medicaid expansion provisions in *NFIB v. Sebelius* was ensuring political accountability by the federal government and state governments, respectively.[43] However, even if one accepts the premise that limiting federal tax credits only to exchanges established by states would impose unconstitutional coercion against other states not doing so, should it then trigger the theory of constitutional avoidance to read the ACA provisions differently in order to avert that problem? This approach would appear to erode accountability for states that chose not to establish exchanges on their own and allow the federal government to achieve its exchange coverage goals without having to pre-empt some states' decisions more explicitly (with an expansion of federal regulation) or even try to mandate state regulation. Moreover, as many as thirty-seven states

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42 *See* Ilya Somin, *Federalism, Coercion, and King v. Burwell*, VOLOKH CONSPIRACY, WASH. POST (Mar. 7, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/07/federalism-coercion-and-king-v-burwell-a-response-to-rick-hills/.

43 *Nat'l Fed'n of Indep. Bus.*, *supra* note 24. As Chief Justice John Roberts wrote in his controlling opinion,

> Spending Clause programs do not pose this danger of coercion when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability . . . .

Id. at 2602–2603.

decided not to establish fully ACA-compliant state exchanges on their own (for the 2014 plan year).[44] They still are not foreclosed from establishing those exchanges in future years, in order to allow their residents to qualify for a subsidy under the *King* petitioners' reading of the ACA. Hence, those states can either remedy any alleged lack of notice about the consequences of not establishing an exchange or take political accountability for deciding not to do so.[45]

Requiring Perpetual Maintenance of Effort in State Medicaid Programs?

The next ripple ahead from Justice Kennedy's concerns over constitutional coercion problems (in the event that the ACA's tax credits are interpreted as being limited only to exchanges established by state governments) involves the former's interaction with another section of the law concerning Medicaid Maintenance of Effort (MOE). This section provides that the "General Requirement to Maintain Eligibility Standards Until State Exchange Is Fully Operational" runs from the date of enactment of the ACA [March 23, 2010] and does not end until the Secretary of HHS determines that an Exchange established by the State under Section 1311 is fully operational.[46] Consider what this might mean if the petitioners' position prevails in *King*, to the effect that "an exchange established by the State under [Section] 1311" narrowly defines exchanges established by states, but not by the HHS Secretary, as the only type of exchange eligible for premium tax credit subsidies determined under Section 1401 of the ACA. The next round of lawsuits involving unconstitutional coercion stemming from the *King* case then could involve how the Medicaid program's condition for complying with this MOE requirement is that a state first establishes the same type of exchange that it needs to make its residents eligible for exchange coverage tax credits. In that event, the penalty for failing to comply with the MOE requirement would be severe—losing eligibility to receive any Federal [Medicaid] payments under 42 U.S.C. 1903(a).[47] Moreover, this

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44 KAISER FAMILY FOUNDATION, STATE HEALTH INSURANCE MARKETPLACE TYPES, 2015, http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/.

45 *See* Jonathan Adler, *Federalism, Coercion, and King v. Burwell*, VOLOKH CONSPIRACY, WASH. POST (February 27, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/27/the-administration-the-irs-and-the-aca-will-the-courts-rein-in-the-presidents-pen/.

46 Patient Protection and Affordable Care Act of 2010, Pub. Law. No. 111–148, tit. I, 124 Stat. 275 (codified as amended at 42 U.S.C. § 1396a(gg)(1)) (adding a new subsection for "Maintenance of Effort").

47 *Id.*

MOE requirement is written into the ACA as perpetual, with no date at which it ends.[48]

How would states without state-established exchanges (after December 31, 2013) be treated regarding their MOE requirements for their old, non-expanded Medicaid program? As of the time of the Supreme Court's review of *King v. Burwell*, very informal unpublished "guidance" from HHS to several states seeking to make changes in their pre-ACA Medicaid programs suggested that the federal government was interpreting this section to end MOE in any state with an operational exchange; not just those with more narrowly defined "state-established" ones.[49] This legal interpretation would no longer appear to be valid, in the event that the petitioners' definition of state-established exchanges prevails in *King*.

Whether a future court might strike down this even-stronger MOE requirement as unconstitutionally coercive, of course, is speculative at this point. However, the MOE requirement that states must freeze key portions of their Medicaid program eligibility rules *forever*—if they fail to establish an exchange—appears to impose disastrous penalties if the latter do not comply (loss of all federal Medicaid funds), and those states would remain at risk of triggering this penalty *forever*.[50] States could also argue that they are being coerced into participating in a "new" program—the ACA's exchange coverage—in order to avoid triggering the MOE requirement after December 31, 2013.[51]

An early preview of a different application of the ACA's MOE requirements for a different part of the Medicaid program is provided by *Mayhew v. Burwell*.[52] In that case, Maine attempted to amend its state plan for Medicaid in August 2012, arguing that the *NFIB* decision had freed it from any further MOE eligibility restrictions involving various optional population categories.[53] Then-HHS Secretary Kathleen Sebelius approved some of the proposed changes, but disapproved the state's plan to drop Medicaid coverage of 19- and 20-year old children in low-income families.[54] This ruling relied on another type of Medicaid MOE provision within the ACA, which required states accepting Medicaid funds to maintain their Medicaid eligibility standards for children until

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48 *Id.*

49 *See* Virgil Dickson & Lisa Schencker, *Premium Subsidies Case Could End Federal Medicaid Funding in Many States*, MODERN HEALTHCARE (Mar. 6, 2015), http://www.modernhealthcare.com/article/20150306/NEWS/150309926/premium-subsidies-case-could-end-federal-medicaid-funding-in-many.

50 *See supra* text accompanying notes 46–48.

51 *See Mayhew*, 772 F.3d at 83.

52 *Id.*

53 *Id.* at 89.

54 *Id.*

October 1, 2019.[55] Maine subsequently challenged this decision in the U.S. Court of Appeals for the First Circuit, alleging among other reasons that, in light of the recent *NFIB v. Sebelius* ruling on the ACA's proposed Medicaid expansion, enforcement of the MOE provision in this case was unconstitutionally coercive in violation of the Spending Clause of the U.S. Constitution.[56]

On November 17, 2014, a three-judge panel denied Maine's petition for review and found no constitutional violation.[57] The State filed a petition for certiorari at the U.S. Supreme Court on February 12, 2015.[58] Several aspects of this case distinguish it from any possible future challenge to the other type of Medicaid MOE requirement in the ACA.

The First Circuit court noted that, in 2009, Maine agreed to continue providing coverage (as it had since 1991), for low-income individuals aged eighteen to twenty, through the end of 2010.[59] Maine actually was required to do so in order to receive economic stimulus funds (including a higher federal funds matching rate for Medicaid spending) under the American Recovery and Reinvestment Act of 2009 (ARRA).[60] However, the ACA was enacted on March 23, 2010, with a different MOE provision regarding Medicaid eligibility for any child under nineteen years of age (or such higher age as the State may have elected).[61] The Maine Department of Health and Human Services complained that it did not have the opportunity to restrict its eligibility standards for children after it accepted the ARRA stimulus funds but before the ACA went into effect.[62] (Maine did opt not to participate in the ACA's Medicaid expansion). Its lawsuit argued that application of the MOE restriction to its proposed eligibility changes were unconstitutionally coercive under *NFIB* and violated the anti-retroactivity principle in *Pennhurst*.[63]

The First Circuit court in *Mayhew* read the *NFIB* ruling narrowly, in accord with the plurality opinion authored by Chief Justice Roberts.[64] Hence, both the First Circuit and the Supreme Court's finding of unconstitutional coercion required two components for a Spending Clause violation: It involved continued receipt of pre-ACA Medicaid

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55 *See* 42 U.S.C. § 1396a(gg) (2014)
56 *Mayhew*, 772 F.3d 80.
57 *Mayhew*, 772 F.3d 80.
58 Petition for Writ of Certiorari, *Mayhew*, 772. F.3d 80 (1st Cir. 2014), *petition for cert. filed* (U.S. Feb. 20, 2015) (No. 14-992).
59 *Mayhew*, 772 F.3d at 88.
60 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (codified at various sections throughout 42 U.S.C.).
61 Patient Protection and Affordable Care Act of 2010, *supra* note 46.
62 Mayhew, 772 F.3d at 88.
63 *Pennhurst State Sch. & Hosp.*, 453 U.S. at 25.
64 Mayhew, 772 F.3d at 86–87.

funding conditioned on participation in an entirely new (expanded) Medicaid program, and the threatened loss of such funding would be so consequential to states that they had no real option to refuse.[65] "[T]he expansion placed a condition on the receipt of funds that did not govern the use of those funds and . . . the condition was unduly coercive."[66]

The First Circuit court viewed the challenged Maine provision as an "unexceptional 'alteration'" of the state's Medicaid program, rather than a "new" program.[67] It also noted that the MOE requirement involved here only applied to children—a shift in degree rather than in kind—(same funding mechanism, same current benefits), and it would last for just nine years.[68]

If and when the Supreme Court decides to accept review of this case, it may not view the MOE restriction imposed on Maine so permissively. The State has a point that it no longer was gaining any benefits (like the stimulus funds) after 2010 in return for maintaining optional coverage of 18- and 19-year olds. Also at issue might be whether the nine-year lock in under the ACA's MOE was a foreseeable, modest change for a "limited" period of transition time.[69]

More significantly, any final ruling in *King* that finds that tax credits are only available in states that have established their own ACA-qualified exchanges is much more likely to trigger challenges to the broader MOE requirement for state Medicaid programs, because the latter are open-ended for states without such exchanges. Locking in a state's Medicaid eligibility standards *forever*, unless it decides either to establish an exchange or risk the loss of all of its future Medicaid funding, appears to represent federal coercion of a different dimension.[70] However, other states that have already made changes in their Medicaid eligibility standards since March 2010—with the approval of HHS—may be allowed some transition time to re-establish their previous ones, to avoid such risks.

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65 *Id*. at 88.

66 *Id.*

67 *Id.* at 89.

68 *Id*.

69 *Id.* at 94.

70 *See* Ralph Lindeman, *PPACA Opponents Eyeing New Challenges to Law's Maintenance-of-Effort Requirements*, 21 HEALTH L. REP. 1239 (2012). For an earlier preview of this possible line of argument from states seeking relief from the broader MOE requirement for coverage eligibility involving adults, *see also* Abby Goodnough & Robert Pear, *Maine Debate Hints at Rift on Medicaid after Ruling*, N.Y. TIMES, July 19, 2012, at A14.

III. DEFERENCE TO THE EXECUTIVE BRANCH, OR TO CONGRESS?

Near the end of Solicitor General Verrilli's portion of oral argument, Chief Justice Roberts suddenly raised a new question about possible *Chevron* deference (due to ambiguity or irreconcilable conflict in various provision of the ACA) to the Obama Administration's Internal Revenue interpretation of what "an Exchange established by the State" means: "[I]f you're right about *Chevron*, that would indicate that a subsequent administration could change that interpretation?"[71]

The Roberts question quickly triggered speculation in both directions as to what it might have signaled regarding his thinking on whether to apply *Chevron* deference to the administration's interpretation of exchange-related tax credit provisions in the ACA statute. One line of thinking, as noted by Adam White, was that Roberts was challenging the Solicitor General's rationale for first invoking such discretion under the second step of *Chevron*-style analysis of an administrative rule, but then suggesting the future burden would be high to reverse this interpretation in a new administration: "For if [the Solicitor General is] suggesting that stakes are too high for a future administration to change course, then he only confirms Justice Kennedy's concern that it strains credulity to suggest that Congress could have entrusted such a significant policy question to the IRS to decide unilaterally."[72]

To place this issue within context of evolving Supreme Court case law, one might begin with a pre-*Chevron* ruling involving a Reagan Administration effort to rescind an existing regulation to require seatbelts or airbags in new automobiles. In *Motor Vehicle Manufacturers Association v. State Farm*, a divided Court held that the National Highway Traffic Safety Administration's rescission of the passive restraint requirement in Modified Standard 208 was "arbitrary and capricious" and "the agency failed to present an adequate basis and explanation for rescinding" the requirement.[73] Therefore, it must either consider the matter further or adhere to or amend the Standard along

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71 Transcript of Oral Argument at 76, *supra* note 8.

72 Adam J. White, *The Roots of Roberts' Remark in King v. Burwell*, WKLY. STANDARD, (Mar. 6, 2015), http://www.weeklystandard.com/keyword/King-v.-Burwell; *see also* Rachel S. Karas, *Chief Justice Questions Utility of Chevron Ruling in ACA Subsidies Case*, INSIDE HEALTH POL'Y, (Mar. 6, 2015) (suggesting that the words of justices Roberts, Alito, and Kennedy during oral argument reflect worry that resorting to a Chevron "step two" ruling that deferred to the IRS interpretation of the law as not "unreasonable" in *King* could have serious consequences for future legal readings of the same provisions by another administration).

73 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983).

lines which its analysis supports.[74] This requirement for a "reasoned analysis" that was neither arbitrary nor capricious still allowed some pre-*Chevron* room for changes in previous agency rules.[75]

Chevron and its new rules of greater deference to executive branch rulemaking in cases of statutory ambiguity was decided in 1984.[76] The next notable evolution in the Court's view of executive branch discretion appeared in *National Cable & Telecommunications Association v. Brand X Internet Services,*[77] involving the proper regulatory classification of broadband internet service. The Court noted that "agency inconsistency is not a basis for declining to analyze an agency's interpretation under the [more permissive] *Chevron* framework"[78]; although "unexplained" inconsistency may in some cases provide a basis for finding a new "interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."[79] It found in *Brand X* that "the Communications Act is ambiguous about whether cable companies 'offer' telecommunications with cable modem service."[80] Silence under the Act suggested that the FCC "has the discretion to fill the consequent statutory gap."[81]

Justice Thomas wrote that "[w]e also conclude that the Commission's construction was 'a reasonable policy choice for the [Commission] to make' at *Chevron's* second step . . . .[t]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.'"[82] He added that "[a]ny inconsistency bears on whether the Commission has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute."[83]

Another extension of executive branch discretion under Chevron analysis involved *FCC v. Fox Television Stations, Inc.* (often referred to as *Fox I*).[84] In this case, the Federal Communications Commission had decided to modify its indecency enforcement regime to regulate so-called fleeting expletives. Justice Scalia concluded that there was no basis in the

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[74] *Id.*
[75] *Id.* at 42.
[76] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).
[77] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005).
[78] *Id.* at 981.
[79] *Id.*
[80] *Id.* at 992.
[81] *Id.* at 997.
[82] *Id.* at 997.
[83] *Id.* at 1020 n.4.
[84] Fed. Commc'ns Comm'n et al. v. Fox Television Stations, Inc., et al., 556 U.S. 502 (2009).

Communications Act or the Supreme Court's opinions "for a requirement that all agency change be subjected to more searching review."[85]

> Although an [executive branch] agency must ordinarily display awareness that it *is* changing position . . . and may sometimes need to account for prior factfinding or certain reliance interests created by a prior policy, it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one.[86]

The ruling concluded that "[i]t suffices that the new policy is permissible under the statute, that there are good reasons for it [(i.e., the decision to modify is neither arbitrary nor capricious)], and that the agency *believes* it to be better, which the conscious change adequately indicates."[87]

Perhaps to complete this trilogy of extensions of agency interpretive discretion under *Chevron*, the Court on March 9 upheld in *Perez, Secretary of Labor, et al. v. Mortgage Bankers Association et al.* that the power of an administrative agency to change an "interpretive" rule that it had previously issued, without being required to follow the note-and-comment rulemaking procedures of the Administrative Procedure Act (APA).[88] In this case, the Department of Labor had issued letters in 1999 and 2001 opining that mortgage-loan officers do not qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act of 1938.[89] After the Department reissued new regulations regarding the exemption in 2004, it once again altered its interpretation of the administrative exemption in 2010—without notice or opportunity for comment.[90] The Court's majority opinion by Justice Sotomayor pointed out that the APA categorically exempts interpretive rules from the notice-and-comment process, although agencies must use the same procedures when they amend or repeal a rule as they used to

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85 *Fed. Commc'ns Comm'n et al.*, 556 U.S. at 502–503.

86 *Id.* at 503 (internal citations omitted).

87 *Id.* at 515. A later ruling in this continuing legal saga, authored by Justice Kennedy in 2012, found that because "the [FCC] failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the Commission's standards as applied to these broadcasts were vague . . . and the Commission's orders must be set aside." Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 132 S.Ct. 2307, 2320 (2012).

88 Perez v. Mortg. Bankers Ass'n, 135 S.Ct. 1199, 1201 (2015).

89 *Id.* at 1204–05.

90 *Id.*

issue the rule.[91] Although the Court's *Perez* decision initially generated a ripple of speculation that it might have been foreshadowed by Chief Justice Roberts' comments during the *King* oral argument, it remains more distinguishable from the latter case. Interpretive rules do not have the force and effect of law.[92] They also remain subject to the constraints of "arbitrary and capricious" standard.[93] That includes the requirement that an agency "provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.'"[94] Moreover, although the precise definition of interpretive rules may remain a continuing topic of debate, in the *Perez* case the petitioner had waived the argument that the 2010 Department of Labor interpretation should be classified as a legislative rule.[95]

In this broader context of more recent Supreme Court decisions involving administrative agency discretion in modifying or even discarding previous rules, the brief comments of Chief Justice Roberts in *King* may have echoed his earlier dissent in *City of Arlington v. FCC:*

> [T]he danger posed by the growing power of the administrative state cannot be dismissed . . . the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating.[96]

From one perspective, Chief Justice Roberts may have been signaling to Justice Kennedy and the Solicitor General during the *King* oral argument that it was unwise in this case to resort to the deference to agency discretion provided by *Chevron* analysis. An issue of such magnitude that involves the possible additional expenditure of tens of billions of taxpayer dollars should not be left to IRS discretion, and it would be better instead to determine the clear meaning of the words that Congress used in approving the ACA in 2010. The 2012 IRS rule in question appears to be much closer to a legislative than an interpretive rule as well (having gone through the full notice-and-comment process

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91 *Id.* at 1206.
92 *Id.* at 1203–04; *but see id.* at 1211 (Scalia, J., concurring).
93 *Id.* at 1209.
94 *Id.* (citing *Fed. Commc'ns Comm'n et al.*, 556 U.S. at 515).
95 *Id.* at 1210.
96 City of Arlington v. Fed. Commc'ns Comm'n, 133 S.Ct. 1863, 1878 (2013).

before becoming final). Determining the meaning of "established by the State" under *Chevron* step one not only would return political accountability to the Congress; it would put the Court's decision on more favorable ground for the petitioners.

On the other hand, Chief Justice Roberts surprised observers in the *NFIB* ruling with a different type of deference to the political branches of the federal government, in finding a way to avoid a ruling that would overturn the entire ACA as unconstitutional. He might instead have been foreshadowing in *King* that his vote will be more likely to defer to the future politics of control of the executive branch (which could re-examine the IRS rule), rather than to the legislative workings of Congress. Even if the Chief Justice has decided to defer, we won't know in which direction he has decided to kick the issue to another branch of government, at least until the Court issues its ruling in *King* in late June. "It ain't over 'til it's over,"[97] but we may not yet know when that truly is the case for the larger legal, legislative, and political issues behind this litigation.

IV. THE WAR OF THE WORDS CONTINUES

The multiple rounds of litigation over whether an IRS rule properly authorized tax credits for federal exchange coverage under the ACA have involved more than just the four words "established by the State" that are highlighted in *King v. Burwell*. A quick search through the appellate briefs and oral argument transcripts in that case and related ones will find differing interpretations of the meaning and significance of other words and phrases in the statutory text (*e.g.*, "such" exchange," "within" a state, "qualified individual," "coverage month," reporting information, and even "final" regulations).[98]

The oral argument on March 4, 2015, added greater emphasis on related judicial doctrines of fair notice, cooperative federalism, unconstitutional coercion, *Chevron* deference, and political accountability. But not every set of tentative thoughts during such

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[97] Quote from Yogi Berra, 1973, http://dictionary.reference.com/browse/it's+never+over+till+it's+over.

[98] *See, e.g.,* Brief of Respondents, *supra* note 12 at 13, 22, & 24 (interpreting "such exchange"); *id.* at 14, 27-29, & 52-53 (interpreting "qualified individual"); *id.* at 26 (interpreting "reporting information"); Brief for Petitioners at 3, 18-19, & 30, King v. Burwell, 135 S.Ct. 475 (Dec. 22, 2014) (No. 14-114), 2014 WL 7386999 (interpreting "coverage months"); *id.* at 2 & 11 (interpreting "within the state"); *id.* at 7 (interpreting "final regulations"); Reply Brief at 6 & 18 King v. Burwell, 135 S.Ct. 475 (Feb. 18, 2015) (No. 14-114), 2015 WL 737858 (interpreting "within a State").

questions and comments will survive the difficult process of finding a Court majority for a final ruling.

For example, even Justice Kennedy signaled several second thoughts and limits on his initial musing during the March oral argument about a potentially serious constitutional question involved in the petitioners' reading of the ACA statutory text concerning the availability of tax credits in federal exchanges: "It may well be that you're correct as to these words, and there's nothing we can do. I understand that."[99]

Even several weeks after oral argument concluded, another potential surprise surfaced during Justice Kennedy's testimony before a congressional committee regarding the Supreme Court's 2016 budget request and related issues of court administration in the face of congressional gridlock.

> We routinely decide cases involving federal statutes, and we say, "Well, if this is wrong the Congress will fix it." But then we hear Congress can't pass a bill one way or the other, that there's gridlock. And some people say, "Well that should affect the way we interpret the statutes." That seems to me a wrong proposition. We have to assume that we have three fully functioning branches of the government, that are committed to proceed in good faith and with good will toward one another to resolve the problems of this republic.[100]

So, let the speculation continue whether those comments do or do not suggest which way Justice Kennedy is likely to have already voted in *King v. Burwell*. We should expect more dissenting and concurring opinions, and a few more surprises ahead, rather than any clear and uniform statements by a strong majority of the justices in this closely divided case.

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[99] Transcript of Oral Argument, *supra* note 8, at 18.

[100] *Notable and Quotable: Anthony Kennedy*, WALL ST. J., Mar. 25, 2015, at A15.