The Problem with "Coercion Aversion": Novel Questions and the Avoidance Canon

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> GENERAL VERRILLI: I think that it would be – certainly be a novel constitutional question, and I think that I'm not prepared to say to the Court today that it is unconstitutional. … But I don't think there's any doubt that it's a novel question … .
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> JUSTICE KENNEDY: Is it a—I was going to say, does novel mean difficult?
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> (LAUGHTER.)[1]

Justice Kennedy may be the swing vote in *King v. Burwell*. Because of that, the post-oral-argument hubbub has focused on Justice Kennedy's questions to counsel, which suggested that he was considering resolving the case in the government's favor using the canon of constitutional avoidance. The *King* challengers assert that an IRS regulation, which permits federal tax credits to subsidize the purchase of health insurance plans on the federal health insurance exchange, contravenes the Affordable Care Act ("ACA"), which authorizes federal tax credits for purchases of health insurance plans on "an Exchange established by a State."[2] If the challengers' reading of the ACA were correct, Justice Kennedy posited, the statute would amount to a Congressional threat to withdraw tax credits and impose a destructive subset of federal regulations on states that did not establish exchanges. That threat, he hinted, would be a forbidden attempt by Congress to "coerce" the states: "if your argument is accepted, the states are being told either create your own exchange, or we'll send your insurance market into a death spiral."[3] His evident inclination was to apply the canon to avoid this reading of the statute and sustain the IRS's rule.

Justice Kennedy's unexpected embrace of this idea—let us call it the "coercion aversion" argument—was a curveball. Neither party raised it, presumably because neither had any incentive to raise it: the challengers

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[1] *See* Transcript of Oral Argument at 49, King v. Burwell, 135 S. Ct. 475 (argued March 4, 2015) (No. 14-114) [hereinafter "Transcript"] (alteration in original).

[2] *See* Patient Protection and Affordable Care Act § 1311, 42 U.S.C. § 18031 (2010) [hereinafter "ACA"]; King v. Burwell, 759 F.3d 358, 364-65 (4th Cir. 2014).

[3] *See* Transcript, *supra* note 1, at 16, 49.

because the argument would cut against them in this case, and the Solicitor General because it would cut against the federal government in future cases. Only one amicus brief devoted significant space to coercion aversion,[4] out of the thirty-one amicus briefs filed on the government's side.[5] The challengers didn't respond to the argument in their reply.[6]

From the moment Justice Kennedy floated it, however, it was clear that coercion aversion could point the way to five votes for the government. The Solicitor General grasped its import instantly. Though circumspectly noting his office's continuing obligation to defend the ACA's constitutionality,[7] he nonetheless did not bat away the helping hand that Kennedy was extending. "[C]onstitutional avoidance becomes another very powerful reason to read the statutory text our way," said General Verrilli.[8]

But there's a problem with coercion aversion, and it arises from the novelty of the asserted Tenth Amendment problem here. This is the choice that the challengers' reading of the ACA poses to states: "*Set up an exchange, or else the federal government will deprive your citizens of tax credits and eliminate the mandate in your state and thereby cause the health insurance markets in your state to collapse*."[9] Whether this choice is an unconstitutionally coercive "regulatory threat" is clearly a question of first impression, and a consequential one.[10] The Court has never invalidated an act of Congress as coercive of the states because of the regulatory burdens it placed on state *residents*, as opposed to the regulatory burdens it placed directly on states themselves. Nor has the Court ever invalidated an act of Congress as coercive of the states because of the conditions it placed on the money it offered to state residents. To date, the Court has only found unconstitutional coercion where Congress placed conditions on the money it offered to states themselves. Adopting the theory

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[4] *See* Brief for Jewish Alliance for Law & Social Action (JALSA) et al. as Amici Curiae Supporting Respondents, King v. Burwell, 135 S. Ct. 475 (filed Jan. 16, 2015) (No. 14-114), 2015 WL 350366 [hereinafter "JALSA Brief"]. Another amicus brief spent its final four paragraphs on the argument that the challengers' interpretation would raise "a serious Tenth Amendment question." *See* Brief for the Commonwealth of Virginia et al. as Amici Curiae Supporting Respondents at 42-43, King v. Burwell, 135 S. Ct. 475 (filed Jan. 28, 2015) (No. 14-114), 2015 WL 412333 [hereinafter "Virginia Brief"].

[5] Docket, King v. Burwell, 135 S. Ct. 475 (No. 14-114).

[6] *See* Reply Brief, King v. Burwell, 135 S. Ct. 475 (filed Feb. 18, 2015) (No. 14-114), 2015 WL 737959.

[7] *See* Transcript, *supra* note 1, at 49-50.

[8] *Id.*

[9] *See* JALSA Brief, *supra* note 4, at 31 ("Establish an exchange, or the federal government will destroy your individual health insurance market.").

[10] *See id.* at 7 ("Never before has this Court confronted a cooperative federalism scheme that threatens states with regulatory, rather than fiscal, harm if they refuse to implement federal policy."); Virginia Brief, *supra* note 4, at 44 ("[I]t is a novel kind of pressure to threaten to injure a State's citizens and to destroy its insurance markets in order to force State-government officials to implement a federal program.").

of coercion by regulatory threat would add a new arrow to the quiver of constitutional federalism.

So Justice Kennedy's question was exactly the right one: is this *novel* question of constitutional law automatically *difficult* in a way that means that the *King* Court should read the statute to avoid it?[11] The answer is no. Modern avoidance has two justifications:[12] honoring Congress's presumed intent not to legislate unintentionally close to a constitutional line and preventing courts from unnecessarily issuing constitutional opinions. The logic of these justifications disintegrates when the putative constitutional problem is a *novel* question of first impression that crystallized only after Congress legislated.[13] Congress can't be presumed to have legislated in light of new constitutional problems that were not evident at the time of lawmaking, and the Court can't claim to be leaving constitutional law undisturbed when its avoidance holding itself manufactures new constitutional doubts. As a result, the Court should apply the canon to avoid truly novel constitutional problems only if it has exhausted other available tools of statutory interpretation, and even then only in preference to actual constitutional invalidation.

For *King*, this principle boils down to a simple syllogism. Because (1) the constitutional problem of coercion by regulatory threat is novel; and because (2) the justifications for the modern avoidance canon disintegrate where the

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[11] Other scholars have discussed the special problems that flow from using the canon to avoid novel constitutional doubts. *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 23-24 (1996); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 488-89 (1990); Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 558-60 (2003); Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 670 n.175 (2008).

[12] *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) ("The basic difference between classical and modern avoidance is that the former requires the court to determine that one possible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one reading *might* be unconstitutional."); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1206-07 (2006) (describing justifications for modern avoidance). This essay adopts an "internal" point of view, in the sense that it accepts the canon as a settled feature of constitutional adjudication and takes its justifications at face value. The articles cited throughout will lead the interested reader to the rich debate over the legitimacy of the canon and the soundness of its rationales.

[13] *Novelty* is a distinct concept from *ambiguity*. Constitutional issues are often ambiguous or "unsettled," and the Court may properly use the canon of constitutional avoidance to avoid addressing unsettled issues or resolving ambiguities. More rarely, though, constitutional questions arise that are not merely ambiguous in light of existing doctrine, but also *novel*, in the sense that they are *unanticipated* questions of first impression whose resolution will meaningfully change settled doctrine. As I explain in the text, the mischief begins when the Court uses the canon to avoid this distinct class of constitutional doubts.

problem being avoided is novel; therefore (3) the Court should use coercion aversion to resolve *King* only as a last resort. In *King*, an alternative avenue for resolving the case is *necessarily* available to a justice who would otherwise use the avoidance canon to circumvent this novel problem. To avoid the ostensibly coercive reading of the statute, a justice must conclude that an alternative, non-coercive construction of the statute is "fairly possible" or "reasonable."[14] But if there's a "reasonable" reading of the ACA whereby tax credits are not linked to the creation of state exchanges, then *a fortiori* the ACA must fail to state *unambiguously* the conditions on the availability of tax credits—which would run afoul of the federalism clear-statement cases that require Congress to impose such conditions in unmistakable terms.[15] Consequently, a justice inclined towards coercion aversion need not and should not rely on it to resolve the case—even if that justice would rule that a clearly worded regulatory threat of this kind was unconstitutional if she were *unavoidably* confronted with that novel question on the merits.

The essay proceeds as follows. Part I explains the novelty of the constitutional problem that the justices are considering avoiding. Part II describes the serious difficulties with equating "novel" questions with "difficult" ones for purposes of the avoidance canon. Part III applies this analysis to *King*. A short conclusion follows.

I. A New Version of Coercion

Imagine that the government loses *King*, and the Court holds that the ACA provides tax credits only on state exchanges. Now imagine the lawsuit in which a state contends that the ACA, so construed, contravenes the Tenth Amendment. That suit would be a successor to *King*, so let us call it *Prince*. The *Prince* lawsuit would claim that it was unconstitutional to force states to make the choice mentioned above: "*Set up an exchange, or else the federal government will deprive your citizens of tax credits and eliminate the mandate in your state and thereby cause the health insurance markets in your state to collapse*."

Prince would pose not merely a run-of-the-mill question of first impression, but a truly *novel* constitutional claim. The Court has never before held that Congress had coerced the states by harming their citizens. As

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[14] Almendarez-Torres v. United States, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) ("[T]he doctrine of constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation—when that interpretation is *reasonable,* though not necessarily the best.") (citation omitted); Crowell v. Benson, 285 U.S. 22, 62 (1932) ("fairly possible").

[15] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 12-13 (1981); *see* Brief for the Respondents at 39-40, King v. Burwell, 135 S. Ct. 475 (filed Jan. 21, 2015) (No. 14-114), 2015 WL 349885 [hereinafter "Gov't Br."]; Brief for Professors Thomas W. Merrill et al. as Amici Curiae Supporting Respondents at 7-9, King v. Burwell, 135 S. Ct. 475 (filed Jan. 28, 2015) (No. 14-114), 2015 WL 456257.

explained below, the offer in *Prince* is not barred by either the "commandeering" or the "coercive-conditions" lines of precedent. So, to strike down the offer in *Prince* as unconstitutional, the Court would have to create a meaningfully new rule of constitutional law.

As an initial matter, *Prince* is not a case of commandeering of the kind that was at issue in *Printz v. United States*.[16] That case involved the Brady Handgun Violence Prevention Act, which directed state and local law enforcement officers to conduct background checks on prospective handgun purchasers.[17] This, the Court held, was impermissible: the federal government may not "command the States' officers" to "administer or enforce a federal regulatory program."[18] The choice in *Prince*, in contrast, does not contain any direct compulsion of or "command" to state officers. The tax credits at issue in *Prince* would act "directly upon individuals, without employing the States as intermediaries."[19] A statute of this sort "is thus entirely consistent with the Constitution's design,"[20] because the Constitution gives Congress "the power to regulate individuals, not States."[21]

Nor does the line of cases forbidding coercion suggest that a state might be unconstitutionally coerced by a federal statute that regulates not the state, but its citizens; the case law points in the opposite direction. Consider the statute at issue in *New York v. United States*,[22] the Low-Level Radioactive Waste Policy Act ("LLRWPA"). This federal law included various "incentives" designed to encourage the states to provide for the disposal of low-level radioactive waste.[23] One set of incentives encouraged states to adopt federal standards for radioactive waste disposal.[24] If the state did not adopt the federal standards, it risked having its citizens be "den[ied] access to … disposal sites."[25] The Court was untroubled, reasoning that "[t]he affected States are not compelled by Congress to regulate," because the "burden caused by a State's refusal to regulate will fall on those who generate

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[16] United States v. Printz, 521 U.S. 898 (1997).

[17] *Id.* at 902.

[18] *Id.* at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system . . . .").

[19] New York v. United States, 505 U.S. 144, 164 (1992).

[20] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2626-27 (2012) (Ginsburg, J., dissenting) [hereinafter "NFIB"].

[21] *Id.* (quoting *Printz*, 521 U.S. at 920) (internal quotation marks omitted).

[22] *New York*, 505 U.S. 144.

[23] *Id.* at 152-54.

[24] *Id.* at 173.

[25] *Id.* at 174 ("States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites.").

waste and find no outlet for its disposal, rather than on the State as a sovereign."[26] The Court did not contemplate that the additional federal regulatory burdens on these *residents* might force the state to provide offsetting relief out of the state's own pocket.[27]

New York did, of course, strike a part of LLRWPA under the Tenth Amendment[28]—the "take title" provision—but the *Prince* offer noticeably differs from that portion of the statute. This provision offered states a choice between two direct Congressional commands to state legislators: either states could "tak[e] title to and possession of" all low-level radioactive waste generated in the state, or else states could regulate that waste in the manner Congress directed.[29] Because both halves of the choice were beyond Congress's power under the Tenth Amendment, forcing a state to choose between the two was also unconstitutional.[30]

Contrast this choice with the choice in *Prince*. Article I authorizes Congress, and Congress alone, to decide who should bear the costs of federal law and whether those costs will be subsidized by the public fisc.[31] Outside the limited context of takings, the Constitution has never been held to require Congress to "pay as it goes" when it enacts federal laws. Thus, Congress can enact a statute that either (1) subjects insurers to federal guaranteed-issue and community-ratings requirements *without* offsetting federal subsidies to citizens, or (2) subjects insurers to federal guaranteed-issue and community-ratings requirements *with* offsetting federal subsidies to citizens. Both regimes are within Congress's power to enact. The only question, then, is whether Congress has the further power to tether its grant of those subsidies to whether the state chooses to establish an exchange.

Of course, a conditional offer of federal money that leaves a state with no genuine choice but to accept is unconstitutionally coercive.[32] But despite the ubiquity of federal conditional-spending schemes, the Court never invalidated such a law as coercive until *NFIB*,[33] and the reasoning of *NFIB* itself stops well short of condemning a *Prince*-style offer. What so troubled the justices in *NFIB* was that the Medicaid expansion offer threatened to upend the terms of a long-standing federal-state bargain upon which the

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[26] *Id.*

[27] *See id.*

[28] *Id.* at 175.

[29] *Id.* at 174-75.

[30] *Id.* at 176.

[31] Helvering v. Davis, 301 U.S. 619, 645 (1937) ("When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states.").

[32] *NFIB*, 132 S. Ct. at 2603-05.

[33] *NFIB*, 132 S. Ct. at 2630 (Ginsburg, J., dissenting) ("The Chief Justice therefore—*for the first time ever*—finds an exercise of Congress's spending power unconstitutionally coercive.").

states had relied.[34] The *NFIB* plurality was careful to note the manifold ways in which the federal flow of funds to the states had generated serious reliance interests.[35] But Congress has made no analogous bargain with the states around the *non*-regulation of insurance. There are no elaborate state schemes to regulate or administer the federal tax credits supplied by the ACA. States have no cognizable reliance interest in the continued *absence* of federal regulation of insurance companies[36]—or even in the absence of "unwise" or dysfunctional federal regulation of insurance companies.[37]

Prince also differs from *NFIB* in another key respect: *NFIB*, like *South Dakota v. Dole*,[38] involved a federal offer of conditional spending made to the state as sovereign; both cases were riddled with references to the fact that the federal offer threatened to pull money directly out of the state's budget.[39] But in *Prince*, the threatened loss will come not from the state's purse, but rather from private individuals. The loss of tax credits will harm state residents, but it will only indirectly and probabilistically harm state budgets. Unlike the "gun to the head" of the state that *NFIB* deplored,[40] *Prince* holds a gun to the head of the state's citizens—and it's a gun that (apparently) not all states perceive to be loaded.[41]

In *Steward Machine Company v. Davis,*[42] the Court considered and rejected the contention that an analogous offer to state citizens was coercive of the states. *Steward Machine* involved a provision of the Social Security Act that offered employers a tax credit for up to 90% of their federal unemployment tax as long as the businesses paid those funds into a state unemployment plan that met federally specified conditions.[43] The challengers argued that this scheme forced "state Legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government."[44] The Court grudgingly acknowledged that

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[34] *NFIB*, 132 S. Ct. at 2605-06 (Roberts, C.J., joined in part by Breyer & Kagan, JJ.) ("The Medicaid expansion . . . accomplishes a shift in kind, not merely degree. . . . A State could hardly anticipate that Congress's reservation of the right to 'alter' or 'amend' the Medicaid program included the power to transform it so dramatically.").

[35] *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J., joined in part by Breyer & Kagan, JJ.) ("[T]he States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.").

[36] *See* U.S. CONST. art. VI, cl. 2.

[37] *Cf.* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955) (applying the rational basis test to economic regulation).

[38] South Dakota v. Dole, 483 U.S. 203 (1987).

[39] *See id.* at 208-12; *NFIB*, 132 S. Ct. at 2601-04 (Roberts, C.J.).

[40] *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.).

[41] *See* Brief for Oklahoma et al. as Amici Curiae Supporting Petitioners, King v. Burwell, 135 S. Ct. 475 (filed Sep. 3, 2014) (No. 14-114), 2014 WL 7463546.

[42] Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

[43] *Id.* at 574.

[44] *Id.* at 587.

conditioning federal tax credits to state residents on state legislative action might result in "undue influence" on the states—"if we assume that such a concept can ever be applied with fitness to the relations between state and nation"[45]—but ultimately concluded the federal offer was proper. Why? Because, the Court reasoned, the federal offer furthered the legitimate end of "safeguard[ing]" the federal treasury from spending additional money on unemployment (itself a proper federal goal) and—"as an incident to that protection"—also promoted state autonomy.[46]

The *Prince* offer at least arguably satisfies these criteria. It promotes a legitimate federal goal—subsidizing access to health insurance—while also encouraging states to exercise local control over state insurance marketplaces. To receive billions in tax credits for health insurance purchases by their residents, all the states must do is create state exchanges on which citizens can spend those credits. *Steward Machine* searched in vain for a constitutional proscription of such an arrangement:

> "Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our Federal Constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received."[47]

In words that might ring in the ears of the judge who could some day decide *Prince*, the Court concluded "[a]n unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin."[48]

To say that a battle is uphill is not to say that it's futile. The Tenth Amendment cases discussed above don't preclude the theory of coercion by regulatory threat, and there's considerable force to the claim that the *Prince* offer is worse for the states than any offer that the Court has thus far ratified. The *Prince* challengers may eventually—and deservedly—win the day.

The crucial question here, however, is not whether the *Prince* challenge will succeed or fail—it is whether the *Prince* challenge is *novel*. That it undoubtedly is. Today, even now that *NFIB* has broken the glass on invalidating conditional spending offers, the case that holds that Congress has unconstitutionally coerced a state by refusing tax credits to its citizens

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[45] *Id.* at 590.

[46] *Id.* at 591.

[47] *Id.* at 597-98.

[48] *Id.* at 598; *see also* Massachusetts v. Mellon, 262 U.S. 447, 482 (1923) ("But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they reside.").

and regulating private corporations would be a blockbuster, one with large repercussions for federal power. Five years ago, when Congress was enacting the ACA—during an era when, it's worth remembering, the conditional-spending test of *Dole* was widely regarded as a dead letter[49]—it could not have anticipated that this extension of the doctrine of constitutional federalism might lurk beyond the horizon.

II. Versions of Aversion

Both General Verrilli[50] and the challengers[51] seemed to agree on the threshold matter of the novelty of the theory of coercive regulatory threat, and the justices did not indicate that they felt differently. The real issue, then, is whether this new constitutional problem offers an appropriate occasion to apply the avoidance canon—or, as Justice Kennedy put it, "does *novel* mean *difficult*?"

At first blush, it may seem that the answer *must* be yes—which is why Justice Kennedy's question was received as a *bon mot* instead of something that merited a serious answer. To a given justice, a novel constitutional theory may have considerable appeal. A justice may hold beliefs about the Constitution that are quixotic, that are out of the mainstream, or that are simply ahead of their time. To that justice, a novel constitutional problem might feel like a *serious* constitutional problem, or at least a problem that deserves to be *taken* seriously. From the point of view of that justice, the formal criteria for using avoidance will appear to be met.

The problem with this logic, though, is that using the avoidance canon to avoid *novel* constitutional doubts unmoors the canon from its justifications. A chief rationale for the modern avoidance canon is an interpretive presumption—an interpretive presumption that Congress does not want to legislate close to a constitutional line.[52] Some have called this regime unfair, but at least it is clear: Congress is on notice that it must speak with special lucidity if it wishes to enact a statute in a constitutional danger zone.[53] The more out-of-the-mainstream a constitutional theory is, though, the less

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[49] Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole: *Why the Court Should Abandon Its Spending Doctrine, and How A Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 464-69 (2003) (describing the *Dole* test as "toothless").

[50] *See* Transcript, *supra* note 1, at 49; *see also supra* note 10 (noting acknowledgements of the theory's novelty by its proponents).

[51] *See* Transcript, *supra* note 1, at 15-16.

[52] *See* Morrison, *supra* note 12, at 1206-1207.

[53] William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 865 (2001) (noting argument that "once it is established as the default rule that Congress must be clear to force the Court to decide a serious constitutional question, there is far less basis for objecting when the Court refuses to act on a constitutional question in the absence of legislative clarity").

defensible this rule is. Congress can't be expected to legislate clearly to override avoidance of the penumbra of a constitutional right where Congress cannot know that right exists by inspecting settled constitutional doctrine. Imputing to Congress the capacity to divine new constitutional rules is just one tick short of imputing to it the intent to avoid a problem precluded by existing doctrine[54]—a move that the Court has called "unsound."[55]

Put another way, modern avoidance carries an inherent qualification on its appropriate use. The constitutional problem that is being avoided must be the sort of problem that was *recognizable* as such by the Congress that enacted the law at issue. Treating a constitutional issue as a problem that merits avoidance means treating it as something that Congress might plausibly have legislated with knowledge of. But it's implausible to require Congress to anticipate the existence of truly new questions of first impression. By using the canon to avoid such questions, the Court doesn't just move the goal posts for Congressional clarity; it carries them off the field.

The second rationale for the modern avoidance canon—avoiding unnecessary constitutional decision-making—also disintegrates where the constitutional problem is novel.[56] To see why, think back to the "classical" version of avoidance, under which the Court supplies a saving construction of a statute only upon finding that the alternative reading is unconstitutional.[57] If a statute runs afoul of settled constitutional rules, the Court makes no new constitutional law when it recognizes that fact and construes the statute to save it. Conversely, in a classical avoidance holding predicated on a novel constitutional problem, the Court is by definition making novel constitutional law.

The same dynamic applies to modern avoidance, even though the Court is not formally making new constitutional law when it applies modern avoidance. Constitutional avoidance opinions matter; they influence later

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[54] Both of these (mis)applications of the canon are distinguishable from (and worse than) cases where the Court avoids a potential (but not novel) constitutional problem that it *thereafter* holds not to be a problem when confronted with the question on the merits. This latter type of error is an inevitable cost of a canon that applies to constitutional "doubts," not constitutional "barriers."

[55] *See* Harris v. United States, 536 U.S. 545, 556 (2002), *abrogated on other grounds by* Alleyne v. United States, 133 S. Ct. 2151 (2013) (rejecting as "unsound" the argument that the canon be used to avoid overruling one of this Court's own precedents because "[t]he statute at issue . . . was passed when *McMillan* provided the controlling instruction, and Congress would have had no reason to believe that it was approaching the constitutional line by following that instruction").

[56] *See* Morrison, *supra* note 12.

[57] Blodgett v. Holden, 275 U.S. 142, 147 (1927) (Holmes, J., concurring); Vermeule, *supra* note 12, at 1959.

Courts,[58] and they therefore influence lower courts and Congress.[59] Modern avoidance gives "penumbras" to constitutional rights—shadows that have "much the same prohibitory effect as . . . the Constitution itself."[60] If the penumbra is not novel, then the Court does not alter constitutional law when it skirts the penumbra. If the penumbra *is* novel, however—which it will be when the doubt being avoided is a new one—the Court's recognition of that new penumbra will make *new* penumbral constitutional law with *new* prohibitory effects. Applying the canon to novel constitutional questions is, in essence, self-defeating; as a practical matter, the Court creates new constitutional law simply by applying the canon.

These issues with avoiding novel doubts flow from the inherent nature of the modern avoidance canon: regardless of the case or of judicial proclivity, they will inexorably emerge whenever the constitutional issue being avoided is a truly novel one. Apart from these intrinsic problems, two other pitfalls might or might not arise depending on the case and on the various justices involved.

The first pitfall is that avoiding novel questions enhances the canon's (already considerable) susceptibility to judicial manipulation.[61] Limiting the canon to avoiding only *known* constitutional problems imposes some quantum of external constraint on its usage. Conversely, the latitude afforded by the canon becomes broader as the canon comes to be invoked to avoid novel or out-of-the-mainstream constitutional concerns. One need only imagine the sheer range of statutory cases in which one could assert a novel constitutional claim on one or both sides of the question presented. The Court's federalism, separation of powers, substantive due process, and equal protection jurisprudence are fecund ground for the constitutional daydreamer—and everyone who has ever been a 1L knows that just about anything can be made out to be a First Amendment violation if you squint hard enough. A conscientious justice need not and might not abuse these additional degrees of freedom; still, there they are.

The second risk is that avoiding novel constitutional questions will exacerbate the unfortunate tendency of avoidance opinions to display "slopp[y]" constitutional decision-making.[62] When a novel constitutional

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[58] *See* Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS J. 713, 722-23 (2014); *compare, e.g.*, Northwest Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 204-16 (2009) *with* Shelby County v. Holder, 133 S. Ct. 2612 (2013).

[59] *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1581 (2000).

[60] Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

[61] *See* Morrison, *supra* note 12, at 1208 (summarizing criticisms of "the courts' abuse of the avoidance canon" in service of "the courts' own policy preferences").

[62] Young, *supra* note 59, at 1583 (noting that a court engaging in avoidance "can do a much sloppier job of constitutional decision-making than it would do if it faced the

theory is first invented, a theory that is interesting and new and not at all straightforwardly required by existing jurisprudence, the theory is unlikely to have been much litigated, precisely *because* it is one that is out of the mainstream of regular constitutional argument. But that is no obstacle to the theory reaching the justices' ears. Ours is the age of the Supreme Court "practice group,"[63] and (not coincidentally) the heyday of the Supreme Court amicus brief;[64] each Term, an unstinting stream of green booklets urges the Court to avoid constitutional doubts old and new, slight and serious. Consequently, when the justices encounter a *new* constitutional doubt, they often do so in the environment least conducive to disciplined constitutional decision-making—bereft of adversarial argument, shorn of factual development, and far afield from the useful outposts of lower court opinions. In these circumstances, a diligent justice recognizing a novel constitutional problem *might* do the hard work of carefully developing and appraising the competing arguments on both sides. But there's always the risk that won't occur, and that instead of avoiding genuine constitutional problems, the justice will effectively be avoiding constitutional jitters or hunches.[65] The after-effects of such a holding will be felt not just in casebooks, but also in Congress. At best, a poorly reasoned avoidance opinion may force Congress to revisit a statute to clarify its language, a waste of Congress's time if the avoided problem isn't substantial; at worst, a poorly reasoned avoidance opinion may deter Congress from exercising lawmaking powers that it can lawfully wield.[66]

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constitutional issue directly"); *see also* Morrison, *supra* note 12, at 1208 (noting the argument that "courts tend . . . to overuse avoidance (by invoking it in the absence of genuine statutory ambiguity or in the service of an implausible constitutional concern) . . . ").

[63] *See* Brandon D. Harper, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503, 1522 (2014) (noting that state attorneys general have "created their own Supreme Court practice organization" that is "tasked with preparing parties and amicus briefs before the Court"); William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1782-89 (2009) (describing the emergence of Supreme Court practice groups in major national firms).

[64] Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 225-26 (2012) (describing the increase in "law professor amici briefs" in recent years and how these briefs are sought after by Supreme Court practitioners); Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. ST. L.J. 1183, 1189-90 (2013) (describing reasons for the recent proliferation of Supreme Court amicus briefs).

[65] This risk persists even if you take the (favorable) view of the avoidance canon advanced by Professor Young, *supra* note 59. He argues that the avoidance canon is a "perfectly legitimate and even advantageous way to enforce the Constitution," *id.* at 1614, but this claim obviously hinges on the existence of some prior account of what enforcing the Constitution entails. The more novel the constitutional question, the harder it will be for a justice to correctly formulate that account.

[66] Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 89 (1995) ("[T]he identification of a constitutional problem is sufficiently probative of the nontentative views

Does all this mean that the Court should *never* avoid novel constitutional problems? Not quite. But it does mean that avoiding novel constitutional doubts should be a *highly disfavored* way of resolving a case,[67] a method of last resort, to be used only once one has exhausted other techniques of statutory interpretation, and if one is prepared to hold that the novel constitutional problem is an actual barrier to the statute. At that extreme—where the novel constitutional issue poses an obstacle, not just a "doubt"—modern avoidance and its twin justifications become irrelevant; what remains, for good or ill, is classical avoidance's raw imperative to save as much law as possible from actual nullification, whether by old law or new.[68] Adopting this approach to novel doubts will discipline and curb the Court's use of the avoidance canon by ensuring that when the justices first confront truly new constitutional questions, they will address them with the caution and carefulness of a court creating law, not dictum.

III. Coercion Aversion

The quartet of concerns just discussed applies with full force to *King*. First, and most salient, is the problem of confounding Congressional expectations. The government has contended, with considerable gusto, that it never occurred to anyone that the ACA was threatening to withdraw tax credits from states that failed to establish exchanges.[69] For argument's sake, stipulate the opposite—that Congress *did* consciously intend the threat. Even in that scenario, it never occurred to anyone that such a threat would

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of the identifiers that the act of identifying a problem will be treated by rational legislative actors as conclusive, and they will act accordingly.").

[67] What might one *lose* by disfavoring avoidance of novel problems? As noted above, the main payoff of modern avoidance—braking the creation of new constitutional law—is basically a wash when issuing the avoidance opinion itself results in the identification of new constitutional penumbras. Another foregone benefit may be the loss of the higher-quality constitutional law that (let us suppose) the Justices would ultimately craft, if they used avoidance to grapple with novel constitutional issues in an incremental fashion. But publicly airing nonbinding drafts of constitutional doctrine in the pages of the *U.S. Reports* is a costly and unattractive way for the Justices to ruminate on constitutional questions. Many alternative and preferable methods exist for the Justices to improve the quality of their constitutional decision-making, e.g., usage of the discretionary certiorari power to select appropriate vehicles for resolving novel questions and permitting lower federal courts and state courts to "percolate" novel questions.

[68] This principle supplies a *post hoc* rationalization for Chief Justice Roberts's otherwise "puzzling" "Commerce Clause essay," NFIB, 132 S. Ct. at 2629 (Ginsburg, J., dissenting), in *NFIB*. Chief Justice Roberts's notable failure to use *modern* avoidance makes sense if one supposes that the *novelty* of the Commerce Clause problem made it unjustifiable for Roberts to apply the modern avoidance canon. What was left on the table was the tool of *classical* avoidance, using which he decided the novel question on the merits and then adopted a saving construction of the act. *See* NFIB, 132 S. Ct. at 2600-01 (Roberts, C.J.).

[69] *See* Gov't Br., *supra* note 15, at 18-19.

violate the Tenth Amendment. The theory of coercive regulatory threat was fully aired for the first time in 2015,[70] and it relies to a significant degree on *NFIB*, which was only decided in 2012.[71] How could Congress have known in March 2010 that it had to legislate with especial clarity if it wished to make such a threat? In Donald Rumsfeld's famous rubric, the regulatory threat theory was an "unknown unknown" at the time of the ACA's passage.[72] It is true that, to Justice Kennedy at least, the unconstitutionality of regulatory threats seems to have appeared straightforward. But his view only became evident to the world (and Congress) at oral argument. It stretches the interpretive presumption too far to imagine that Congress has the capacity to forecast the privately harbored constitutional commitments of a single justice—no matter how consequential his vote may be.

Second, a coercion aversion opinion will elicit shadow constitutional law that may have not-so-shadowy effects on future challenges to federal statutes. Consider the ACA's "maintenance of effort" provision,[73] which requires states to freeze into place their 2010 Medicaid enrolment and eligibility policies for adults until "the date on which [HHS] determines that an Exchange established by the State … is fully operational."[74] In other words, the ACA says to the states: *"Set up your own exchange, or the federal government will subject your Medicaid program to the maintenance-of-effort rule."* As a limitation on state legislative autonomy, that is not such a far cry from the threat ostensibly being made in *King*. Opinions from "swing votes" on the Court reflecting that key justices regard such conditional offers as impermissible may induce a state that didn't establish an exchange to bring a Tenth Amendment attack on this provision.[75]

Environmental law may also become caught up in the wake of a coercion aversion opinion. Peabody Energy Corporation is an intervenor in a pending challenge to the EPA's forthcoming regulations on coal-fired power plants.[76] Peabody's brief to the D.C. Circuit, which was filed *before* oral argument in

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[70] *See* JALSA Brief, *supra* note 4, at ii.

[71] *See id.* at v (citing *NFIB* "*passim*").

[72] Donald Rumsfeld, Sec'y, Dep't of Def., Dep't of Def. News Briefing (Feb. 12, 2002) (transcript *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636) ("[A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know."). Thanks to Dave Owen for this point.

[73] ACA § 2001(b).

[74] 42 U.S.C. § 1396a(gg)(1).

[75] Of course, a government victory in *King* might make this challenge moot by deeming the establishment of the federal exchange to have satisfied this condition. *See* Gov't Br., *supra* note 15, at 29-30.

[76] *See Petition for Extraordinary Writ*, *In re* Murray Energy Corp., No. 14-1112 (D.C. Cir. June 18, 2014).

King, devoted a few sentences to asserting that the EPA was "commandeering" (not "coercing" or "threatening") states into submitting state implementation plans; it made no mention of *King*.[77] *After* Justice Kennedy's questions at the *King* argument, Professor Laurence Tribe, who is counsel for Peabody, shifted gears. A Tenth Amendment argument leveraging the regulatory threat concept spanned a dozen pages of his subsequent Congressional testimony about the regulations at issue in that case[78]—regulations now portrayed as having coercive effects "strikingly similar" to the IRS rule in *King*[79]—and will surely feature prominently in the ongoing litigation over these new regulations.[80]

This partial snapshot captures the two most obvious examples of areas of the law that might be affected by an avoidance holding in *King*. If the justices were to endorse broad or loose language indicating that *any* kind of regulatory bargaining with the states is *per se* impermissible,[81] the legal uncertainty for other cooperative federalism schemes would concomitantly increase. A *King* opinion that creates shadow constitutional law about coercion by regulatory threat could have important repercussions.

The two other pitfalls with avoiding novel constitutional questions also happen to be present in *King*. First, the case illustrates how the license to avoid novel constitutional claims may facilitate the judicial manipulation of case outcomes. Although the avoidance argument that caught the justices' eye was made by an amicus brief in *support* of the IRS's rule, state amici who *oppose* the IRS's rule also made a rather novel Tenth Amendment argument: that the IRS's reading of the statute mandates the states to provide health insurance to state employees and impermissibly subjugates the states to

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[77] *Brief for Intervenor Peabody Energy Corp.* at 12-13, *In re* Murray Energy Corp., No. 14-1112 (D.C. Cir. June 18, 2014), 2014 WL 7405848; *id.* at *i* (reflecting brief was filed December 30, 2014).

[78] *See EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues: Hearing before the Subcomm. On Energy & Power of the H. Comm. on Energy & Commerce*, 114th Cong. (2015) 2-4, 16-27 (testimony of Laurence H. Tribe, Professor, Harvard Law School).

[79] *Id.* at 3-4; *id.* at 26 ("[T]he gun consists of subjecting non-complying States to a kind of Russian roulette in which they run the risk of being hit with a centrally planned and administered federal scheme, a plan whose details are as yet unknown, but one that threatens significant disadvantage to them and their citizens, both in absolute terms and vis-à-vis other States, if they decline to submit their own plans to EPA.").

[80] *See* Mario Loyola, *Federal Coercion and the EPA's Clean Power Plan*, THE ATLANTIC, May 17, 2015, http://www.theatlantic.com/politics/archive/2015/05/federal-coercion-and-the-epas-clean-power-plan/393389/.

[81] *Cf.* JALSA Brief, *supra* note 4, at 29 ("Given the doctrinal difficulties that arise from regulatory incentives—and the constitutional doubts associated with any regulatory differentiation—it might make sense to hold that regulatory threats are unconstitutionally coercive no matter how trivial they might appear.").

federal taxation.[82] So the Scylla of regulatory threat is paired with the Charybdis of a direct mandate to and tax on the states. Is this new constitutional problem less worthy of avoidance than the regulatory threat problem? Who knows? If a justice avoids one of these problems and ignores the other, it is safe to assume that the real work of deciding the case has been done elsewhere.

Second, a non-negligible risk exists that the shadow constitutional law produced in *King* won't be *well-crafted* shadow constitutional law. The theory of coercive regulatory threat received its first public airing at Supreme Court amicus briefing.[83] Venturing forth to describe the contours of the regulatory threat concept without a single pair of adversarial briefs on the subject, let alone a set of lower-court opinions or a district-court record, would be a highly risky endeavor for a Court that, quite sensibly, tends not to proceed *a voce solo* when elaborating constitutional rules.

For all these reasons, the Court should not rely on coercion aversion to resolve *King*. Some might worry (or hope) that the upshot of this argument will be a defeat for the government, and death spirals in 34 states. But this overlooks an odd but important aspect of *King*. If a justice is convinced that the ACA can be "reasonably" read *not* to convey a coercive regulatory threat, then that justice believes that the ACA can be "reasonably" read *not* to condition tax credits on the creation of state exchanges. That, in turn, entails that the ACA fails to *unambiguously* specify the terms of a conditional spending offer to the states.[84] In other words, the ambiguity that a justice would rely on to avoid this novel constitutional problem is *necessarily* sufficient to sustain the IRS's rule on *Pennhurst* clear-statement grounds.[85]

Rather than writing a coercion aversion opinion, a justice inclined to avoid this novel constitutional problem ought to seize this alternative. This would be the best outcome: better than writing a coercion aversion opinion in the government's favor, and (to a justice worried about regulatory threats) much better than holding *against* the government. Whatever such an opinion might lack in complete candor—if indeed it can be said to lack anything at

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[82] *See* Brief for State of Indiana et al. as Amici Curiae Supporting Petitioners at 18-30, King v. Burwell, 135 S. Ct. 475 (filed Dec. 19, 2014) (No. 14-114), 2014 WL 7463545.

[83] *See* sources cited *supra* note 4.

[84] *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 141 (2005) (plurality opinion) (Kennedy, J.) (noting that the avoidance canon is "a canon for choosing among plausible meanings of an ambiguous statute"); Clark v. Martinez, 543 U.S. 371, 385 (2005) (asserting that the avoidance canon "comes into play only when . . . the statute is found to be susceptible of more than one construction . . . .").

[85] *See* sources cited *supra* note 15.

all[86]—it would make up for in protecting sound constitutional decision-making in the long term.

Conclusion

If one or more of the justices use coercion aversion to decide *King*, it will be clear that the considerations urged here will have been overlooked or disregarded by those justices. But if no justice does so, the silence will be ambiguous. The opinions would say nothing about coercive death spirals, would eschew any mention of regulatory threats, and would refrain from speculating on possible Tenth Amendment obstacles. That end result, if a bit of an anticlimax, would be the right one. Even if coercion aversion lurks in the backs of their minds, the justices can—and therefore *should*—resolve *King* without using the avoidance canon to inaugurate a new branch of federalism jurisprudence.

[86] *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736 (1987) ("[T]he prevailing view of the judicial function (and one I fully accept) would support the judge who, as an individual, does not go as far as he might be willing to go if the case before him does not require it. The problem of candor, once again, arises only when the individual judge writes or supports a statement he does not believe to be so.").