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King v. Burwell and the Rise of the Administrative State

Ronald D. Rotunda *

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INTRODUCTION

The Patient Protection and Affordable Care Act¹—popularly called either the “ACA,” or “Obamacare” by opponents, proponents, and even the White House²—is a complex law totaling nearly a thousand pages in length.³ The litigation now before the Supreme Court in *King v. Burwell*⁴ presents, on the surface, a simple issue of statutory interpretation. However, that surface has a very thin veneer. If the Court allows

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

² Katie Zezima, *Obama: ‘In five years it will no longer be called Obamacare,’* WASH. POST (May 20, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/05/20/obama-in-five-years-it-will-no-longer-be-called-obamacare/>; David Nakamura, *Obama: “That’s right – I care,”* WASH. POST (Oct. 5, 2011, 6:39 AM), http://www.washingtonpost.com/blogs/44/post/obama-thats-right--i-care/2011/10/04/gIQAtRs4ML_blog.html; *Patient Protection and Affordable Care Act*, WIKIPEDIA, http://en.wikipedia.org/wiki/Patient_Protection_and_Affordable_Care_Act (last visited Feb. 18, 2015).

³ See *supra* note 1.

⁴ *King v. Burwell*, 135 S. Ct. 475 (2014).

administrators *carte blanche* to change the very words of a statute, we will have come a long way towards governance by bureaucrats. Over the years, Congress has delegated many of its powers, but it has never delegated the power to raise taxes or spend tax subsidies in ways that no statute authorizes.

The ACA, in Section 1311, provides that states shall create an American Health Benefit Exchange (“Health Exchanges”).⁵ If they meet certain criteria, they are “Qualified Health Exchanges,” or “Qualified Exchanges,” that qualify under the Act for federal subsidies at issue.⁶ However, it is clear that Congress does not have the constitutional power to order, or commandeer,⁷ states to enact particular laws. While Congress cannot force a state to enact a qualified Health Exchange, it can use its taxing and spending power to “bribe” states by offering various incentives to those states that enact and implement the kind of laws that Congress wants.

That is what the ACA does. It provides that if a state creates a qualified Health Exchange by January 1, 2014, then another section of the law—Section 36B, in the Internal Revenue Code—offers generous subsidies in the form of “premium assistance tax credits” and “refundable tax credits,” which not only reduce tax liability but also provide for federal money paid to private insurance companies.⁸ As one proponent of the law explained,

[I]f you’re a state and you don’t set up an exchange, that means your citizens don’t get their tax credits—but your citizens still pay the taxes that support this bill. So, you’re essentially saying [to] your citizens you’re going

⁵ 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)).

⁶ Mark Seidenfeld, *Tax Credits on Federally Created Exchanges: Lessons from a Legislative Process Failure Theory of Statutory Interpretation*, 99 MINN. L. REV. 101 (2015).

⁷ *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997); 1 RONALD D. ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.10(d)(i) (“Federal Orders to State and Local Governments”) (West Reuters, 5th ed. 2012 (1 Vol.)).

⁸ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1401(a), 124 Stat. 213 (2010) (codified as amended at 26 U.S.C. § 36B). The U.S. Treasury pays these subsidies directly to a taxpayer’s insurer, to offset any premiums owed. *Id.* at § 1412, 124 Stat. 231 (2010) (codified at 42 U.S.C. § 18082).

to pay all the taxes to help all the other states in the country.⁹

Congress expected that all or most states would take the bribe. Still, it created a fallback position: if a state refuses to set up a qualified state Health Exchange, a different section of the ACA, Section 1321,¹⁰ authorizes the Secretary of Health and Human Services (HHS) to set up Federal Exchanges in those states that refuse to set up qualified Health Exchanges.

No provision of the ACA offers any tax subsidies or payments for *federally*-created (as opposed to *State*-created) Health Exchanges. That supports the carrot-and-stick approach to encourage states to create, implement, and maintain state Health Exchanges. In other words, if the state creates a Health Exchange, its citizens secure valuable tax benefits in addition to acquiring health insurance. If the state refuses to create, implement, and maintain a Health Exchange, that state's citizens will lose out on the financial benefits, though they will have to pay federal taxes that finance the subsidies that residents in other states (those with State-created Exchanges) will receive.

At the time the law came into being, proponents of Obamacare thought that this fallback position would not be necessary, because (1) the subsidies were generous; (2) the state and its citizens would lose out on these subsidies if it refused to create a Health Exchange; (3) and (in their view) the ACA would be a very popular law.¹¹ As the trial court acknowledged in *King v. Burwell*, "Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges. Instead, Congress assumed that tax credits would be available nationwide because every state would set up its own Exchange."¹²

Over two-thirds of the states (a total of thirty-four states) refused to establish their own exchanges for 2014.¹³ It turned out that the ACA has

⁹ Peter Suderman, *Watch Obamacare Architect Jonathan Gruber Admit in 2012 That Subsidies Were Limited to State-Run Exchanges (Updated With Another Admission)*, REASON (Jul. 24, 2014, 9:57 PM), <http://reason.com/blog/2014/07/24/watch-obamacare-architect-jonathan-grube>.

¹⁰ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1321(c), 124 Stat. 186 (2010) (codified at 42 U.S.C. § 18041(c)) (authorizing and directing the Department of Health and Human Services to "establish and operate such Exchange within the State").

¹¹ *Halbig v. Burwell*, 758 F.3d 390, 408-09 (D.C. Cir. 2014).

¹² *King v. Sebelius*, 997 F. Supp. 2d 415, 430-31 (E.D. Va.), *aff'd sub nom.* *King v. Burwell*, 135 S. Ct. 475 (2014).

¹³ Brief for Petitioner, *King v. Burwell*, 135 S. Ct. 475 (2014) (No. 14-114), 2014 WL 7386999, at *7 [hereinafter Brief for Petitioner].

not been as popular as its proponents believed it would be. Indeed, polls show that the more people learn about the law, the less favorably they view it.¹⁴

The Administration now wants to extend these subsidies to *federally*-created Health Exchanges. Otherwise, fewer people will sign up for health insurance because it would be much cheaper to forgo the insurance and pay any fine. It makes financial sense for people to avoid paying for health insurance until they are ill, because they can purchase only when they mean it—Obamacare does not allow insurance companies to refuse coverage because of preexisting medical conditions.¹⁵

What to do? The response of the IRS was not to ask Congress to amend the ACA. Instead, the IRS, by issuing a rule, has amended the statute. The position of the IRS, in a nutshell, is that when Section 36B refers to Section 1311 and *State* Exchanges, there is some sort of ambiguity and it really means to refer to Sections 1311 *and* 1321 and Federal *or* State Exchanges.

¹⁴ In October of 2014, polls showed that 53 percent of people view the Affordable Care Act unfavorably, a jump of 8 percentage points since June. July's results mark the fifth time since April 2010, and the first time since January, that at least half of Americans are not supportive of the health care reform law. The poll found that the share of people who view Obamacare favorably fell slightly, to 37 percent, marking the lowest rating the law has received since its passage. Views about the ACA remain sharply partisan.

Jeffrey Young, *Obamacare Is More Unpopular Than Ever, Poll Shows*, HUFFINGTON POST (Aug. 1, 2014, 4:59 PM), http://www.huffingtonpost.com/2014/08/01/obamacare-poll_n_5639192.html. Another poll, in February 2015, concluded, "voters are less supportive of government-imposed levels of health insurance." In addition, "[m]ost think consumers are better off with less government involvement in the health care marketplace." *Voters Are Less Supportive of Government-Imposed Levels of Health Insurance*, RASMUSSEN REPORTS (Feb. 2, 2015), http://www.rasmussenreports.com/public_content/archive/health_care_update_archive/february_2015/voters_are_less_supportive_of_government_imposed_levels_of_health_insurance.

¹⁵ The federal government repeatedly touts this fact. *E.g.*, "[y]our insurance company can't turn you down or charge you more because of your pre-existing health or medical condition like asthma, back pain, diabetes, or cancer. Once you have insurance, they can't refuse to cover treatment for your pre-existing condition." *Coverage for Pre-Existing Conditions*, HEALTHCARE.GOV, <https://www.healthcare.gov/health-care-law-protections/pre-existing-conditions/> (last visited Feb. 18, 2015).

ACA, THE SPENDING CLAUSE, AND THE COMMERCE CLAUSE

Congress enacted the ACA using an unusual procedure called “reconciliation,” which allowed only limited amendments. Although the Democrats controlled both Houses at the time, reconciliation was the only way they could secure sufficient votes for final approval. It is doubtful that any one individual read the entire bill, or that, in any one person did read it, he or she could understand all of its ramifications. The bill, after all, is not only very long but also very complex.¹⁶ Moreover, it is legislation, and a statute never reads like a dime novel. Complex and controversial statutes invite litigation.

Shortly after the President signed the law, on March 23, 2010,¹⁷ the litigation began. The first significant decision on the Supreme Court level was *National Federation of Independent Business v. Sebelius*.¹⁸ A particularly controversial portion of the law required people to purchase health insurance. A Court majority (but with no majority opinion) concluded that the Congress did not have authority to enact that provision under the Commerce Clause.

The Commerce power is broad. Congress can regulate anything that crosses a state line (typically highways, railroads, and so forth) or anything that uses an instrumentality of interstate commerce (e.g., telephones, automobiles, even if the instrumentality does not cross a state line).¹⁹ Finally, Congress can regulate any [1] *commercial* [2] *activity* that [3] *affects* interstate commerce.²⁰ It does not matter if the commerce crosses a state line, but there must be “activity” and the activity must be “commercial.” Simply holding a handgun is not a *commercial* activity.²¹ Not buying health insurance (like not buying a car) is an omission, not an activity.

Obamacare, of course, *affects* interstate commerce. Just about anything does. If I buy health insurance (or bananas), that transaction

¹⁶ The law is wide-ranging in its mandates. For example, it regulates the display of nutritional content at chain restaurants. *See* 21 U.S.C. § 343(q)(5)(H)(2010). It imposes various taxes and fees on medical devices, 26 U.S.C. § 4191(2010), and tanning booths. *See* 26 U.S.C. § 5000B (2010). It governs break time for nursing mothers while at work. 29 U.S.C. § 207(r)(1) (2010). Some provisions only apply to certain states. Thus, Section 10323, of the ACA extends Medicare coverage to individuals exposed to asbestos from a mine in Libby, Montana. Section 2006, increases Medicaid payments only in the State of Louisiana.

¹⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, 124 Stat. 119 (2010).

¹⁸ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

¹⁹ *U.S. v. Lopez*, 514 U.S. 549 (1995).

²⁰ *Lopez*, 514 U.S. at 565-566.

²¹ *E.g., Lopez*, 514 U.S. 549 (1995).

affects interstate commerce. If I do not buy health insurance (or bananas), that failure to act also affects interstate commerce. However, the refusal to buy insurance is not an act, but an omission. It is the failure to act. That failure to act—doing nothing—is a non-act; it is also not a commercial act. All prior cases that upheld federal legislation under the Commerce Clause dealt with commercial acts—noncommercial inaction is both noncommercial (refusing to buy something is not a commerce) and it not a commercial act (inaction is not an act). Thus, a majority of the Justices in *National Federation of Independent Business* held that Congress could not use the Commerce Clause to require people to purchase insurance.

As Chief Justice Roberts explained,

The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to “regulate” something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to “coin Money,” in addition to the power to “regulate the Value thereof.” And it gives Congress the power to “raise and support Armies” and to “provide and maintain a Navy,” in addition to the power to “make Rules for the Government and Regulation of the land and naval Forces.” If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching “activity.”²²

²² *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2586–87 (internal citations and footnotes omitted).

Justice Scalia, joined by Justices Kennedy, Thomas, and Alito, filed an opinion he labeled a dissent. However, on this issue these four Justices agreed with Roberts:

[T]hat failure—that abstention from commerce—is not “Commerce.” To be sure, *purchasing* insurance is “Commerce”; but one does not regulate commerce that does not exist by compelling its existence. “[R]egulate” [. . .] can mean to direct the manner of something but not to direct that something come into being. There is no instance in which this Court or Congress (or anyone else, to our knowledge) has used “regulate” in that peculiar fashion.²³

However, Chief Justice Roberts, joined by four other Justices, concluded that Congress could impose the individual mandate by using the taxing power and that, to save the constitutionality of the law, the Court would interpret the “mandate” with its fine for noncompliance as a tax.²⁴

That did not eliminate the constitutional problem with the law. Although the Court upheld the individual mandate as a tax, there was still the question of whether Congress could force the states to accept the statutory provision expanding the states’ obligations under Medicaid—the so-called Medicaid expansion. The majority (seven to two) held that the portion of the law giving the Secretary of Health and Human Services the authority to penalize States that chose not to participate in law’s expansion of the Medicaid exceeded Congress’s power under the Spending Clause. However, the Court (this time, five to four) held that the penalization provision was severable, thus saving most of the law. To the surprise of many observers, many states—in spite of the federal incentives—responded by *not* expanding Medicaid.

FEDERAL EFFORTS TO INCENTIVIZE STATES TO CREATE, IMPLEMENT, AND MAINTAIN HEALTH EXCHANGES

The issue in *King v. Burwell*,²⁵ like the Medicaid expansion, is an outgrowth of the Spending Clause issue. In this case, Congress also tried to bribe the states using its taxing and spending power. The problem is

²³ *Id.* at 2644 (Scalia, J., dissenting).

²⁴ *Id.* at 2598.

²⁵ *Burwell*, 135 S. Ct. 475 (2014).

that many states did not take the bribe. The Administration responded by deciding to change the statute by allowing Federal Health Exchanges to take advantage of the federal subsidies. The problem is that the Administration did not ask Congress to amend the statute. Instead, the IRS simply issued a regulation that amended the statute. Does the IRS have power to amend a statute? That is the question. The Court has never allowed an agency to *amend* a law.

Congress, the Obama Administration, and the experts who helped draft Obamacare expected states to take the rowing oar in implementing another important provision of the new law by creating State Health Exchanges. President Obama predicted, in 2010, “by 2014, each state will set up what we’re calling a health insurance exchange”²⁶ Two years later, the news media at the time reported that “Obama and lawmakers assumed that every state would set up its own exchange.”²⁷ This optimism was unwarranted. In fact, as of 2014, thirty-four states refused to establish their own exchanges.²⁸

The Secretary of Health and Human Services testified before a House Committee that she expected the states to create these Exchanges. Her optimism that the states would do so was one of the reasons she gave why the President opposed the single-payer model, where the federal government would run everything.

So this really starts at the States. *States put together exchanges* either as a single State or in a multi-State area, if that is what they choose. *We provide technical assistance* to the States to do that. And even though the timetable for exchanges doesn’t begin until 2014, we intend, starting next year, to begin very robust discussions so that we don’t wait until the last minute and have States in a situation where they can’t do this. *We have already had lots of positive discussions, and*

²⁶ Remarks by the President on Health Insurance Reform in Portland, Maine, THE WHITE HOUSE (Apr. 1, 2010, 3:17 PM), available at <http://www.whitehouse.gov/the-press-office/remarks-president-health-insurance-reform-portland-maine>.

²⁷ Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES (Aug. 4, 2012), http://www.nytimes.com/2012/08/05/us/us-officials-brace-for-huge-task-of-running-health-exchanges.html?pagewanted=all&_r=0.

²⁸ Brief for Petitioner, *supra*, note 11, at *7. *Contra Analysis of Enrollment in the Marketplaces for the First Month of the 2015 Open Enrollment Period*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES (Dec. 30, 2014), <http://www.hhs.gov/news/press/2014pres/12/20141230a.html> (noting that the Federal Government, in its HealthCare.gov website, reported that in December 2014, only 12 states and the District of Columbia were using their own Marketplace platforms).

*States are very eager to do this. And I think it will very much be a State-based program.*²⁹

Professor Jonathan Gruber,³⁰ who was involved with drafting the statute, later acknowledged said that the reason that the law limited federal subsidies to State-established Health Exchanges was to incentivize the states to set up Health Exchanges:

What's important to remember politically about this is if you're a state and you don't set up an exchange, that means your citizens don't get their tax credits—but your citizens still pay the taxes that support this bill. So you're essentially saying [to] your citizens you're going to pay all the taxes to help all the other states in the country. I hope that that's a blatant enough political reality that states will get their act together and realize there are billions of dollars at stake here in setting up these exchanges.³¹

He made that claim repeatedly.³²

The law as written encourages states to create what it called “Health Insurance Exchanges” to implement the ACA. The law provides tax credits and subsidies for people who purchase health insurance through a *state* exchange. If the state did not create an Exchange meeting federal standards, the federal government would create a federal exchange. The people who purchased health insurance through a *federal* exchange would not get these tax credits and subsidies. That setup encourages states to set up Qualified Exchanges because, otherwise, the citizens of a state without a state-established Exchange would not be eligible for

²⁹ *FY 2011 Budget Overview: Department of Health and Human Services: Hearing Before the Subcomm. on Labor, Health and Human Serv., Educ. and Related Agencies of the Comm. on Appropriations, H. R., 111th Cong. 2d Sess. (April 21, 2010) (testimony of Kathleen Sebelius, Secretary of HHS) (emphasis added).*

³⁰ See Ronald D. Rotunda, *Jonathan Gruber and the Wisdom of Crowds*, VERDICT-JUSTIA (Dec. 29, 2014), <https://verdict.justia.com/2014/12/29/jonathan-gruber-wisdom-crowds>.

³¹ Peter Suderman, *Watch Obamacare Architect Jonathan Gruber Admit in 2012 That Subsidies Were Limited to State-Run Exchanges (Updated With Another Admission)*, HIT & RUN BLOG (Jul. 24, 2014 9:57 PM), <http://reason.com/blog/2014/07/24/watch-obamacare-architect-jonathan-grube>.

³² Sara Hurtubise, *Obamacare Architect Says AGAIN That Subsidies Were Only Supposed To Go To State Exchanges*, DAILY CALLER (Jul. 25, 2014, 2:13 PM), <http://dailycaller.com/2014/07/25/obamacare-architect-says-again-that-subsidies-were-only-supposed-to-go-to-state-exchanges/>.

federal financial help.³³ These people would not get federal assistance, even though the taxpayers in that state would have to pay the federal taxes used to finance the tax credits and subsidies that the citizens of other states would enjoy.

In addition to incentives (carrots), the ACA has disincentives (sticks) to prod states to set up Health Exchanges. For example, the law penalizes states that do not create Exchanges by barring them from narrowing their state Medicaid programs until “an Exchange established by the State . . . is fully operational.”³⁴

THE ACA’S CAREFULLY-CRAFTED DISTINCTION BETWEEN STATES, ENTITIES TREATED AS STATES, AND THE FEDERAL GOVERNMENT

No section of the ACA defines “state” to include the federal government. However, other provisions make clear that Congress knew how to draft language that treated a non-state as a “state” for purposes of any provision of the ACA.

For example, the ACA provides that territories of the United States (e.g., Guam) are “States,” for purposes of this law. Section 1323 states that if a “territory” creates an Exchange, it “shall be treated as a State” under this law. Another section, Section 1304(d), provides that Washington, D.C. is a “state” for purposes of the subsidy dealing with State Health Exchanges. “In this title, the term ‘State’ means each of the 50 States and the District of Columbia.”³⁵ However, no section of the law defines “state” to include the federal government.

An earlier version of the bill—one that Congress did not enact—provided that “any references in this subtitle to the Health Insurance Exchange . . . shall be deemed a reference to the State-based Health Insurance Exchange.”³⁶ That would treat Federal Exchanges the same as State Exchanges. Congress did not enact that version. The fact that it considered such express language surely is evidence that Congress knew

³³ Jonathan H. Adler and Michael F. Cannon, *Another ObamaCare Glitch*, WALL ST. J. (Nov. 16, 2011), <http://www.wsj.com/articles/SB10001424052970203687504577006322431330662> (“Congress may have wanted to limit assistance to state-run exchanges—including encouraging states to create exchanges so that the federal government doesn’t have the burden.”)

³⁴ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 2001(b)(2) (2010), (codified at 42 U.S.C. § 1396a(gg)).

³⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1304(d), 124 Stat. 187 (2010) (codified at 42 U.S.C. § 18024).

³⁶ H.R. 3962, 111th Cong. §308(e) (2009) (emphasis added).

how to provide that the law would treat a State-created Exchange and a Federal Exchange the same.

Section 1401 of the ACA adds Section 36B to the Internal Revenue Code.³⁷ This section authorizes federal tax-credit subsidies for health insurance coverage that anyone purchases through an “Exchange established by the State under section 1311”³⁸ of the statute. Section 36B is several pages in length and focuses only on State-created Health Exchanges. When the ACA was codified, that section became part of the Internal Revenue Code.³⁹

CHEVRON DEFERENCE

Case law tells us that, in general, courts should defer to an agency’s interpretation of the statute governing it. The leading case is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁴⁰ hence courts and commentators often refer to this principle as *Chevron* deference. The Court first decides if “Congress has directly spoken to the precise question at issue.”⁴¹ Second, “if the statute is silent or ambiguous with respect to the specific issue,” the Court determines if “the agency’s answer is based on a permissible construction of the statute.”⁴² In *Chevron*, the Court held that an Environmental Protection Agency regulation that allowed states to treat all pollution-emitting devices within same industrial grouping as though they were encased within single “bubble” was based on permissible construction of the term “stationary source” in the Clean Air Act Amendments.⁴³

In this case, the IRS is not even interpreting the sections of the law governing it. Recall that when a majority of the states refused to establish a qualified Health Exchange,⁴⁴ HHS (not the IRS) establishes Health

³⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1401, 124 Stat. 213 (2010) (codified at 26 U.S.C. § 36B).

³⁸ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1311, 124 Stat. 173 (2010) (codified at 42 U.S.C. § 18031(b)).

³⁹ “Refundable credit for coverage under a qualified health plan.” 26 U.S.C. § 36B (2010).

⁴⁰ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁴¹ *Id.* at 842.

⁴² *Id.* at 843.

⁴³ *Id.* at 859.

⁴⁴ As of January 2015, only 14 states have established Health Exchanges. *Analysis of Enrollment in the Marketplaces for the First Month of the 2015 Open Enrollment Period*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES (Dec. 30, 2014), <http://www.hhs.gov/news/press/2014pres/12/20141230a.html>; Susan Jones, *Jonathan Gruber: No Obamacare Subsidies in States That Don’t Set Up Exchanges*, CBS NEWS (Jan. 5, 2015, 11:28 AM),

Exchanges under Section 1321 of the law.⁴⁵ However, no section of the ACA authorizes any subsidies for Section 1311 Exchanges. Hence, the IRS issued regulations that provide that it will extend tax-credit subsidies for insurance purchased through Exchanges established by the federal government under Section 1321. The IRS claims that it is resolving ambiguity in sections 1311 and 1321. However, both of those sections are in title 42 of the United States Code. The IRS is not responsible for interpreting or enforcing title 42. HHS is responsible for title 42. Assuming that there is any ambiguity of what “Section 1321” means, or what “state” means, never before has the Court held that the IRS can define a term that is in the jurisdiction of another agency.

THE CONSTITUTIONAL ISSUE BENEATH THE VENEER OF STATUTORY INTERPRETATION

In *Massachusetts v. E.P.A.*, various states, local governments, and environmental organizations sought review of an order of the Environmental Protection Agency (EPA).⁴⁶ The EPA had denied a petition for rulemaking to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act.⁴⁷ The District of Columbia Circuit rejected the petitions and the Supreme Court reversed, saying: “[W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.”⁴⁸ The Court held that the EPA could not avoid taking regulatory action under the Clean Air Act regarding greenhouse gas emissions from new motor vehicles.⁴⁹

The EPA argued that, in its expert view, a number of voluntary executive branch programs already provided an effective response to the threat of global warming.⁵⁰ Moreover, it had concluded that regulating greenhouse gases might impair the President’s ability to negotiate with “key developing nations” to reduce emissions.⁵¹ It also argued that limiting motor-vehicle emissions would reflect an inefficient and

<http://cnsnews.com/news/article/susan-jones/jonathan-gruber-no-obamacare-subsidies-states-dont-set-exchanges>.

⁴⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1321(c), 124 Stat. 186 (2010) (codified at 42 U.S.C. § 18041(c)).

⁴⁶ *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007).

⁴⁷ *Massachusetts*, 549 U.S. at 521.

⁴⁸ In *Massachusetts v. E.P.A.*, the Court complained that the “EPA has refused to comply with this clear statutory command.” *Id.* at 533.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

piecemeal approach to address the problem of climate change.⁵² The majority rejected all those arguments.⁵³

In response to *Massachusetts v. EPA*, the EPA promulgated greenhouse-gas emission standards for not only new motor vehicles but also stationary sources. The statute provided that a “major emitting facility” is a stationary source with the potential to emit 250 tons per year of “any air pollutant” (or 100 tons per year for certain types of sources). However, the EPA recognized that requiring permits for all sources with greenhouse-gas emissions above these low statutory thresholds would drastically expand those programs and render them, in the EPA’s word, “unadministrable.” Hence, the EPA purported to “tailor” its programs by providing that sources would not become subject to the law if they emitted less than 100,000 tons per year of greenhouse gases.⁵⁴

The problem with the EPA’s regulation was that the statute it was allegedly “interpreting” provided for different numbers. In *Utility Air Regulatory Group v. EPA*,⁵⁵ Justice Scalia, for the Court, held that EPA lacked authority to “tailor” the Act’s unambiguous numerical thresholds of 100 or 250 tons per year to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers.⁵⁶ The EPA wanted to make sure that these thresholds were much higher. It purported to interpret “100 tons” or, in some circumstances, “250 tons” to mean greenhouse gases to 100,000 tons per year. The Court explained the issue pithily:

How, given the statute’s language, can the EPA exempt from regulation sources that emit more than 250 but less than 100,000 tpy [tons per year] of greenhouse gases

⁵² *Id.*

⁵³ *Id.* at 533-35. On the other hand, courts do not have carte blanche to second-guess agency nonenforcement actions. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court held that there is a presumption of unreviewability of decisions of agency *not* to undertake an enforcement action. It also held that the plaintiffs did not overcome this presumption. In this case, prison inmates sued to compel the Food and Drug Administration to take enforcement action under the Federal Food, Drug, and Cosmetic Act with respect to drugs used for lethal injections to carry out the death penalty. The Court rejected the inmates’ claims. There were no dissents. *Chaney* was really a standing case, although the Court never used the word “standing.” Instead, it explained that no one was coerced by nonenforcement. In *Massachusetts v. E.P.A.*, the petitioners alleged sufficient harm.

⁵⁴ *Util. Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427 (2014).

⁵⁵ *Util. Air Regulatory Group*, 134 S. Ct. 2427.

⁵⁶ *Id.* at 2445.

(and that also do not emit other regulated pollutants at threshold levels)?⁵⁷

The Court's answer was as unambiguous as the statutory reference to 250 tons per year:

Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a *severe blow to the Constitution's separation of powers*. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it *does not include a power to revise clear statutory terms that turn out not to work in practice*.⁵⁸

This case certainly looks like the identical twin to *Utility Air Regulatory Group*. The statute at issue — the ACA — provides that there are only subsidies of Health Exchanges created pursuant to *State Exchanges* established under Section 1311. The IRS claims that it can "interpret" these sections (including sections that it does not administer but HHS administers), find that there is some sort of ambiguity, and conclude that Section 1311 really means Sections 1311 *and* 1321, and *State Exchanges* really means Federal *or* *State Exchanges*. No Supreme Court has ever held that an agency could define Section 1311 to mean "Section 1311 *and* Section 1321."

The assertion of a Presidential power or an agency power to amend, unilaterally, or to suspend statute raises significant questions. If the President has absolute discretion to ignore laws that he prefers not to exist, the Constitutional limits of Presidential authority have the restraining power of air. President George H.W. Bush, in the course of his Presidency, unsuccessfully argued that Congress should lower the capital gains rate. Instead, could he have simply instructed the IRS to lower to tax capital gains to no more than a 10% rate, no matter what the law provides? The IRS, under this theory, could advise taxpayers to compute their capital gains tax and then send the IRS only 10% of the gain instead of 28%.

⁵⁷ *Id.* at 2451.

⁵⁸ *Id.* at 2446 (internal citations omitted) (emphasis added).

In 1998, in *Clinton v. New York*,⁵⁹ the Court held that it was unconstitutional to give the President a line item veto; under that statute, Congress could override that veto. The power of the President to suspend or waive a constitutional law when the law itself delegates no such power to the President is much more powerful than a line item because there is no procedure to override a Presidential Decree. Why should lobbyists urge Congress to create, extend, or change a tax deduction, when all they have to do is persuade the President?

CONCLUSION

The reasoning of *Utility Air Regulatory Group* goes beyond statutory interpretation. The Court explained the constitutional problem with the EPA's claim. Under our system of government, Congress makes laws, while the President executes them. "The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice."⁶⁰ The President's constitutional power to execute laws cannot include the power to revise clear statutory terms that turned out not to work in practice.

The claim that the IRS is now making also goes well beyond an issue of statutory interpretation. If the IRS can define "Section 1311" to mean "Section 1311 and Section 1321," it is very hard to see where any boundaries will come to be. Since the Great Depression, the regulatory state has become stronger. The initial theory was that unbiased "experts" could decide these issues that are not questions with which democracy should concern itself.

We know that is not the case. Administrative decisions can be much more significant than issuing a regulation that defines "grain elevator." Administrators promulgate regulations that are often "self-financing" because "they place the costs of compliance on the private sector."⁶¹ Unelected administrators, hidden from public view, decide significant and controversial issues such as "net neutrality," or the future of the Internet. Regulators (and the President who appoints them) can use

⁵⁹ *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁶⁰ *Util. Air Regulatory Group*, 134 S. Ct. at 2446. See also *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (holding that the Commission did not have the authority "to develop new guidelines or to assign liability in a manner inconsistent with the statute").

⁶¹ See the thoughtful analysis in, F.H. BUCKLEY, *THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA* 152-53 (Encounter Books, 1st ed. 2014).

complex regulations that are written in jargon to reward political friends and burden political enemies. One of the complaints about the enactment of Obamacare was that the President's "waivers" of various provisions⁶²—waiver that the statute did not authorize—served to reward the President's political supporters or undercut objections to the law.⁶³

The holding in *King v. Burwell*⁶⁴ should be a very good signpost, telling us either that the speed limit on the road to an administrative state has been lifted, or that there are speed bumps ahead.

⁶² *Id.* at 287-88. Just before the vote on the ACA, the Department of Justice announced it was dropping its investigation of Congressman Alan Mollohan; he had been "undecided" and then voted for the bill. Paul Kane, *Justice Dept. ends probe of Rep. Mollohan*, (Jan. 26, 2010, 3:25 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012601156.html>.

⁶³ Ronald D. Rotunda, *On the Health-Care Mandate, Obama Reaches Beyond the Law*, WASH. POST (Jul. 18, 2013), http://www.washingtonpost.com/opinions/on-the-health-care-mandate-obama-reaches-beyond-the-law/2013/07/18/d442aefc-efb4-11e2-a1f9-ea873b7e0424_story.html.

⁶⁴ *Burwell*, 135 S. Ct. at 475.