
DEBATE

KING v. BURWELL AND THE VALIDITY OF FEDERAL TAX SUBSIDIES UNDER THE AFFORDABLE CARE ACT

Set for oral argument on March 4, 2015, *King v. Burwell* brings to the Supreme Court yet another challenge to the Affordable Care Act (ACA). The *King* plaintiffs cite 26 U.S.C. § 36B to attack the validity of certain federal health insurance subsidies provided by the Internal Revenue Service (IRS) through the ACA. Specifically, because § 36B authorizes subsidies for low-income taxpayers who purchase health insurance from an “Exchange established by the State,” the plaintiffs allege that such subsidies are not valid on exchanges operated by the federal government where the states refused to operate a state-sponsored exchange. Given that the federal government operates exchanges in thirty-four states, the Supreme Court’s ruling will potentially affect nearly ten million taxpayers nationwide.

Professors Eric Segall and Jonathan Adler debate the merits of *King v. Burwell*, and each suggests how the Court should rule. Professor Segall argues that the Court should follow the IRS’s interpretation of § 36B—namely, that federal tax subsidies are available in a state with a federally operated exchange, because the law allows the federal government to operate the “Exchange established by the State.” Professor Segall emphasizes that *Chevron* deference requires the Court to defer to the IRS interpretation. In response, Professor Adler contends that *Chevron* deference is unnecessary because the statutory language is clear: an “Exchange established by the State” cannot be an exchange established by the Department of Health and Human Services. Professor Adler argues that, given the unambiguous language in the statute, the Court need not defer to the IRS interpretation and should rule for the plaintiffs.

OPENING STATEMENT

*Making Law Out of Nothing at All: Why the Government Should Win the Latest Obamacare Challenge*ERIC J. SEGALL[†]

INTRODUCTION

The Affordable Care Act (ACA)¹ is yet again in front of the United States Supreme Court. On March 4, 2015, in *King v. Burwell*, ideologically driven plaintiffs will once more ask the Justices to dismember President Obama's signature legislative achievement.² This time, the plaintiffs' claim is that the Internal Revenue Service (IRS) has no legal authority to provide federal tax subsidies to low-income purchasers of health insurance on federal exchanges.³ If the challenge is successful, nearly ten million people may lose their health insurance.⁴

Many issues, both constitutional and statutory, that reach the United States Supreme Court raise difficult and complex interpretive and normative questions. To name just a few, laws relating to abortion, affirmative action, and campaign finance regulation implicate competing fundamental values, and complicated regulatory cases often involve thorny definitional and linguistic problems. Reasonable people can and do disagree over such cases.

[†] Kathy and Lawrence Ashe Professor of Law, Georgia State University College of Law. I would like to thank Nicholas Bagley, Erin Fuse Brown, Kenneth Jost, and Ken Kelly for helpful comments.

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

² See Brief for Petitioners at i, *King v. Burwell*, No. 14-114 (U.S. Dec. 22, 2014), 2014 WL 7386999 (stating the question presented to the Supreme Court in *King v. Burwell*); Docket, No. 14-114, *King v. Burwell*, available at <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-114.htm> (last updated Jan. 28, 2015), archived at <http://perma.cc/PH5Q-SSJJ> (setting oral argument for March 4, 2015).

³ Brief for Petitioners, *supra* note 2, at i ("The question presented is whether the Internal Revenue Service . . . may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the . . . ACA.").

⁴ Joan McCarter, *Study: 9.6 Million People Would Lose Insurance if the U.S. Supreme Court Guts Obamacare*, DAILY KOS (Jan. 8, 2015, 1:42 PM), <http://www.dailykos.com/story/2015/01/08/1356441/-Study-9-6-million-people-would-lose-insurance-if-the-U-S-Supreme-nbsp-Court-guts-nbsp-Obamacare>, archived at <http://perma.cc/AJ3A-RJCG>.

The *King* case, however, is different. If well-established legal rules matter to the Justices, the plaintiffs will lose—at least partly because, under accepted principles of statutory interpretation, if reasonable people can disagree about the meaning of the ACA, *the plaintiffs have to lose*. The real suspense is whether the Supreme Court’s decision will be grounded in law or politics. If history is any guide, the ACA may be in trouble.

I. BACKGROUND OF THE ACA AND PREVIOUS CHALLENGES

From the moment the ACA was first introduced in Congress, the entire legislation relied on three fundamental and interlocking ideas. First, the law would not allow insurance companies to deny consumers coverage based on preexisting medical conditions or charge consumers more for those conditions. Second, because consumers would no longer be penalized for waiting until they became ill to purchase health insurance—and many rational consumers would do exactly that—the government would require consumers to buy insurance or to instead pay a penalty or tax. And third, because millions of Americans would not be able to afford the premiums the law would obligate them to pay, the federal government would provide subsidies to those consumers with low incomes. All three of these elements (commonly referred to as the “three-legged stool”) were viewed as necessary for the law to succeed.⁵

As soon as the bill passed both houses of Congress (in an admittedly unusual procedure),⁶ highly motivated conservative and libertarian law professors and other right-wing advocacy groups began fighting it with every imaginable legal tool. They first challenged the part of the law requiring people to purchase insurance or to instead pay a penalty or tax.⁷ The academics knew that if the mandate was stricken from the law—if one leg of the stool was cut off—the rest of the ACA would likely go as well.

⁵ See generally Jonathan Gruber, *Health Care Reform Is a “Three-Legged Stool”: The Costs of Partially Repealing the Affordable Care Act*, CENTER FOR AM. PROGRESS (Aug. 5, 2010), <https://www.americanprogress.org/issues/healthcare/report/2010/08/05/8226/health-care-reform-is-a-three-legged-stool>, archived at <http://perma.cc/8LBS-3HHH>.

⁶ See James C. Capretta, *The Reconciliation Option*, NAT’L REV. ONLINE (Oct. 18, 2011, 4:00 AM), <http://www.nationalreview.com/node/280274/print>, archived at <http://perma.cc/ZA4D-9Q7T> (discussing how a congressional budgetary procedure, “reconciliation,” was instrumental to the ACA’s passage).

⁷ See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012) (“On the day the President signed the Act into law, . . . [t]he plaintiffs alleged . . . that the individual mandate provisions of the Act exceeded Congress’s powers . . .”).

The first lawsuit attempting to gut the ACA was filed just “minutes after the President signed” the bill into law.⁸

The main architect of the anti-ACA legal strategy was Professor Randy Barnett of Georgetown, who, along with other contributors to the legal blog *The Volokh Conspiracy* (including Professor Jonathan Adler of Case Western), made the curious argument that a law comprehensively regulating a trillion dollar industry that affects every single state was somehow not a regulation of “Commerce . . . among the several States.”⁹ They isolated the ACA’s individual mandate from the rest of the legislative scheme and argued that, if the mandate was valid, pretty soon the government could force people to buy broccoli.¹⁰

These professors and other scholars wrote legal blogs and op-eds in major newspapers, assisted with briefs, and used every social media resource at their disposal to make an extremely weak legal argument (that the sky was falling) look respectable.¹¹ As conservative Harvard Law School professor and former Reagan Administration official Charles Fried noted at the time, the arguments “don’t make much sense but the music is there.”¹²

The strategy of changing the public dialogue from law to politics almost worked. Five Supreme Court Justices held that Congress’s Commerce Clause power does not extend to mandates¹³—even though not a single word in the Constitution prohibits mandates, and several mandates were

⁸ *Florida ex rel Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011), *aff’d in part and rev’d in part*, *Florida ex rel Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part and rev’d in part*, *Sebelius*, 132 S. Ct. 2566.

⁹ U.S. CONST. art. I, § 8, cl. 3. See generally Josh Blackman, *How Randy Barnett Joined the Constitutional Challenge to Obamacare*, THE VOLOKH CONSPIRACY (Sept. 10, 2013, 10:29 AM), <http://volokh.com/2013/09/10/randy-barnett-joined-constitutional-challenge-obamacare>, archived at <http://perma.cc/4H2U-33NM> (noting Professor Barnett and Professor Adler’s contributions to the Obamacare discourse); see also Randy E. Barnett, *Is Health-Care Reform Constitutional?*, WASH. POST (Mar. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031901470.html>, archived at <http://perma.cc/6DXT-6XL3> (discussing Professor Barnett’s Commerce Clause theory).

¹⁰ See Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 69 (2013) (explaining the “broccoli hypothetical” and its impact).

¹¹ See, e.g., sources cited *supra* note 9.

¹² Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES (Mar. 26, 2012), http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html?_r=1&, archived at <http://perma.cc/86FB-AURV>.

¹³ *Sebelius*, 132 S. Ct. at 2587.

employed by the very first Congresses (so much for conservative reliance on text and history).¹⁴

But, as we know, Justice Roberts decided to join the four moderates on the Court and uphold the mandate—not as an exercise of the Commerce Clause power but rather as a legitimate tax.¹⁵ The ACA, and its three-legged stool, lived for another day (though the Court struck down a significant aspect of the law’s Medicaid expansion).

Numerous other cases were filed challenging the ACA on a variety of other grounds¹⁶ but, with the exception of the *Hobby Lobby* decision,¹⁷ they were unsuccessful. Now, however, led by Professor Adler, right-wing pundit Michael Cannon, and a host of conservative think tanks such as the Cato Institute, the ACA is yet again before the United States Supreme Court.

II. *KING V. BURWELL*

This time the case is not a constitutional challenge but rather a statutory argument that the IRS has misinterpreted the law. In *King v. Burwell*, the plaintiffs claim that the third leg of the stool, federal subsidies for those who are legally required to buy health insurance but who cannot afford the premiums, cannot be made available in the thirty-four states that refused to create their own insurance exchanges and in which the federal government runs the exchange.¹⁸ If the Court rules for the plaintiffs, it is likely that the health care markets in those states will be plunged into chaos and the ACA crippled (unless Congress were to step in and amend the law—a highly unlikely event).¹⁹

One does not have to be a health care expert or legal academic to fully understand the plaintiffs’ argument and see why it has no *legal* merit. The *King* plaintiffs are challenging the IRS’s decision to provide subsidies on all health care exchanges regardless of whether those exchanges are operated by

¹⁴ See generally Einer Elhauge, *If Health Insurance Mandates Are Unconstitutional, Why Did the Founding Fathers Back Them?*, NEW REPUBLIC (Apr. 13, 2012), <http://www.newrepublic.com/article/politics/102620/individual-mandate-history-affordable-care-act>, archived at <http://perma.cc/AS5W-7N25> (discussing mandates passed by the first Congresses).

¹⁵ See generally Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law>, archived at <http://perma.cc/2VQH-R8EH>.

¹⁶ See *The Cases*, HEALTH CARE LAWSUITS, <http://healthcarelawsuits.org/cases.php> (last visited Feb. 15, 2015), archived at <http://perma.cc/B2NU-SFU5> (collecting relevant cases).

¹⁷ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (striking down regulations requiring contraception coverage under the Religious Freedom Restoration Act of 1993).

¹⁸ See Brief for Petitioners, *supra* note 2, at 1-3 (“[T]he Act only subsidizes coverage through an Exchange established by a state.”).

¹⁹ See generally *supra* note 4 and accompanying text.

the state or federal governments.²⁰ When a plaintiff challenges an agency decision as being inconsistent with an act of Congress, the legal rules are well established. Under the landmark *Chevron* case, a court must first determine whether Congress spoke unambiguously on the issue.²¹ If Congress has done so, and the agency decision is inconsistent with that clear language, the court will strike down the decision.²² If the law is ambiguous or unclear, however, the agency's decision must be upheld if it is reasonable—a low threshold.²³ It is well-settled law that the court must look at the statute as a whole, not individual provisions taken out of context, to make those determinations.²⁴

In other words, for the plaintiffs to prevail, assuming that law matters, they must demonstrate that the ACA as a whole clearly and unambiguously precludes the IRS from providing tax credits to people who buy health insurance from federal exchanges. The plaintiffs simply cannot make that showing.

The plaintiffs rely on an ACA section stating that subsidies will be available for certain low-income taxpayers who purchase health insurance from an “Exchange established by the State.”²⁵ They then argue that exchanges created by the federal government are not “established by the State,” and therefore the IRS acted illegally by deciding to provide subsidies on federal exchanges.²⁶ These health exchanges are not physical places but rather websites offering health insurance in compliance with ACA requirements.

The problem with the plaintiffs' argument is that it ignores another section of the ACA, which states that, if the states do not create a health exchange as required by the first section, the federal government will establish “such exchange.”²⁷ The authority given to the U.S. Department of Health and Human Services (HHS) is not to create “an” exchange, a

²⁰ Brief for Petitioners, *supra* note 2, at 5-7.

²¹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see also Chevron Doctrine*, CENTER FOR EFFECTIVE GOV'T, <http://www.foreffectivegov.org/node/2624> (last visited Feb. 15, 2015), *archived at* <http://perma.cc/EF4K-NH2D> (“[T]he court must determine whether Congress spoke directly to the question at issue. If so, then the court defers to the statute.”).

²² *Chevron*, 467 U.S. at 842-43 & n.9.

²³ *Id.* at 843-44.

²⁴ *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (“In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”).

²⁵ 26 U.S.C. § 36B(a), (b)(2)(A) (2012); *see* Brief for Petitioners, *supra* note 2, at 3.

²⁶ Brief for Petitioners, *supra* note 2, at 11, 17.

²⁷ 42 U.S.C. § 18041(c)(1)(B) (2012).

“federal” exchange, or a “United States” exchange but quite specifically “such” exchange.

What does the word “such” connote in the context of the law? Given that the entire structure of the ACA relies on three essential components—one of which is the availability of federal subsidies—it is no surprise that the IRS read the statute to allow for subsidies on both state and federal exchanges. The only *legal* issue is whether the clear language of the entire law makes that reading impermissible because it is an unreasonable interpretation of the statutory scheme.

A good way to think about that question is through the following hypothetical. Imagine the federal government wanted to encourage people to save more money for retirement and hoped states would cooperate. And imagine Congress then passed a law that read:

Every state shall set up an investment exchange to encourage long term saving. Any taxpayer who invests in an exchange *established by the state* shall receive a \$1000 federal tax credit. If a state does not create an investment exchange, the Secretary of the Treasury shall create *such* exchange.

Looking at this language, and knowing the purpose of the law, could the Secretary of the Treasury provide for tax credits in the federal investment exchanges? The answer is obviously yes—that would be a reasonable interpretation of the law (and the best interpretation of the law). The word “such” according to *Black’s Law Dictionary* means something “having just been mentioned.”²⁸ This clear parsing of the relevant statutory language shows that the government should win (in both the hypothetical and the real case). Everything else about the *King* case is doublespeak and lawyer talk.

For example, like the plaintiffs and numerous other amici, Professor Adler and Mr. Cannon argue in their amicus brief that Congress used the “established by a state” language to warn states that, if states did not create their own exchange, their citizens would not be entitled to federal subsidies.²⁹ This narrative is pure fiction. No language in the law employs this carrot-and-stick approach, and no state was warned at *any* time by *any* member of Congress or the Obama Administration that it would lose the subsidies if it did not create its own exchange. Today, there is such overwhelming evidence

²⁸ BLACK’S LAW DICTIONARY 1661 (10th ed. 2014); *see also* Brief for the Respondents at 22, *King v. Burwell*, No. 14-114 (U.S. Jan. 21, 2015), 2015 WL 349885 (also citing the definition from *Black’s Law Dictionary*).

²⁹ Brief of Jonathan H. Adler and Michael F. Cannon as *Amici Curiae* in Support of Petitioners at 4-5, *King v. Burwell*, No. 14-114 (U.S. Dec. 29, 2014), 2014 WL 7463548.

that this story is untrue that it would be surprising if either the plaintiffs, Professor Adler, or Mr. Cannon continue to rely on it.³⁰

Moreover, even if some governmental person, someplace, somewhere, actually thought that the ACA conditioned subsidies on states creating their own exchanges, such a veiled threat would not pass constitutional muster. Under the Supreme Court's spending power doctrine, conditions on federal grant money must be expressed unambiguously so that states understand what they must do and what they will lose should they choose not to accept the condition.³¹ It is not plausible that the Congress that passed the ACA would have bet its entire success on such an invisible and legally dubious threat.

Professor Adler and Mr. Cannon's amicus brief also argues that Congress included in amendments to the ACA a provision directing the IRS to treat exchanges established by U.S. territories as if they had been established by states, thus creating "equivalence between territories and 'States.'"³² It then argues that, since Congress made no similar statement about federal exchanges, subsidies were limited to state exchanges.³³

This argument completely misses the point that, when HHS was given authority to create "such" exchange as the one "established by the State," the subsidies would follow the federally created exchange, so no reason existed for another amendment. The territories, conversely, were not given the power to create "such" an exchange as the states in the original law.³⁴

Finally, as health law expert Nicholas Bagley has argued, if the law is read as the plaintiffs, Professor Adler, and Mr. Cannon argue, federal exchanges would not be able to provide insurance to anyone.³⁵ The ACA says that only people who "reside[] in the State that established the

³⁰ See Greg Sargent, *Republican State Officials Cast Doubts on Anti-Obamacare Lawsuit*, WASH. POST (Jan. 27, 2015), <http://www.washingtonpost.com/blogs/plum-line/wp/2015/01/27/republican-state-officials-cast-doubts-on-anti-obamacare-lawsuit>, archived at <http://perma.cc/TX27-TRLG> ("Several state officials who were directly involved at the highest levels in early deliberations over setting up state exchanges—all of them Republicans or appointees of GOP governors—have [said] that at no point in the decision-making process during the key time-frame was the possible loss of subsidies even considered as a factor.").

³¹ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

³² Brief of Adler and Cannon, *supra* note 29, at 12-13.

³³ *Id.*

³⁴ See generally *id.*

³⁵ Nicholas Bagley, *Three Words and the Future of the Affordable Care Act*, 40 J. HEALTH POL. POL'Y & L. (forthcoming 2015) (manuscript at 3), available at http://jhpl.dukejournals.org/content/early/2014/11/21/03616878-2867881.full.pdf+html?utm_source=blog&utm_medium=blog%20post&utm_campaign=j-JHP_PAP_Dec14 ("If Adler and Cannon were correct that Congress scrupulously distinguished between state-established exchanges and exchanges in general, then no one in a state with a federally established exchange could go on that exchange to buy a health plan.").

Exchange” may purchase insurance from the exchanges.³⁶ If Congress really meant to distinguish between state-established exchanges and federal exchanges, the law would seem to preclude people residing in a state with a federally established exchange from purchasing insurance from that exchange.³⁷ Congress could not possibly have intended for HHS to create federal exchanges incapable of selling health insurance.

The gist of this case is whether the power of the federal government to create “such” an exchange as the one “established by the State,” also gives the IRS the power to provide subsidies on that exchange, just like it provides on the exchanges run by the states. Looking at the law as whole, and the context in which it was passed, shows beyond the shadow of a doubt that the answer is yes. And even if that interpretation is only “reasonable,” the *Chevron* doctrine requires that the government prevail.³⁸

CONCLUSION

Under the ACA, all three legs of the stool were intended to be the basis of health insurance in every state, regardless of whether the states or the federal government actually operate “such” exchange. Any other ruling by the Supreme Court would ignore clear text and unassailable context, and would make law out of nothing at all.

³⁶ 42 U.S.C. § 18032(f)(1)(a)(ii) (2012).

³⁷ See generally Bagley, *supra* note 35.

³⁸ See *supra* note 21 and accompanying text.

REBUTTAL

*Text, Context, and Tax Credits*JONATHAN H. ADLER[†]

INTRODUCTION

The Affordable Care Act (ACA) has returned to the Supreme Court for the third time in four years. Having considered a frontal challenge to the statute as a whole, as well as the tension between the ACA's coverage requirements and the Religious Freedom Restoration Act, the Court must now dig into the bowels of the ACA's text.

In *King v. Burwell*, the Justices are being asked to decide whether the ACA allows the Internal Revenue Service (IRS) to offer tax credits for the purchase of health insurance in exchanges established by the federal government.³⁹ Although the practical and political ramifications of the case may be significant, *King* presents the sort of interpretive question courts face all the time. Were it not for the context, *King* would be a run-of-the-mill case of statutory interpretation, rather than the battle royal over the future of the ACA it has become. Be that as it may, traditional approaches to statutory interpretation are sufficient to resolve the case and amply support the petitioners' claims.

I. EXCHANGES UNDER THE ACA

A central feature of the ACA is the creation of health insurance exchanges for the purchase of health insurance in the individual market. Each exchange is supposed to be a marketplace in which consumers in the individual market can compare and purchase qualifying health insurance plans.⁴⁰ The exchanges also serve as a means for the government to impose and enforce

[†] Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation, Case Western Reserve University School of Law.

³⁹ Brief for Petitioners at i, *King v. Burwell*, No. 14-114 (U.S. Dec. 22, 2014), 2014 WL 7386999.

⁴⁰ See Sandy Praeger, *A View from the Insurance Commissioner on Health Care Reform*, 20 KAN. J.L. & PUB. POL'Y 186, 190 (2011) ("The main purpose of the exchanges will be to facilitate the comparison and purchase of coverage by individuals and small businesses.").

relevant regulatory requirements, as well as to disburse tax credits and cost-sharing subsidies for qualifying health plan purchases.⁴¹

Section 1311 of the ACA provides that every state “shall . . . establish” its own health insurance exchange.⁴² This requirement is unenforceable,⁴³ however, so the ACA provides states with numerous incentives to cooperate, as well as a federal fallback. Among other things, the ACA authorizes generous funding to help states set up their own exchanges.⁴⁴ As for the fallback option, section 1321 of the ACA requires the federal government to “establish and operate” exchanges in states that fail to create exchanges or to enact other required reforms.⁴⁵

State exchanges are not only places to purchase qualifying health insurance; they are also the statutory mechanism for delivering tax credits and cost-sharing subsidies to eligible individuals. Section 1401 of the ACA authorizes tax credits for qualifying health insurance plan purchases in “an Exchange established by the State under [section] 1311.”⁴⁶ The *King* plaintiffs argue that this provision means what it says: tax credits are authorized only in exchanges established by the states under section 1311 of the ACA.⁴⁷ That is, just as section 1401 authorizes tax credits for insurance only if it is purchased on “an Exchange,” it also authorizes tax credits for insurance only if it is purchased on an exchange that both complies with section 1311’s requirements and is “*established by the State*.”⁴⁸

Professor Segall contests this interpretation and argues that the repeated references to “established by the State” do not preclude tax credits issued through exchanges “established” by the Department of Health and Human

⁴¹ *Id.*; see also Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, 23 HEALTH MATRIX 119, 129-32 (2013) (describing the exchanges).

⁴² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(b)(1), 124 Stat. 119, 173 (2010) (codified at 42 U.S.C. § 18031(b)(1) (2012)).

⁴³ See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the states to implement by legislation or executive action, federal regulatory programs.”); see also *Halbig v. Burwell*, 758 F.3d 390, 399 (D.C. Cir. 2014) (“A state is not literally required to establish an Exchange; the ACA merely encourages it to do so.”).

⁴⁴ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(a), 124 Stat. 119, 173 (2010) (codified at 42 U.S.C. § 18031(a) (2012)) (granting Treasury funds to the states to assist with the exchanges’ establishment).

⁴⁵ *Id.* § 1321(c)(1), 124 Stat. at 186 (codified at 42 U.S.C. § 18041(c)(1) (2012)).

⁴⁶ *Id.* sec. 1401, § 36B(b)(2)(A), (c)(2)(A)(i), 124 Stat. at 213, 216 (codified as amended at 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i) (2012)). Section 1402 further authorizes payment of “cost-sharing” subsidies to insurance companies for qualifying health insurance plan purchases on exchanges where tax credits are available. *Id.* § 1402, 124 Stat. at 220-24 (codified as amended at 42 U.S.C. § 18071 (2012)).

⁴⁷ Brief for Petitioners, *supra* note 39, at 3.

⁴⁸ For a more extensive version of this argument, see Adler & Cannon, *supra* note 41.

Services (HHS) under section 1321. This is so, he argues, because federal exchanges established by HHS are the full and complete equivalent of exchanges established by states under section 1311. In Professor Segall's telling, it all comes down to a single word: "such." Yet this single word cannot bear the weight Professor Segall places upon it.

Section 1321 provides that should a state fail to create the "required exchange"—that is, the exchange required under section 1311—"the Secretary shall . . . establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements."⁴⁹ But this language does not establish the proposition that an exchange established by HHS is an exchange "established by the State." Section 1321 expressly refers to HHS as the entity that must "establish" the exchange and provides that HHS does so "within" the state, rather than on the state's behalf. And were there any doubt that HHS is not a "State" under the ACA, section 1304 expressly provides that "'State' means each of the 50 States and the District of Columbia."⁵⁰

As the U.S. Court of Appeals for the D.C. Circuit recognized in *Halbig v. Burwell*,⁵¹ section 1401 identifies three separate requirements that a qualifying health insurance plan purchase must meet for tax credits to be received: First, the purchase must take place on an exchange.⁵² Even though allowing tax credits for health insurance purchases regardless of place of purchase might advance the goal of expanding insurance coverage, the ACA authorizes tax credits and cost-sharing subsidies only for plans purchased in an exchange. Second, the exchange must have been established under section 1311.⁵³ That is, the exchange must comply with the various requirements contained in section 1311 and other relevant provisions (such as sections 1312 and 1313). Third, and most significantly, the exchange must have been "established by the State."⁵⁴ That is, the availability of tax credits turns on both the type of exchange in which the insurance is purchased, as well as who established it.

⁴⁹ Patient Protection and Affordable Care Act § 1321(c)(1), 124 Stat. at 186 (codified at 42 U.S.C. § 18041(c)(1) (2012)).

⁵⁰ *Id.* § 1304(d), 124 Stat. at 172 (codified at 42 U.S.C. § 18024(d) (2012)).

⁵¹ 758 F.3d 390 (D.C. Cir. 2014).

⁵² *See id.* at 399.

⁵³ *See id.* at 399-400 ("[T]he Secretary is to establish the type of exchange described in section 1311, [and] when she does so, she acts under section 1311, even though her authority appears in section 1321.").

⁵⁴ *Id.* at 400 (quoting 26 U.S.C. § 36B(c)(2)(A)(i) (2012)).

Accepting that “such exchange” is an exchange established under section 1311 that fulfills section 1311’s requirements, HHS-established exchanges still only satisfy the first two requirements of an exchange eligible for federal tax subsidies, but do not satisfy the third.⁵⁵ A section 1311 exchange established by the federal government is still not an exchange “established by the State.” In Professor Segall’s view, this additional language, added at multiple times and to multiple places in section 1401, serves no purpose at all. It is mere surplusage. Yet it is well established that courts are to make every effort to “give effect to every word that Congress used in the statute.”⁵⁶

Moreover, reading section 1321 to create complete equivalence between exchanges established under section 1311 and those established under section 1321 (without regard for whether they are established by a state or by HHS) does more than generate surplusage. It also creates other problems for the statutory text. Numerous references to exchanges “established by the State” throughout the statute become incongruous if this phrase is read to include exchanges established by the federal government.⁵⁷ For example, under Professor Segall’s interpretation, noncooperating states could constrain the operations of federally established exchanges.⁵⁸ Thus, the ACA puts states’ Medicaid funds at risk if their exchanges fail to comply with various statutory requirements.⁵⁹ But Professor Segall’s reading of the ACA would mean that states would have to monitor the *federal government’s* actions when it establishes exchanges for the states, lest they lose their Medicaid funds. Although Professor Segall purports to care about the whole text, he ignores these and other provisions that cut against his interpretation of the statute.

Professor Segall claims that, were the Court to accept the plaintiffs’ interpretation of the ACA, “federal exchanges would not be able to provide

⁵⁵ See *id.* (“The problem confronting the IRS Rule is that subsidies also turn on a third attribute of Exchanges: who established them.”).

⁵⁶ See, e.g., *Lowe v. SEC*, 472 U.S. 181, 207-08 n.53 (1985); see also Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 218 (1917) (“[T]he legislator is presumed to, as in fact he does, choose his words deliberately intending that every word shall have a binding effect.”).

⁵⁷ See 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>, archived at <http://perma.cc/Z8KV-zL6J> (discussing ACA sections 1311(f), 2001, and 2201 as examples).

⁵⁸ See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(f)(3)(A), 124 Stat. 119, 173 (2010) (codified at 42 U.S.C. § 18031(f)(3)(A) (2012)) (giving states control over whether to give exchanges “established by the State” authority to contract with “eligible entit[ies]” to carry out exchange responsibilities).

⁵⁹ See *id.* sec. 2201, § 1943(a), (b)(1)(D), 124 Stat. at 289, 290 (codified at 42 U.S.C. § 1396w-3(a), (b)(1)(D) (2012)) (conditioning federal financial assistance on meeting statutory requirements, such as providing a “secure electronic interface” in the exchange “established by the State”).

insurance to anyone” because section 1312 provides that “qualified individuals” must be residents of “the State that established the Exchange.”⁶⁰ Yet the relevant statutory provision, when read in context, creates no such absurd result and is readily harmonized with the rest of the statutory text. Section 1312’s definition of a “qualified individual” who may “enroll in any qualified health plan available to such individual”⁶¹ is—like the other requirements of Part II of Subtitle D (sections 1311 through 1313)⁶²—addressed to the states on the assumption that they have complied with section 1311’s command that each state establish its own exchange. This requirement is conditioned on the state’s cooperation. Should a state fail to cooperate, however, the residency requirement has no effect, as there is no state-established exchange to which it may apply.

By contrast, when section 1321 requires HHS to establish an exchange, it also instructs HHS to “take such actions as are necessary to implement such other requirements” of the required exchange.⁶³ This directive authorizes HHS to adopt parallel qualified-individual requirements for the federally established exchange. And even were this not the case, an incongruity or ambiguity created by different language in a different provision of the statute would not be enough to overcome the plain language of section 1401.

II. DESPERATELY SEEKING AMBIGUITY

Recognizing the difficulty of establishing that the ACA expressly authorizes tax credits in exchanges established by the federal government, Professor Segall seeks refuge in the *Chevron* doctrine, under which courts are to defer to reasonable agency interpretations of ambiguous statutory text.⁶⁴ The problem for Professor Segall’s argument, however, is that there is nothing ambiguous about the relevant statutory text. Thus there is no basis for deferring to the IRS’s interpretation.

According to Professor Segall, the only relevant question is whether the agency has put forward a “reasonable” interpretation of a complex regulatory statute. Further, Professor Segall maintains, the mere existence of disagreement about the meaning of statutory text itself demonstrates that the agency position should—indeed, must—prevail. “If reasonable people can disagree,” he proclaims, “*the plaintiffs have to lose.*” Whatever the merits of

⁶⁰ *Id.* § 1312(f)(1)(A)(ii), 124 Stat. at 184 (codified at 42 U.S.C. § 18032(f)(1)(A)(ii) (2012)).

⁶¹ *Id.* § 1312(a)(1), 124 Stat. at 182 (codified at 42 U.S.C. § 18032(a)(1) (2012)).

⁶² *Id.* §§ 1311–1313, 124 Stat. at 173–85 (codified at 42 U.S.C. §§ 18031–18033 (2012)).

⁶³ *Id.* § 1321(c)(1), 124 Stat. at 186 (codified at 42 U.S.C. § 18041(c)(1) (2012)).

⁶⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984).

this approach to judicial review of agency action, it has little basis in the actual practice of federal courts. Indeed, were the law as Professor Segall describes, federal agencies would almost never lose *Chevron* cases at step one,⁶⁵ except when unanimous agreement exists indicating that the agencies' interpretations were unreasonable.

Contrary to Professor Segall's characterization of prevailing doctrine, the Supreme Court and federal appellate courts routinely reject potentially reasonable agency interpretations of complex statutes on the grounds that the text is sufficiently clear to resolve at *Chevron* step one, *even if* "reasonable people" can and do disagree. Multiple cases decided within the last year, including *Utility Air Regulatory Group v. Environmental Protection Agency*,⁶⁶ demonstrate the point. In *Utility Air Regulatory Group*, "reasonable people"—including four justices⁶⁷—found the agency position to be "reasonable," and yet the agency still lost. The law as applied by the courts is not as Professor Segall describes it.

The Supreme Court has been clear that agencies can neither create nor resolve ambiguity by rewriting clear statutory terms or ignoring inconvenient statutory text.⁶⁸ Nor have courts deemed statutory complexity sufficient to render a statute ambiguous. Instead, courts routinely work their way through thickets of statutory text to determine for themselves whether Congress directly addressed the issue at hand. If, under *Chevron*, Congress has addressed "the precise question at issue,"⁶⁹ and the law is clear, that ends the matter, even if "reasonable" people might differ.

⁶⁵ *Chevron* outlined a two-step inquiry for courts to undertake when evaluating an agency's interpretation of a federal statute. First, the court is to consider the relevant statutory text in order to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the court is required to give effect to the unambiguous meaning of the text. If the court determines that the relevant text is "ambiguous," however, and concludes that interpretive authority has been delegated to the agency in question, the court must defer to the agency's interpretation, provided that such interpretation "is based upon a permissible construction of the statute." *Id.* at 843.

⁶⁶ 134 S. Ct. 2427, 2439 (2014) (rejecting the Environmental Protection Agency's interpretation of its authority to regulate stationary source greenhouse gas emissions under the Clean Air Act).

⁶⁷ *Id.* at 2449-50 (Breyer, J., dissenting) (along with Justices Ginsburg, Sotomayor, and Kagan, disagreeing with the majority opinion).

⁶⁸ *See, e.g., id.* at 2446 ("The power of executing laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice."); *id.* (reaffirming "the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate").

⁶⁹ *Chevron*, 467 U.S. at 842.

III. COULD CONGRESS HAVE MEANT IT?

In Professor Segall's telling, it was always Congress's intent to "provide subsidies to those with low incomes" to help them purchase health insurance. Perhaps so, but that does not mean Congress provided for such assistance in any and all circumstances. Instead, the law repeatedly conditions benefits for needy populations on state cooperation with congressional design. The Medicaid expansion, for example, was always contingent upon state cooperation. Indeed, the federal government's entire argument that the Medicaid expansion was constitutional was premised on the fact that states retained the choice to reject the expansion—a difficult and unpleasant choice, to be sure, but a choice nonetheless.⁷⁰ As the ACA was written, Congress was even willing to risk benefits for preexisting Medicaid beneficiaries to ensure state cooperation. When the Supreme Court held that conditioning preexisting Medicaid funds on acceptance of the Medicaid expansion was unconstitutionally coercive in *National Federation of Independent Business v. Sebelius*,⁷¹ all the Court's decision did was alter the calculus for resistant states. The states' ability to choose—and to frustrate the law's purposes—was always there.

Eligibility for tax credits and cost-sharing subsidies is contingent upon income as well. Those who earn too much, *or too little*, are ineligible for tax credits.⁷² That is, as the ACA is written, individuals can be too poor to get help buying insurance. It may have been the ACA authors' hope that such individuals would be covered by the Medicaid expansion, but (as noted above) that hope could only be fulfilled if states agreed to cooperate.

It is also indisputable that those who drafted the ACA considered conditioning subsidies for health insurance purchases on state cooperation. As Michael Cannon and I have detailed elsewhere, this idea was proposed by prominent health law experts and contained in draft legislation that led to

⁷⁰ See Brief for Respondents (Medicaid) at 34, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-400) (“[T]he size of a federal grant may make it less likely, as a practical matter, that a State will view federal policy as sufficiently contrary to local interests to warrant turning down the federal funds. But that doesn't mean that the federal government, simply by offering, has coerced the State into accepting.” (internal quotation marks and citation omitted)).

⁷¹ 132 S. Ct. 2566, 2601-05 (2012).

⁷² See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1401, § 36B(c)(1)(A), 124 Stat. 119, 215 (codified as amended at 26 U.S.C. § 36B(c)(1)(A) (2012)) (defining “applicable taxpayer” for purposes of the federal tax credit as “a taxpayer whose household income . . . exceeds 100 percent but does not exceed 400 percent of an amount equal to the poverty line” (emphasis added)).

the ACA.⁷³ The bill produced by the Senate Health, Education, Labor, and Pensions (HELP) Committee, for instance, withheld subsidies from states that refused to adopt desired reforms.⁷⁴ States that refused to create their own health insurance exchanges would be without subsidies for up to four years,⁷⁵ and states that refused to enact the bill's required employer mandate could forfeit such subsidies permanently.⁷⁶ In fact, there is a long history of considering similar conditions in health care reform proposals.⁷⁷

Despite this history, Professor Segall insists that the ACA must provide for "all three legs of the stool" at all times. Here again he ignores facts that fail to fit his narrative. In reforming the child-only market, for example, the ACA imposed community-rating regulatory requirements, which beginning in September 2010 prevent insurance companies from charging people more for preexisting conditions, *without* providing subsidies or imposing an individual mandate.⁷⁸ Congress similarly failed to provide a three-legged stool for U.S. territories⁷⁹ or for the long-term care entitlement known as the Community Living Assistance Services and Supports (CLASS) Act, even though the federal government's chief actuary warned that the latter would implode unless the law also addressed possible adverse selection from too many high-risk individuals participating in the program.⁸⁰ Professor Segall's claim that the ACA consistently provides for all three legs of the proverbial stool is simply false.

⁷³ See Adler & Cannon, *supra* note 41, at 154-57 (discussing antecedent bills); see also Brief of Jonathan H. Adler and Michael F. Cannon as *Amici Curiae* in Support of Petitioners at 22-28, King v. Burwell, No. 14-114 (U.S. Dec. 29, 2014), 2014 WL 7463548 (same).

⁷⁴ Adler & Cannon, *supra* note 41, at 155.

⁷⁵ See Affordable Health Choices Act, S. 1679, 111th Cong. § 3104(d)(1) (2009) (providing a federal fallback option only after "the expiration of the 4-year period following the date of enactment").

⁷⁶ *Id.* § 3104(d)(2) ("With respect to a State that makes the election [refusing to enact the employer mandate], the residents of such State shall not be eligible for credits . . . until such State becomes a participating State . . .").

⁷⁷ See Chris Conover, *Do Obamacare's Challengers Have a 'Nutty,' 'Stupid' or 'Screwy' Interpretation of the Law?*, FORBES (Feb. 18, 2015, 11:16 AM), <http://www.forbes.com/sites/theapothecary/2015/02/18/do-obamacares-challengers-have-a-nutty-stupid-or-screwy-interpretation-of-the-law>, archived at <http://perma.cc/CB9L-WX4H> (discussing prior health care reform efforts).

⁷⁸ Adler & Cannon, *supra* note 41, at 174.

⁷⁹ See Sarah Kliff, *Think Your State Has Obamacare Problems? They're Nothing Compared to Guam.*, WASH. POST (Dec. 19, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/19/think-your-state-has-obamacare-problems-theyre-nothing-compared-to-guam>, archived at <http://perma.cc/HSU6-8FH4> ("While the Affordable Care Act requires health insurers in the territories to accept all shoppers no matter how sick, it does not mandate that all territorial residents buy plans nor does it provide subsidies to make coverage more affordable . . .").

⁸⁰ Adler & Cannon, *supra* note 41, at 174.

CONCLUSION: LAW OR POLITICS?

Professor Eric Segall proclaims that *King* is an easy case. He maintains the plaintiffs' arguments have "no *legal* merit" and that "politics" provides the only basis upon which the plaintiffs could prevail. Courts have not seen it this way. A divided panel of the U.S. Court of Appeals for the D.C. Circuit concluded the IRS rule at issue contravened the relevant statutory text, as did a district court in Oklahoma.⁸¹ Even the U.S. Court of Appeals for the Fourth Circuit, in ruling for the government, recognized the force of the plaintiff's arguments challenging the IRS rule, conceding that "a literal reading of the statute undoubtedly accords more closely with [the plaintiffs'] position."⁸² In Professor Segall's telling, these judges must all have been knaves or fools.

Professor Segall's insistence that those with whom he disagrees are playing politics while he seeks to uphold the law is even more curious given how much time and effort he expends trying to discredit the *King* case by casting aspersions on the motivations of the plaintiffs and their supporters. Contrary to what Professor Segall claims, I have never suggested (let alone argued) that "a law comprehensively regulating a trillion dollar industry that affects every single state was somehow not a regulation of 'Commerce . . . among the several States.'" The article by Professor Randy Barnett that Professor Segall cites for this proposition does not make this argument either,⁸³ nor is this what the Supreme Court held in its 2012 ACA decision.⁸⁴ His characterization of the arguments in *King*, and the strength of the plaintiffs' case, is not much better.

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⁸¹ Halbig v. Burwell, 758 F.3d 390, 399, 412 (D.C. Cir. 2014); Oklahoma *ex rel.* Pruitt v. Burwell, No. 11-0030, 2014 WL 4854543, at *9 (E.D. Okla. Sept. 30, 2014).

⁸² King v. Burwell, 759 F.3d 358, 369 (4th Cir. 2014).

⁸³ The article Professor Segall cites for this claim not only fails to support his argument, but asserts the opposite. See Randy E. Barnett, *Is Health Care Reform Constitutional?*, WASH. POST (Mar. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031901470.html>, archived at <http://perma.cc/6DXT-6XL3> (distinguishing the regulation of health insurance from a mandate to engage in economic activity).

⁸⁴ See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587-91 (2012) (limiting the Court's Commerce Clause holding to the individual mandate of the ACA).