

# Mistaken Paradigms and Interpreting Dreams: Some Reflections on *King v. Burwell*

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## Introduction

In *King v. Burwell*, the Supreme Court addressed the question of whether federal subsidies for the purchase of medical insurance were available to income-qualified individuals who purchased on federally run exchanges.<sup>1</sup> It ruled that such subsidies, provided for by a regulation promulgated by the Internal Revenue Service, were available.

In reaching this conclusion, the Court upheld the IRS regulation but disregarded the operative language of the Affordable Care Act.

The ACA's text authorizes federal subsidies for medical insurance purchased on an exchange "established by the State" but is silent about authorizing such subsidies for medical insurance purchased on an exchange established by the federal government. The Court, somewhat remarkably, regarded the pivotal statutory language in the ACA as "surplusage," and described the straight-forward language as "not . . . a particularly useful guide to a fair construction of the statute."<sup>2</sup> This acknowledged disregard of quite plain statutory language raises serious questions about the appropriate method used by the Court in interpreting the ACA (or any other statute).

Effectively reading pivotal statutory text out of a statute seems well beyond the umpire or referee function much proclaimed by the chief justice during his confirmation process. The approach to

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<sup>1</sup> 135 S. Ct. 2480 (2015).

<sup>2</sup> *Id.* at 2483.

statutory interpretation embraced in *King* invites nonlegislative actors such as courts and agencies to identify and embrace a broad statutory narrative and then shoehorn the legislative text into that story line. The *King* approach anthropomorphizes statutes, assuming that there is a clear and coherent statutory vision, with all components serving a set, designed function. That is not how legislation emerges from the legislative process, and pursuing that “coherent statutory vision” allows for what happened in *King*—the Court used this anthropomorphization to allow perceived broad statutory objectives and structures to trump clear statutory language. The Court turned away from what the ACA did to what the ACA’s drafters should have done or meant to do (as the Court divined it).

The *King* approach turns statutory interpretation into a secular version of the Genesis story of Joseph, who gained power and influence by interpreting the dreams of the Egyptian pharaoh.

Genesis 41 tells the story of the Egyptian pharaoh dreaming of seven attractive cows being eaten by seven ugly cows, and seven plump ears of grain being swallowed by seven blighted ears of grain. When asked to interpret the pharaoh’s dreams, Joseph concluded that the cows were not cows but years, and the same for the ears of grain. Invoking divine guidance, Joseph saw the pharaoh’s dreams as signaling seven years of plenty followed by seven years of famine, and he recommended a sensible policy—a food savings plan during the good times to ensure food availability during the years of famine.

In *King*, the Court found that the ACA’s language, which authorized subsidies for purchases of medical insurance on an exchange “established by the State,” also called for the availability of subsidies on exchanges established not by the state but by the federal government. That was the case even though the ACA (Section 1304(d)) actually defined the term “State” so as not to include the federal government.<sup>3</sup> As with the Biblical story of Joseph, the Court in *King* looked to the dreams of the drafters of the ACA (and those of advocates for universal medical care coverage over many decades) and took measures to accommodate, empower, and implement those dreams. In the process, the Court treated the legislative work product actually produced by Congress as unhelpful surplusage. To use a more

<sup>3</sup> 42 U.S.C. § 18024(d) (codifying Section 1304(d) of the ACA).

modern metaphor, *King* turns statutory interpretation into a Rorschach test.

The *King* approach has significant separation-of-powers implications, transferring enormous powers to nonlegislative entities such as agencies and courts. The consequence of the decision in *King* also has significant federalism implications—diminishing state autonomy and states’ roles in two ways.

First, the outcome of *King* diminishes states’ roles and withdraws states’ authority. By determining whether or not to set up an exchange, states would have served as gatekeepers to federal subsidies under the ACA, a role that states now play with respect to expanding ACA-based coverage under state Medicaid programs.

Second, *King* eliminates the role that states play under the ACA in striking the appropriate balance between (1) providing access to federal subsidies for their residents who have incomes that qualify for federal subsidies, and (2) providing a safe harbor (and competitive advantage) for their employers who face taxes/penalties if their employees secure federal subsidies. Under the ACA’s employer mandate for employers with 50 or more full-time employees, employers are penalized (substantially) if the employer does not provide ACA-compliant health benefits and if one of its employees receives a subsidy on an exchange. So no exchange means no subsidy and, therefore, no employer-mandate tax or penalty.<sup>4</sup>

<sup>4</sup> Petitioners’ interpretation of the ACA subsidy provisions empowers (and does not coerce) states (1) by establishing states as gatekeepers to the federal exchange-based subsidies, and (2) by allowing states to provide a tax safe harbor to large employers whose medical insurance policies do not comply with the comprehensiveness and affordability requirements of the ACA and who are thereby subject to a substantial fine/tax. That fine/tax is triggered when one employee receives a subsidy on an exchange. This form of state empowerment is the antithesis of federal coercion through use of conditions on federal spending programs, such as the functionally forced expansion of Medicaid under the ACA held invalid in *Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (“*NFIB*”). Unlike expanded Medicaid, which made use of after-the-fact leveraging and took place at the level of contract modification, the exchange-based subsidy was an admittedly new program and therefore occurred at the contract-formation stage, where courts traditionally allow the parties more flexibility. At contract modification, principles of fairness attach in the performance of an ongoing contractual relationship; that is not the case at contract formation. In *NFIB*, the Court viewed the ACA Medicaid expansion not as a foreseeable, organic part of pre-existing Medicaid but an unanticipated add-on—a new program that, to survive constitutional scrutiny, had to be treated as a contract formation situation, not a contract modification. Had the ACA’s expanded Medicaid provisions been mandated on

The approach embraced by the Court in *King* allows courts and agencies to have their way with statutory text when that text does not yield results in accord with the drafters' pharaoh-like dreams, as interpreted by a court or an agency based on gossamer and much-contested claims of statutory context, purpose, or structure.

But how can we be confident that the dreams, as interpreted by a court or an agency, reflect the preferences of the drafters rather than those of latter-day advocates or the interpreters themselves? And, in a democratic nation governed by the rule of law, can we really accept legislation by dreams or governance by dreams and their interpretation? Doesn't that empower modern, secular Josephs in ways that are troubling to democracy and the rule of law? After all, the rule of law, going back centuries, relies in large measure on statutory text as the guardian of democratic accountability and empowerment and as the embodiment of the statutory lawmaking function.

The Constitution assigns that lawmaking role primarily to Congress, although the Constitution also contemplates a role for the president, with his concurrence or non-concurrence (veto) serving as a part of the lawmaking process. And the Supreme Court has been the vigorous guardian of the constitutional formalities of that

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states as a form of contract modification, that would have been unconstitutionally coercive as a violation of the principle that states cannot be forced to participate in federal programs (the "anti-commandeering" principle). The ACA's Medicaid enhancements and inducements were held valid, but only when seen as a contract-formation situation, in which states had real choices to opt-in or not, without the threat of loss of pre-existing Medicaid funding. Under the plaintiffs' interpretation in *King*, the states were in a contract-formation situation regarding exchange-based subsidies; they could set up an exchange and thereby allow subsidies to flow on those exchanges, or not; no threat to a pre-existing program existed, and no fiscal harm to the state as compared to the *status quo ante* existed. Moreover, under *New York v. United States*, 504 U.S. 144 (1992), a claim of coercion must focus on state budgetary expenses and obligations, not the loss of benefits to a state's residents as would have been the case if the plaintiffs' interpretation of the subsidy provisions of the ACA had been accepted by the *King* Court. See James Blumstein on the *King* Oral Argument, Volokh Conspiracy, Wash. Post, Mar. 3, 2015, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/05/james-blumstein-on-the-king-oral-argument/>; James F. Blumstein, Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule, 2011–2012 *Cato Sup. Ct. Rev.* 67 (2012); James F. Blumstein, *NFIB v. Sebelius* and Enforceable Limits on Federal Leveraging: The Contract Paradigm, the Clear Notice Rule, and the Coercion Principle, 6 *J. of Health & Life Sciences L.* 123 (Feb. 2013).

lawmaking process—formalities that solemnize and ensure the integrity of that process.

For example, the Court has rejected innovations like the legislative veto because that short-circuits the authority of one house (the Constitution contemplates bicameralism) and undermines the authority of the president when Congress acts without the president's involvement (the absence of "presentment").<sup>5</sup> The Court has also rejected a line-item-veto innovation because that transferred lawmaking power from Congress to the president.<sup>6</sup> But the Joseph interpretation-of-dreams approach to statutory interpretation, as reflected in *King*, looks in a very different direction. It admittedly treats operative statutory terms as "surplusage," problems to be overcome, when those terms do not fit the broader statutory dream as interpreted by a nonlegislative body. As in the story of Joseph, where "cows" and "grain" were treated as "years," the term "state"—albeit an ACA-defined term that does not include the federal government—is treated as including the federal government for purposes of making available tax subsidies to income-qualified purchasers of medical insurance on federally run exchanges.

In short, *King* does not paint a pretty portrait of where the art of statutory interpretation now is. No matter what one thinks of the outcome in terms of health policy, the Court's approach in *King*—purportedly saving the law from itself by disregarding its own textual provisions—is, well, stunning, even Orwellian. The ugly cow of the story of Joseph in the Bible (Genesis 41) has swallowed the plump one—in this case, the one actually enacted by Congress.

## **I. The ACA's Structure and Text**

### *A. Types of Exchanges Under the ACA and Their Significance*

Under the ACA, there are two kinds of exchanges, marketplaces in which sellers of medical insurance offer medical insurance policies and consumers can shop for such policies. Under Section 1311, states "shall" establish an exchange. The parties and the Court recognized that that mandatory language is unenforceable because, under the anti-commandeering principle, the federal government cannot force

<sup>5</sup> See *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>6</sup> See *Clinton v. New York*, 524 U.S. 417 (1998).

states to participate in federal programs.<sup>7</sup> Yet the mandatory language, unenforceable though it may be, remains in the statutory text and expresses a strong preference for states to establish and operate an exchange.

The role of states in running exchanges was an important feature of the ACA as drafted in the Senate. While states, the Senate drafters came to realize, could not be compelled to establish exchanges, states could be given a right of first refusal, so that no federal exchange could be set up in a state unless a state chose not to establish an exchange or otherwise failed to do so. And states could be incentivized to set up exchanges, consistent with the anti-commandeering principle. The ACA drafted in the House contemplated a federally run exchange, a significant difference between the versions drafted in the Senate and the House; and it was the Senate version that ultimately became the law in this regard.

In what I have previously referred to as likely an “oops” provision, Section 1321 of the ACA recognizes the unenforceability of the mandatory provisions of Section 1311; states cannot be ordered to establish an exchange (although, as noted, they can be incentivized to do so).<sup>8</sup> Section 1321 sets up a fallback provision—namely a mandatory duty on the part of the federal government to establish “such” an exchange if a state elects not to set up an exchange under Section 1311. Absent the fallback provision of Section 1321, the ACA would have failed because states could not be compelled to set up exchanges, and no federal alternative would have been present. The federal government’s obligation (or opportunity) to establish an exchange arises only when a state chooses not to or otherwise fails to establish an exchange under Section 1311.

*King* draws an erroneous inference about the ACA’s exchange-fallback provision (Section 1321). The readily apparent role of the fallback provision, which requires the federal government to establish

<sup>7</sup> See *NFIB*, 132 S. Ct. 2566 (2012) (Anti-commandeering principle has a functional dimension so that Congress cannot force states to expand Medicaid on pain of losing pre-existing Medicaid funds); *Printz v. United States*, 521 U.S. 898 (1997) (Congress cannot force local officials to conduct background checks); *New York v. United States*, 505 U.S. 144 (1992) (Congress cannot force states to “take title” of radioactive waste).

<sup>8</sup> *Id.*; *South Dakota v. Dole*, 483 U.S. 203 (1987) (Congress may attach reasonable conditions to funds disbursed to the states without running afoul of the Tenth Amendment.).

an exchange where states choose not to or fail to do so, is to avoid the anti-commandeering problem if Section 1311 stood alone—impermissibly mandating states to establish an exchange.

Plaintiffs contended that the ACA, in order to overcome the anti-commandeering problem, incentivized states to establish an exchange by limiting subsidies to income-qualified persons who purchased medical insurance through exchanges established by a state. Evidence of this preference for state-run exchanges is that the ACA (Section 1311) retains the mandatory language despite its acknowledged unenforceability and gives states the first shot at establishing an exchange (precluding the federal government from establishing an exchange if the states act). But the drafters of the ACA miscalculated: States did not find the incentives sufficient, and nearly two-thirds decided not to establish such an exchange. The result under the ACA, plaintiffs argued, was that subsidies were unavailable in the two-thirds of states that did not establish an exchange.

In response to plaintiffs' contention that drafters of the ACA believed that the incentives for states to establish exchanges constituted "a deal that [states] would not refuse," the Court in *King* stated that the fallback provision (Section 1321) "refutes [that] argument." Why so? Well, according to the Court, the "whole point" of the fallback provision was "to create a federal fallback in case a State chooses not to establish its own Exchange." So, therefore, this demonstrates that "Congress did not believe it was offering States a deal they would not refuse" because the fallback provision "expressly addressed what would happen if a State *did* refuse the deal".<sup>9</sup>

This reasoning gets it backwards.

The fallback provision was a constitutional necessity under the anti-commandeering principle. Under that principle, states have a constitutionally protected right not to set up an exchange, even though Section 1311 of the ACA seemingly mandates states to establish such exchanges. The ACA was constitutionally obligated to achieve its goal of state-established exchanges by use of incentives, not mandates or functional coercion.

Incentives encourage behavior, but do not mandate it; such is the nature of an incentive and the constitutional anti-commandeering principle. Treading too close to the mandate line through use

<sup>9</sup> *King*, 135 S. Ct. at 2494 (emphasis in original).

of incentives risks running afoul of the anti-commandeering bar, which has a functional, not merely a formal, dimension.

That is, regulatory commandeering has a functional counterpart that applies to the use of conditions on federal spending. That functional counterpart was recognized in the portion of *NFIB v. Sebelius* that dealt with ACA-prescribed states' expansion of Medicaid. The ACA threatened states with the loss of all pre-existing Medicaid funding if they did not expand Medicaid to cover the ACA-prescribed category of eligible persons (covering persons with incomes up to 138 percent of the federal poverty level). *NFIB* held invalid that linkage between states' pre-existing Medicaid program funding and their ACA-imposed obligation to cover all persons with incomes below 138 percent of the federal poverty level.<sup>10</sup>

The presence of the fallback provision in Section 1321 was a response to a constitutional necessity; and that constitutional necessity, the anti-commandeering principle, was what obligated the ACA's drafters to embrace an incentives strategy. In addition, that incentives strategy had to leave real choices for states because the incentives could not be excessively coercive in practice. So, of course, the ACA recognized—it constitutionally had to recognize—that states might not accept the incentives. The ACA provided for a fallback provision in order to ensure the constitutional and practical viability of the ACA's exchange-based structure.

The Court erred by drawing an inference that the existence of a fallback provision regarding exchanges meant that the ACA did not embrace an incentives structure in order to encourage states to establish their own exchanges. To be constitutional, such an incentives structure had to allow for real choice, which means that some (or, as it turned out, many) states will not be drawn to action by the incentives offered. The fallback exchange provision only acknowledges the constitutional game plan; it is entirely consistent with plaintiffs' assertion that the carrot offered to states for establishing exchanges was access for a state's residents to federal tax subsidies (and the correlative stick was the absence of eligibility of a non-electing state's residents to those federal subsidies).

The Court's opposite inference—that the existence of the federal exchange fallback refutes plaintiffs' contention that the incentives

<sup>10</sup> *NFIB*, 132 S. Ct. at 2607–08.

were designed to incentivize states to establish exchanges and were expected to do the job—does not and cannot withstand analytical scrutiny; it disregards the constitutional game plan and the dilemma posed by that game plan, as reflected by the anti-commandeering principle. The Court, here, is caught with its analytical toga down.

*B. The Subsidy Provisions*

An entirely different ACA provision—Section 1401—deals with subsidies for income-qualified persons who purchase medical insurance. Income-qualified persons are those who have incomes in the range of 100–400 percent of the federal poverty level.

Under the ACA, subsidies are not available for all purchases of medical insurance by income-qualified individuals.

For example, subsidies under the ACA are not available for such purchases if income-qualified individuals purchase medical insurance outside an exchange. Persons can buy medical insurance outside an exchange, but no subsidies attach. So, the structure of the ACA precludes the contention that all those who are income-qualified receive universal subsidies through the ACA for their purchases of medical insurance.

Similarly, no subsidies on exchanges are available for persons who do not qualify for a state's Medicaid program but whose income is below 100 percent of the federal poverty level. Such persons are not income-qualified for subsidies on an exchange. Those persons were assumed by the ACA's drafters to be covered by states' expansions of their pre-existing Medicaid programs, which, until the decision in *NFIB* made such state decisions optional, were considered an automatic outcome; no state could risk its entire pre-existing Medicaid program funding by declining to expand pre-existing Medicaid, and such was the risk under the ACA before the Supreme Court invalidated that condition in *NFIB*.

Under the Supreme Court's 2012 decision in *NFIB*, states are not obliged to extend their pre-existing Medicaid programs to include all persons whose income is below 100 percent of the federal poverty level and who are thereby ineligible for the ACA's federal subsidies on a state-established exchange.<sup>11</sup> Nearly half the states have chosen not to extend (or not yet to extend) their Medicaid programs, even

<sup>11</sup> *Id.* at 2608.

though the matching terms under the ACA are very attractive. That leaves a significant number of persons in poverty who reside in non-expanding states and are uncovered by Medicaid, yet who are ineligible for federal subsidies on the exchanges.

In short, the ACA does not provide for universal subsidies—either for income-qualified persons who purchase medical insurance outside an exchange or for non-income-qualified persons (those with incomes below 100 percent of the federal poverty level) who are not covered by Medicaid but whose income is too low to qualify for subsidies on a federal exchange. On the other hand, the ACA does provide that income-qualified persons who purchase medical insurance on an exchange “established by the State under Section 1311” are eligible for federal subsidies. These subsidies are available on a sliding scale for persons whose income falls in the range of 100–400 percent of the federal poverty level.

By its terms, the ACA makes no comparable provision for subsidies to accrue to income-qualified persons who purchase medical insurance on the fallback federally run exchanges. Concluding that the lack of such a provision in the ACA was a gap in the ACA, the IRS determined to fill that gap. By regulation, it decided that federal subsidies should apply to income-qualified persons who purchase medical insurance through federal fallback exchanges. The IRS concluded that such an extension of subsidies was consistent with the ACA (even if not directly authorized by it).

As described earlier, the IRS regulation is a double-edged sword. It expands benefits to income-qualified employees in states that choose not to set up exchanges (and therefore have federally run exchanges). At the same time, the rule triggers potentially substantial taxes/penalties for some employers whose health plans do not comply with the comprehensiveness and affordability mandates of the ACA and that have at least one employee who receives a subsidy on an exchange.

This all seems very straightforward. No subsidies are available outside the exchanges. And subsidies on the exchanges are only available to those who are income-qualified and not covered by Medicaid. Two types of exchanges are provided for; Section 1401 of the ACA provides for subsidies only on exchanges “established by the State under Section 1311.” No comparable provision authorizes subsidies on federally run exchanges established under Section 1321.

And no provision exists in the ACA, with respect to federal subsidies, for a gap-identification or gap-filling role for the IRS.<sup>12</sup>

The federal government is charged with establishing an exchange—“such” exchange—where the states elect not to set one up. But these are exchanges, at best, established not by a state but *in lieu of* an exchange established by a state. The ACA defines the term “state” so that it does not include the federal government.<sup>13</sup>

Had the ACA enacted subsidies on both types of exchanges—those established by a state and by the federal government—it would not have taken much to achieve that objective. The term “state,” for example, could have been defined to include the federal government, but the ACA defines a “state” so as to exclude the federal government. Or the operative subsidy provision could have been generic—subsidies are available when medical insurance is purchased on an exchange, in contrast to the lack of such subsidies when medical insurance is purchased outside an exchange. Or, even simpler, the language could have authorized subsidies for state-established or federally established exchanges.

Under the circumstances, the operative subsidy provisions of the ACA (if not ignored) cannot reasonably be understood as enacting or authorizing subsidies on federally run exchanges. What the ACA did (as distinct from what its drafters arguably should have done or

<sup>12</sup> In the face of this straightforward language and exchange structure, one might question whether the IRS had gap-filling authority. See, e.g., *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1839, 1843 (2012) (plurality opinion of Breyer, J.) (Where statutory language on a “particular issue” is clear cut, a court will infer that “Congress did *not* delegate gap-filling authority to an agency” regarding the precise question in issue.) (emphasis in original). The Court’s unwillingness to rely on the *Chevron* doctrine, which traditionally grants deference to agency decisionmaking (see discussion of *Chevron, infra*), might be explained, at least in part, by reservations about whether the ACA had delegated gap-filling authority to the IRS on the tax subsidy issue. The Court in *King* said as much: “[H]ad Congress wished to assign that question [whether tax credits are available on federally run exchanges] to an agency, it surely would have done so expressly.” *King*, 135 S. Ct. at 2489.

<sup>13</sup> The term “state” is defined in Section 1304(d) of the ACA so that it does not include the federal government. 42 U.S.C. § 18024(d) (defining the term “state” to include each of the 50 states and the District of Columbia). The ACA’s definition of a “state” is applicable to Title I of the ACA, which includes Sections 1311, 1321, and 1401. Those sections mandate the establishment of exchanges and govern the subsidy provisions. Where, with respect to territories, the definition of “state” was to be expanded, the ACA deemed the territories to be treated as a state if they sought funding to establish an exchange. 42 U.S.C. § 18043(a)(1).

perhaps meant to do) is altogether clear; and the Court did not really dispute that, labeling this analysis the most “natural” interpretation of the ACA’s terms.

## II. The ACA’s Text Should Govern

A 1980 case, arising in the context of an equal protection challenge, points the way to the conclusion that what Congress *did*, not what it might have intended to do or arguably should have done, is what should be given effect by a court.

In *United States Railroad Retirement Board v. Fritz*, the Supreme Court dealt with a statute that fundamentally restructured the railroad retirement system—somewhat as the ACA fundamentally restructured the American health care system.<sup>14</sup> Under pre-existing law, railroad industry retirees who had worked for both railroad and non-railroad employers could qualify for both Social Security benefits and railroad retirement benefits. These “windfall” benefits threatened the financial viability of the railroad retirement system.

Congress cut back on these retirement benefits, preserving them for some categories of workers but not for others. The line drawn in the statute—between those whose dual benefits were preserved and those whose benefits were curtailed—was subject to constitutional challenge under equal protection.

In his dissent, Justice William Brennan asserted that the “purposes” of the statute were “clear.”<sup>15</sup> Committee reports stated the goal of retaining all “vested” retiree rights based on considerations of fairness and the legitimate expectations of retirees.<sup>16</sup> Justice Brennan criticized the resolution reached by Congress—curtailing such benefits for some pre-existing beneficiaries—because that resolution did not preserve pre-existing rights for all beneficiaries. Congress’s resolution as reflected in the statute was at odds with the “principal purpose” of the law—“to preserve the vested earned benefits of retirees who had already qualified for them.”<sup>17</sup>

The Court’s response to that line of analysis—that the “purpose” of the statute, to preserve preexisting benefits for all beneficiaries,

<sup>14</sup> 449 U.S. 166 (1980).

<sup>15</sup> *Id.* at 185 (Brennan, J., dissenting).

<sup>16</sup> *Id.* at 185–86 (Brennan, J., dissenting).

<sup>17</sup> *Id.* at 186 (Brennan, J., dissenting).

trumped the terms of the statute itself—was clear-cut: The “plain language of [the statute] marks the beginning and end of our inquiry.”<sup>18</sup> The terms of the enacted law control; and resort to ostensible but un-enacted provisions cannot be used analytically to overcome a law’s terms.

The approach in the *Fritz* case has its counterpart in interpreting statutes such as the ACA. “There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”<sup>19</sup> The terms of the statute must govern,<sup>20</sup> unless they are unclear or “ambiguous.” The Court in *King* conceded as much. So how did the Court overcome the clear meaning of the ACA’s operative provisions regarding the scope of the subsidy? This is where Chief Justice Roberts shed the robes of Holmes and donned those of Houdini.

#### *A. Statutory Anomalies*

The Court looked to other provisions of the ACA and concluded that there could be interpretive concerns (statutory anomalies) if the ACA’s provisions regarding subsidies were applied in other contexts. Most significantly, the Court looked to a provision regarding the definition of a “qualified individual”—a person to whom all exchanges must make health plans available.<sup>21</sup> The ACA defines a “qualified individual” as a person who “resides in the State that established the Exchange.” The Court found this to be a “problem,” because such a definition would mean that no qualified individuals existed for federally run exchanges since, in those states, there would be no exchange established by the state.<sup>22</sup>

<sup>18</sup> *Id.* at 176.

<sup>19</sup> *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982).

<sup>20</sup> Devotion to specific statutory terms, even if odd, has a long tradition. *United States v. Locke*, 471 U.S. 84 (1985) is a good example. Congress in that case specified a filing deadline of December 30, even though it was customary for a deadline to track the end of a month, and December has thirty-one days. Despite the risk of confusion, which triggered the litigation, the agency adopted and the Supreme Court affirmed the December 30 deadline, not extending it to December 31. The congressional will, as reflected in the terms of the statute, was respected. Neither the agency nor the Court took it upon itself to undo or redo the straightforward textual command.

<sup>21</sup> *King*, 135 S. Ct. at 2490.

<sup>22</sup> *Id.*

Well, does that make the subsidy provision ambiguous? Hardly. It has nothing to do with the subsidy provision. And one must wonder about the Court's attempt to anthropomorphize the statute by inferring that Congress would not "intend" to establish a regime without any qualified individuals to whom federally run exchanges must offer their services. The anthropomorphization of the ACA—trying to determine and then implement a single, unifying theme for the entire ACA—seems wrongheaded and hopelessly naïve, as reflected in the Court's *Fritz* decision. Resort to purpose can illuminate text, not serve to eviscerate it. Statutory interpretation deserves better.

The interpretive issue is what to do with the "qualified individual" provision, should the issue arise. That provision does not and cannot shed light on why the operative subsidy provision warrants interpretive interment. At most, the "qualified individual" provision would support an inference that the drafters assumed that state-run exchanges would be the norm, probably because of the unenforceable mandatory "shall" language in Section 1311 or, plausibly, because of the incentives built into the ACA's subsidy provisions.<sup>23</sup>

In any event, the provisions regarding qualified individuals cannot reasonably or sensibly transform clear-cut and straightforward language regarding subsidies into ambiguous language.

### B. Consequences

The Court in *King* also looked to consequences or outcomes of plaintiffs' position if it prevailed. The Court was influenced by the argument that a significant reduction in subsidies (because so many states had chosen not to establish an exchange) would interfere with the working of the insurance markets in states with federally run exchanges. The insurance market reforms—no consideration of pre-existing medical conditions by insurance companies when accepting customers in the individual market ("guaranteed issue")—were

<sup>23</sup> The workaround embraced by the D.C. Circuit in *Halbig v. Burwell*, was its observation that exchanges must offer services to a "qualified individual," but that others could make use of the exchanges as well. *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014). The D.C. Circuit's approach comports with the ACA's terminology, and its adoption has the virtue of focusing on the specific interpretive concern—rather than forcing the total disregard and evisceration of a clear statutory term in a different portion of the ACA (and thereby allowing federal subsidies not expressly or even impliedly provided for by Congress when enacting the ACA).

nationwide in scope, and the Court concluded that those nationwide reforms would not work in non-electing states without the availability of tax subsidies on federally run exchanges. An insurance death spiral in individual markets in non-electing states would result, because the pool of the insured would become sicker, would be more expensive to insure, would drive up premium prices, and would result in the departicipation or non-participation of healthier individuals who could sign up (once enrollment opened up) if they became ill. The risk to individuals of non-insurance would diminish, the price of insurance would increase, and, without subsidies, many more persons would not be required to sign up under the individual mandate because they were not obliged to spend more than 8 percent of their income on medical insurance premiums. From this, the Court reasoned as follows: "So it stands to reason that Congress meant for those provisions [tax subsidies] to apply in every State as well."<sup>24</sup>

This is back to the world of Joseph and the pharaoh, of course. There is no claim that Congress did, in fact, act on what it ostensibly meant to do or how it meant for things to work. Only through anthropomorphization—after-the-fact inferring that there is a single guiding (invisible?) principle that must govern all interpretation, particularized and controlling language to the contrary notwithstanding—could this type of "it stands to reason" analysis trump operative language in the ACA or any statute and assign that otherwise-controlling language to the ignominious status of "surplusage."

The "it stands to reason" analysis—the focus on consequences to conclude "that Congress meant for" the tax subsidies "to apply in every State"—relies on broad considerations of abstract "purpose" or "intent." That style of analysis gives effect to these types of amorphous purposes or objectives at the expense of trashing, not illuminating, actually enacted terms.

The plaintiffs claimed that Congress used incentives for states to set up exchanges—by allowing states to serve as gatekeepers to tax subsidies for their residents. One potential outcome of such a constitutionally mandated strategy was the possibility that states would choose a pathway that preferred business climate objectives and safe harbor protection for its businesses against the employer-mandate

<sup>24</sup> King, 135 S. Ct. at 2493–94.

tax. That would conduce toward discouraging the formation of state-established exchanges and no tax subsidies for a state's residents when they purchased medical insurance. If there were adverse effects on the individual insurance market or on individual beneficiaries, those were foreseeable consequences (some would say risks) of the terms of the ACA as enacted and the federalism-based structural design that empowered states to make such choices. If that state-based preference were deemed unacceptable by the legislatively accountable branch, the Congress, then Congress or the states themselves through their political process are charged with making that determination and deciding whether and how to remedy that unacceptable outcome.

Plaintiffs' claim was plausible—and according to Jonathan Adler and Michael Cannon correct.<sup>25</sup> But it should not have to be correct, only plausible when it has the statutory text behind it. The *King* Court's finding otherwise is an admitted rewriting of the terms of the ACA—albeit in furtherance of a perceived overarching purpose. But pursuit of and identification of such an overarching purpose by a court or an agency results in the undoing and redoing of the terms of the ACA itself and reflects an unrealistic and false attempt to anthropomorphize the ACA. It purports to identify a single, coherent purpose or policy that can, through nonlegislative intervention, trump the work actually done by Congress as enacted into law with adherence to the formalities of lawmaking.

This type of analysis transfers enormous power away from the legislative branch at the federal level and from the political processes at the state level. And it turns the Court into something of a "Dream Team," overturning the work of Congress based on fuzzy, subjective, and indeterminate efforts at constructing a statutory worldview that does not exist and derives from the judicial imagination. Such judicial power does not or at least should not exist. And it calls into question just what is going on in the judicial process.

<sup>25</sup> Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, 23 *Health Matrix* 119 (2013).

### **III. The Roadmap to Ambiguity: Undoing and Redoing the ACA's Text**

#### *A. The "Context" Issue*

The *de rigueur* mantra—akin to a *deus ex machina* in the King Court's rendering—is the concept of "context." This is the Court's "Shazam." Say it loud and say it often—look at context, not at a set of words in isolation. That seems reasonable, when helping to understand what words mean; but what about when the words are clear on their own terms? The use of context not to clarify but to disregard (and even effectively excise as in *King*) legislative terminology is destructive of legislative supremacy in lawmaking.

Given the chief justice's affinity to a baseball metaphor when describing a court's role—just calling balls and strikes—it might be useful to invoke a legendary (and perhaps apocryphal) Yogi Berra story.

Yogi was a great catcher with the New York Yankees, who trained in St. Petersburg, Florida. As legend has it, a young woman was standing outside the Yankees' training facility, dressed in shorts and a tank top, when Yogi emerged from the dressing room. Seeing Yogi dressed in a T-shirt and shorts, the young woman commented: "You look cool, Yogi." Looking back at the similarly clad young woman, Yogi responded: "You don't look so hot yourself."

Now, this is a case for context. Was Yogi slurring the young woman, using a connotative expression suggesting that she did not look attractive? Or was Yogi responding in a more denotative manner, recognizing that both he and the young woman were dressed to account for the hot Florida weather and that, accordingly, she would not be hot despite the weather conditions? Context, in this situation, illuminates the words spoken. Was Yogi using the term "hot" in a literal manner, regarding the hot Florida weather? Or was he using the term in the more idiomatic sense, which would gratuitously cast aspersions on the young woman's appearance?

Consideration of context in the Yogi story provides real insight to the meaning of a set of words; it does not disregard Yogi's words but gives them accurate meaning. It would be entirely appropriate to ask whether, for example, Yogi had previously known or encountered the young woman, so that he would not welcome her comments or might construe them to be related to his own appearance (after all

being “cool” can have a colloquial meaning that refers to appearance, not temperature-related comfort). Was Yogi being provoked to make an acerbic, not a conversational, retort? Or was Yogi just making a perhaps infelicitous comment about the temperature-adaptive or weather-adaptive character of the young woman’s choice of clothing? Context in the Yogi situation clarifies and illuminates Yogi’s meaning, but it does not eviscerate his words or assign them to the trash bin of “surplusage.”

The use of “context” in *King* was altogether different—not an attempt to understand the underlying meaning of specific and controlling terms in a statute, using “context” to inform the meaning of the words as used. It was an attempt to divine an overarching statutory “context” and then place (or disregard, as the matter warrants) those critical and controlling words into that overarching statutory “context” so as to ignore the words themselves, not inform their meaning. That exercise was performed in the name of the higher cause of fulfilling a purportedly overarching statutory objective as divined by the Court—as effectively presented in court filings and extra-judicial postings by the statute’s agenda-driven maximalist advocates, and as inferred from other provisions of the statute.

*King*’s resort to “context” provides an executive agency or a court with what amounts to a “Get Out of Jail Free” card—an opportunity to undo and redo the particularized and restrictive terms of a statute, thereby vesting enormous discretion and power with nonlegislative actors. As reflected in the *King* case, this use of Houdini-like methods improperly allows for nonlegislative disregard for clear, legislatively adopted terminology in a statute—much like Justice Brennan’s rejected claim in *Fritz* that the retiree-benefits fix, as embodied in statutory law, was at odds with the overall purpose or objective of the law.

#### *B. Purpose, Structure, and Consequences of the ACA*

Once the *King* Court concluded that the “context” of the ACA made the otherwise-clear language of the subsidy provision “not so clear,” that opened the door; it allowed the Court to delve into broader, amorphous considerations of purpose, structure, and consequences. But there again, the narrative the Court embraced was, at best, an uncertain one.

The Court contended that Congress would intend subsidies to be available on federal and state exchanges so as to avoid an insurance market death spiral. But, of course, Congress did not so provide when it would have been very easy to so provide. That type of reasoning is *ex post* and far from legislative or even legislatively authorized gap-filling—especially so when alternative narratives that conform to the language regarding the availability of subsidies are available.

Such an alternative narrative includes the comprehensive work of Jonathan Adler and Michael Cannon (and more than one amicus brief) demonstrating that the subsidy strategy was designed to incentivize states to set up exchanges when drafters realized that states could not be commanded to set up those exchanges.<sup>26</sup> Under that line of argument, the legislative preference, as formulated in the Senate version that became the ACA, was for state-established exchanges. When the drafters realized that such state-established exchanges could not be mandated (despite the mandatory language of Section 1311), they purposefully and knowingly embraced an incentives approach, as permitted under the anti-commandeering cases. Those incentives, it turned out, were insufficient to induce most states to establish an exchange,<sup>27</sup> but that provides no warrant for

<sup>26</sup> *Id.* See also Jonathan H. Adler & Michael F. Cannon, *King v. Burwell* and the Triumph of Selective Contextualism, 2014–2015 *Cato Sup. Ct. Rev.* 35 (2015).

<sup>27</sup> A question was raised by supporters of the government's position in *King* about whether states had clear notice that their failure to establish an exchange would mean no subsidy for their residents on the federally run exchange. In *NFIB*, the Court had ruled that imposition of the ACA's expanded Medicaid mandate did not provide states with adequate notice at the relevant time—when they signed up for Medicaid—so the additional conditions could not be imposed on states as a condition for retaining preexisting Medicaid funding. See Blumstein, 2011–2012 *Cato Sup. Ct. Rev.*, *supra* note 4, at 93–99; Blumstein, 6 *J. of Health & Life Sciences L.*, *supra* note 4, at 130–35. This Clear Notice requirement for conditions on federal spending programs derives from *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). The notice issue in *King* is very different. The claim is that states lacked adequate notice of the consequences when they declined to establish an exchange. But the exchange and subsidy aspects of the ACA were new programs—contract formation. There was no after-the-fact imposition of conditions on a pre-existing program. If states decided to set up an exchange under the ACA, that would be a new program with the statute setting forth the relevant and straightforward terms and conditions. To the extent that the states were lulled by the challenged IRS rule, the strongest argument on this point, states still have the option to set up an exchange and secure for their residents the ability to qualify for subsidies.

the IRS or the Supreme Court to fill a perceived gap that is not a gap contemplated by the terms of the ACA itself.

Another plausible narrative, or consequence, is that the structure of the ACA empowers states, allowing them to serve as gatekeepers. This is a federalism narrative.

The plaintiffs' theory would establish states as gatekeepers to subsidies in their states—much as they are gatekeepers with regard to expanded Medicaid under the Court's 2012 *NFIB* decision. Further, states would be empowered to provide a tax safe harbor to large employers in their states. The large-employer mandate obliges employers with 50 or more employees to provide qualifying medical insurance to their full-time employees (30 hours) or face a substantial tax/penalty. The tax/penalty is \$2000 per employee per year (after an exemption for the first 30 employees). The key is that the tax is triggered when one employee receives an ACA subsidy.

If a state controls access to subsidies (for example, by not setting up an exchange), it can bar subsidies by not establishing an exchange; states can thereby provide a safe harbor to their employers from the bite of the employer mandate/tax. The political process in such states would be charged with determining what to prioritize—strong business climate with its economic benefits and with some non-qualifying medical benefits for workers versus expanded subsidies for residents with incomes in the 100–400 percent of the federal poverty level. Under *King*, such state empowerment as provided for under the terms of the ACA does not exist, a real federalism cost.<sup>28</sup>

In addition, there are important separation-of-powers costs that stem from *King*. The ACA empowers the IRS to make various implementing regulations, but there is no indication that the IRS is authorized to determine whether the terms of the ACA regarding subsidies leave a statutory gap and if so how to fill that gap.

Legislative gap-filling in this context is a job for Congress, not the courts or the IRS. The IRS regulation challenged in *King* reflects executive-branch overreaching, and it is disappointing that the Supreme Court did not see that the IRS regulation in the *King* case was part of a broader mosaic of executive-branch overreaching that the

<sup>28</sup> This narrative also belies the claim, made by some supporters of the government's position in *King*, that the linkage between the availability of a subsidy and the obligation of a state to set up an exchange was coercive. For discussion of this point, see note 4, *supra*.

courts can and should rein in. This is especially true regarding tax subsidies, where enormous expenses are at stake and are being implemented based, at best, on an ambiguous legislative platform.

#### **IV. *Chevron* and Related Issues**

Pre-existing case law, stemming back over 100 years, seemingly had established a legislative clear-statement rule for authorizing tax credits. That is, tax credits “must be expressed in clear and unambiguous terms.”<sup>29</sup>

That earlier doctrine is in tension with the more recent approach in the *Chevron* case, which mandates deference to agency rulemaking where an underlying statute is ambiguous.<sup>30</sup> *King* provided the Court with an opportunity to address and resolve that tension. In an earlier decision, the Supreme Court had held that an agency, faced with an ambiguous underlying statute, retained its deference under *Chevron* in rulemaking, even in matters related to taxation.<sup>31</sup> That is the so-called *Chevron* Step 2 analysis; but the Court had not addressed the question of the vitality of the earlier “clear statement” mandate in the context of determining whether agency rulemaking granting tax credits is warranted—that is, *Chevron* Step 1.

The *King* Court did not directly address that earlier clear-statement doctrine or its relationship to the *Chevron*-style analysis, a missed opportunity.

As noted, a case could be made that the *Chevron* rule, which calls for judicial deference to agency rulemaking when an underlying statute is ambiguous, was in tension with the earlier tax-subsidy, clear-statement doctrine. But the Court in *King* expressly declined to invoke the *Chevron* framework, so one would think that the earlier tax-subsidy, clear-statement doctrine would still be the right precedent to use. Resolution of the tension on this issue—did *Chevron* erode the pre-existing tax-subsidy, clear-statement doctrine?—would have been an important clarification. But, again, the Court missed its mark, ignoring the issue entirely in its opinion. The Court left the inference that the older case law regarding tax subsidies is no longer operative since the IRS’s tax subsidy under the ACA was

<sup>29</sup> *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 183 (1889).

<sup>30</sup> *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

<sup>31</sup> *Mayo Found. v. United States*, 562 U.S. 44 (2011).

upheld based on a law considered by the Court to be ambiguous, not clear, as required by the pre-existing doctrine. But the *King* Court left this to inference by not dealing with the status of the tax-subsidy, clear-statement rule in the modern context.

Another issue of importance arises from the Court's refusing to apply the *Chevron* framework to this case.

Under *Chevron*, an agency receives deference for its regulations when a statute authorizes agency action but is ambiguous about how an agency should resolve a set of policy options deemed reasonable under the operative legislation. In *King*, the Court found the ACA to be ambiguous; so presumably under *Chevron* an agency can resolve policy options and receive judicial deference. That does not mean that an agency can, based purely on political preferences, undo previous agency action.<sup>32</sup> But an agency can make changes where it chooses and defends alternative policy prescriptions authorized by underlying legislation.<sup>33</sup>

In this case, a putative Republican president could redo the Obama administration's IRS regulation. For example, the IRS in the future could embrace the federalism goals outlined earlier, empowering states to choose between business climate considerations and tax subsidies for its residents. That would reflect an enhanced gatekeeping role for states, allowing states to provide a safe harbor from employer-mandate taxation for noncompliance with the ACA. A future IRS could analogize such a state decisionmaking role as comparable to states' roles in providing a safe harbor from federal antitrust legislation under the antitrust "state action" doctrine.<sup>34</sup> Under *Parker*, states can insulate private parties from federal antitrust enforcement when states adopt a policy that prefers regulation to competition and actively supervises private conduct to ensure that state policies are being adhered to.<sup>35</sup>

At the *King* oral argument, the question of a possible redo of the IRS regulation by a future administration was raised by the chief

<sup>32</sup> See, e.g., *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>33</sup> See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

<sup>34</sup> See *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>35</sup> See *FTC v. Tico Title Ins. Co.*, 504 U.S. 621 (1992). That "active supervision" component played a central role in the Court's refinement of *Parker* immunity this term. See *North Carolina St. Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

justice. Some have interpreted the Court's avoidance of reliance on the *Chevron* framework as a signal that future administrations will not be afforded an opportunity to redo the existing IRS regulations by limiting tax subsidies to state-established exchanges. The contention is that the *King* Court left no room for agency flexibility in embracing alternative interpretations of the ACA subsidy provisions going forward.

This is an intriguing issue—and that commentary is not clearly unfounded—but I think that this set of conclusions overreads the *King* opinion. An ostensible reason, seemingly apparent from oral argument, that the Court likely chose not to embrace the type of deference mandated by *Chevron* is that the IRS regulation was providing for enormous increases in federal tax subsidies—something that past precedent allowed only when legislation clearly authorized those subsidies.<sup>36</sup> As I noted earlier, the Court did not expressly link its analysis to this earlier doctrine, but it did express its concern about granting such deference to an agency when the ACA was, at best, ambiguous.

*King* does not necessarily apply symmetrically with respect to the increase or decrease of the availability of federal tax credits.<sup>37</sup> The reason for skepticism in situations such as *King* about non-explicit deference to the IRS—given the history—is that tax credits are being increased without clear statutory authorization by Congress. Where tax credits are being reduced, the concerns about clear legislative authorization are diminished, and greater deference in that circumstance would seem not inappropriate. But the issue is surely fair to raise, and only time will tell if a Republican administration is elected in 2016 and if it seeks to revisit these issues administratively.

<sup>36</sup> See *Yazoo & Miss. Valley R.R. Co.*, 132 U.S. at 183.

<sup>37</sup> See *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows the unambiguous terms of the statute and thus leaves no room for agency discretion”). *King* held that the ACA was ambiguous and not unambiguous on the subsidy question, so *Brand X* would suggest a role for agency rulemaking of the type discussed.

## V. Judicial Role Considerations

### A. A Paradigm Mistake

Finally, one comes to the question of judicial role. The chief justice received much criticism in some quarters for his rescuing of the ACA in the *NFIB* case by deeming the individual mandate a constitutionally valid “tax,” rather than a constitutionally questionable “penalty” (the term adopted in the text of the ACA itself).<sup>38</sup> I saw the penalty/tax issue as one of political accountability: if Congress and the Obama administration wanted the legal benefits of labeling the individual mandate as a tax, they should not be allowed to play political dodge-ball games by labeling the individual mandate in the ACA itself a penalty and not a tax.

But I also have recognized and respected the chief justice’s broader view from 30,000 feet that the Court would put itself into a difficult position institutionally to strike down the entire ACA on constitutional grounds when that legislation was the signature product of an administration that also had a super-majority in both the Senate and the House at the time of enactment. That meant going the extra mile to find a reasonable pathway toward upholding the ACA, consistent with the requirement that the pathway is reasonable under principles undergirding the rule of law.<sup>39</sup>

In 2012, for the Court to invalidate the entire ACA would have been a judicial trumping of both other branches. It would have been seen as and treated as a political confrontation during the 2012 presidential election, and it would have placed the Court’s institutional role in the political crosshairs of a fierce political and partisan campaign. The Court would have stood against the political branches, and one can arguably understand the impetus of the chief justice for restraint in those circumstances.

The posture in *King* was altogether different; by not recognizing that difference, the Court made a significant paradigm mistake.

The issue in *King* was legislative interpretation, not constitutional interpretation; statutory interpretation is undoubtedly within the Court’s job description, and the Court’s legitimacy is beyond

<sup>38</sup> See, e.g., Ilya Shapiro, *Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 *Tex. Rev. L. & Pol.* 1 (Fall 2012).

<sup>39</sup> See James F. Blumstein, *Understanding the Faulty Predictions Regarding the Challenges to Health Reform*, 2014 *U. Ill. L. Rev.* 1251 (2014).

criticism in that sphere. In such a role, the Court was not in confrontation with the other branches. It was not being asked to trump the politically accountable branches. It was asked to referee a dispute that pitted the IRS, an executive branch agency, against Congress. If plaintiffs had prevailed, Congress would have been empowered to determine whether a problem with the ACA existed and if so how to resolve it. That is, in *King* the Court was not aligned against both the Congress and the president; it was being asked by plaintiffs to give effect to what Congress did, not what it may have intended to do, and in the process to empower Congress as the institution to determine whether a fix was needed (and if so what that fix might be).

But the Congress of 2015 is under new management compared with the Congress that enacted the ACA in 2010. If anything, that should have increased the Court's unwillingness to use its Houdini approach to safeguard the purported broad purposes of the enacting Congress by allowing for perceived drafting gaps to be filled nonlegislatively by judicial inference or IRS action. That is, from an institutional perspective, there was a strong case for the Supreme Court to hold the enacting Congress to the text of what it had enacted. The institutional or judicial-restraint concerns that may have led the chief justice in *NFIB* to find a way to save the ACA from constitutional invalidation were not present in *King*.

Adopting the plaintiffs' "natural" interpretation of the ACA's subsidy provisions in *King* would have created an opportunity for dialogue, an approach that should have appeal to a Frankfurterian such as the chief justice. A ruling for plaintiffs would undoubtedly have had some destabilizing short-run practical consequences, but many of those concerns could have been resolved remedially through a transition phase.<sup>40</sup> A ruling for plaintiffs would also have increased the likelihood that the party in control of Congress (Republicans) and the president (a Democrat) would have to have a political conversation about future changes to the ACA. And, to the extent that congressional Republicans had no participation in the enactment of the ACA and enjoyed a certain political validation from their legislative takeover—shared to some degree with the president through his reelection—a ruling for plaintiffs might have forced some discussion

<sup>40</sup> See the discussion of the procedural posture of the case, dealing with a motion to dismiss, in Part V.B, *infra*.

about health reform legislation that would have had the fingerprints on it of both parties.

Where the terms of the ACA were clear cut, the Court had a duty under the rule of law to enforce its terms; but in the face of admitted statutory ambiguity, at most, the Court had no obligation to enforce the purported broad general purposes, policy preferences, or objectives of the ACA when they were not embedded as enactments in the actual terms of the ACA itself—and when giving effect to such broad goals necessarily resulted in condemning the operative provisions of the enacted text to the never-never status of “surplusage.” Such statutory surgical repair is a role for Congress—especially a Congress under new management.

The Court concluded that its interpretation “respect[ed] the role of the Legislature” and that the Court should “not undo what [Congress] has done.” The Court said it must respect and secure “a fair understanding of the legislative plan.” But that led to the wrong outcome when such a “fair understanding” necessitated actually undoing and redoing what Congress actually did—in the process labeling the operative statutory language surplusage and therefore inoperative. *King* did not respect Congress; it disempowered Congress as an institution, implicitly buying into the government’s position that Congress could not be counted on to “fix” the problems that would arise if plaintiffs’ position were accepted.

But it is precisely Congress that must determine whether what it actually did needs fixing and if so in what manner; use by the Court of its own interpretation of the ACA’s “legislative plan” so as to trump the terms of the ACA itself reflects a significant paradigm mistake about the Court’s role regarding interpretation of the ACA. *King* reflected no deference to what Congress did in the ACA or what role Congress would or should play if the ACA’s statutory terms were given effect.

### *B. Procedural Posture: Considering a Motion to Dismiss*

The Supreme Court, after all is said and done, is a court. Courts operate with rules. The chief justice noted at oral argument that the case was before the Supreme Court on a motion to dismiss.<sup>41</sup>

<sup>41</sup> See Jim Blumstein on Why the Procedural Posture of *King v. Burwell* Might Matter, Volokh Conspiracy, Wash. Post (June 24, 2015), <http://www.washingtonpost.com/>

In a proceeding under a motion to dismiss, the focus is on the pleadings, not extrinsic evidence or considerations. Yet the Court's opinion is replete with analysis that turned on extrinsic facts, such as predictions about a death spiral in the individual medical insurance marketplace. The Court, critically, relied on the "calamitous result" on insurance markets in states that have not established exchanges, concluding that Congress "plainly meant to avoid" that outcome. Accordingly, the Court, despite the terms of the ACA itself, concluded that tax credits are "allow[ed]" for "insurance purchased on any Exchange created under the [ACA]" in order to avoid the calamitous results Congress wanted to avoid. These observations have little if any role in a motion-to-dismiss proceeding.

Without consideration of extrinsic factors, such as the effect of plaintiffs' interpretation of the ACA's subsidy provisions on the functioning of the individual market for medical insurance in states with federally run exchanges, the Court would have had no basis for ruling against plaintiffs' position. The Court seemed to recognize this when it stated that "[r]eliance on context and structure in statutory interpretation" calls for "great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."<sup>42</sup> In *King*, however, the Court decided that "such reliance is appropriate" because of the consequences of giving effect to the terms of the ACA itself. And without such reliance, by the Court's own acknowledgment, the interpretive outcome in *King* would have to have been different.

Reliance on such "it stands to reason" type of inferences was, therefore, pivotal to the Court's casting aside the ACA's clear and operative language—that subsidies were available to income-qualified persons who purchased medical insurance on exchanges established by a state and that the ACA made no comparable provision regarding subsidies to income-qualified persons who purchased medical insurance on federally run exchanges.

But such reliance in the context of ruling on a motion to dismiss is inappropriate or at least highly questionable since such reliance goes well beyond the pleadings. If it were to act like a court, the Supreme

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news/volokh-conspiracy/wp/2015/06/24/jim-blumstein-on-why-the-procedural-posture-of-king-v-burwell-might-matter.

<sup>42</sup> *King*, 135 S. Ct. at 2495–96 (citations omitted).

Court, by the terms of its own analysis, would have reversed the lower courts' grant of the government's motion to dismiss. That would not have meant granting of judgment to the plaintiffs, given the Court's thoughts regarding context and structure. It would, however, have meant remanding for consideration, in a procedurally proper forum and manner, of the types of extrinsic factors that the Court deemed so crucial to reaching an understanding of the ACA's subsidy provisions. A remand could also have included fact-finding or consideration of context in a summary judgment proceeding. The subsidies would have remained in place during the pendency of those proceedings, since the result of the Court's action would only be a denial of a motion to dismiss, not a judgment for plaintiffs.<sup>43</sup>

The Court's treatment of and reliance on extrinsic matters in the procedural posture of the matter—ruling on a motion to dismiss—further calls into question just what was going on and why in the Court's deliberations.<sup>44</sup> The Court's reasoning in the context of ruling on a motion to dismiss went well beyond accepted and customary boundaries for a motion-to-dismiss proceeding.

The Court's stretching not only the interpretive but also the procedural boundaries raises the question, again, of just what is going on—an issue raised in dissent by Justice Antonin Scalia. It seems that, as described earlier, this is the Court's paradigm mistake—its determination that the institutional roles of the Court in the

<sup>43</sup> Moreover, had the Court given effect to the operative language in the ACA, by limiting subsidies to state-established exchanges, the procedural posture of the case would also have resulted in reversal of the motion to dismiss granted by the lower courts. It would not and could not have resulted in a judgment for plaintiffs. So, additional proceedings in the lower courts would have been needed to translate the reversal of the motion to dismiss into an enforceable judgment—plenty of time for the political process to play out or for an orderly transition to take place without upsetting existing insurance contracts or undoing those settled expectations.

<sup>44</sup> The Court's decision to hear the case suggested a strong interest in addressing the broad issues raised; if, upon further analysis, the Court took a different view than the one presented by plaintiffs, then it still had to live within the parameters of the procedural posture—review of the lower courts' granting of a motion to dismiss. In that posture, the Court could not properly affirm the granting of a motion to dismiss if it confined itself to examining the pleadings. In order to reach the analytical outcome it did, the Court had to and did consider extrinsic circumstances and projected (and contested) consequences regarding the putative impact of a ruling for plaintiffs on the insurance markets; in a motion-to-dismiss proceeding, consideration of such extrinsic factors beyond the pleadings is at the very least procedurally questionable.

constitutional case of *NFIB* and in the statutory case of *King* are the same or analogous. Yet avoiding use of its constitutional authority to trump both political branches by overturning the ACA did raise non-trivial concerns regarding the Court's role. In *King*, on the other hand, the Court was being asked to interpret the terms of a statute, not confronting both other branches. The communication of the interpretive question—giving effect to clear text of a statute—would have been easy and straightforward. There was no confrontation with both the politically accountable branches, only empowering the Congress and the states consistent with the terms and text of the ACA.

But again the government and its backers won the case at 30,000 feet, characterizing it as a political attack on the ACA. The Court unnecessarily and unwarrantedly shied away from giving effect to the terms of the ACA and thereby empowering Congress for no real institutional reason. All the Court had to do was enforce the terms of the ACA—respecting Congress's work product and its role in modifying that work product if Congress deemed that to be warranted—and disavow any involvement in the political process. As in the *Fritz* case, the Court would have focused on what Congress did and would have stayed within the procedural parameters of how courts function.

## **VI. How Far Does Executive Discretion Extend?**

After *King*, one is left to wonder what extensions to federal subsidies could be implemented by executive action under the ACA. If broad purposes trump, and even relegate, directly on-point statutory language to mere "surplusage," can the IRS do even more?

Under the ACA, subsidies on exchanges are now available to purchasers on both federally established and state-established exchanges. But those eligible for such subsidies must be income-qualified—that is, persons having incomes in the range of 100–400 percent of the federal poverty level. The 100–400 percent of the federal poverty level range was adopted in the ACA under the assumption that persons with lower incomes (under 100 percent of the federal poverty level) would be covered under states' ACA-expanded Medicaid programs. But in *NFIB* the Supreme Court ruled that the ACA went too far in assuring (effectively coercing) coverage of an expanded population under states' Medicaid programs.

The result of *NFIB* is that states may opt into expanded Medicaid with attractive financial incentives, but they have a genuine choice; they no longer must put at risk their pre-existing Medicaid programs if they choose not to expand Medicaid. And nearly half of the states have, to this point, declined to expand their Medicaid programs to cover the ACA's preferred population.

The result is that, in non-expanding states, persons with incomes under 100 percent of the federal poverty level may not be covered by Medicaid and yet are too poor to qualify for tax subsidies on an exchange. This seems like an utterly irrational outcome in terms of eligibility for federal subsidies.

The income-qualification guidelines are clearly specified in the ACA—100–400 percent of the poverty line. But *NFIB* also makes it abundantly clear that Congress in the ACA had a clear preference that persons in poverty have medical coverage and federal financial support for that coverage; indeed, so clear was that objective that Congress overreached by effectively (and unconstitutionally) mandating that states expand their Medicaid programs to cover all those who would otherwise not be eligible for subsidies on an exchange.

Given this “context” and these “purposes,” is the IRS free to issue regulations that extend subsidies on exchanges to those who are not eligible for their state's Medicaid program but who now do not qualify for subsidies on exchanges because their incomes are too low? Or, even more far-reaching, does the ACA by itself authorize federal subsidies for such persons on the exchanges, despite the textual constraints of the ACA itself, given the access-oriented overarching objectives of the ACA?

This type of expansion has not been under consideration, at least openly, but wouldn't the type of reasoning in *King* lend itself to this type of executive-branch-driven expansion of subsidy availability? Or even a court-based claim by a person in the no-man's-land between Medicaid ineligibility (too much income) and ineligibility for exchange-based subsidy (too little income)? If operative and controlling statutory terms or provisions are consigned to the Orwellian world of “surplusage,” overborne by resort to such amorphous and malleable concepts as overall “purpose” or “structure” or “context,” why is such an IRS regulation expanding subsidies—which are indisputably in accord with Congress' overall access-oriented objectives—or even litigation on this theory unsupportable?

One can imagine a limitation on litigation or a distinction on administrative action, but just asking the question and having to do more than say “the provisions of the ACA do not provide for such subsidies” indicates just how broad and undisciplined the Court’s decision in *King* really is. Maybe we should stay tuned on this.

## **VII. Conclusion**

In sum, the Court’s opinion in *King* was highly disappointing and institutionally corrosive; its unpersuasive, interpretation-of-dream-like reasoning and analysis lend support to the inference that the issue was decided at 30,000 feet—at the level of broad institutional role and policy considerations that resulted from a paradigm mistake about the Court’s role. The Court missed an opportunity to empower Congress (and indirectly the states) by ruling for plaintiffs. In the process, the unsatisfying and unpersuasive use of Shazam tactics in reaching its outcome undermines its own institutional credibility—precisely the opposite of its stated goal of staying out of the political realm by deferring to what Congress purported to do in enacting the ACA. This is particularly the case when the Court, in (Lewis) Carrollian fashion, concludes that the key operative language—about availability of federal subsidies on exchanges established by a state—is not to be illuminated through non-textual techniques but to be ignored.