

## Examining the Questions Surrounding *King v. Burwell*

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It seemed like a simple argument over one small snippet of text.

The Affordable Care Act itself states that subsidies will be provided to help U.S. residents to purchase health policies offered "through an exchange established by the state."

But things got a little more complicated in May 2012, when an [IRS rule](#) interpreted that statement as permitting the subsidies in an exchange administered either by a state or the federal government.

And now the Supreme Court will hear oral arguments on March 4 as part of its process to determine whether subsidies are legal to help U.S. residents purchase coverage through the federal exchange.

While the answer to that question seems straightforward, there are many complicated issues involved in *King v. Burwell*. In this edition of "Road to Reform," we take a look at the crux of the case and some of the potential ripple effects of the decision.

### **Are Subsidies Illegal?**

The answer to that question depends on whom you ask.

According to [an analysis](#) out last week, the Supreme Court should have no reason to believe subsidies are illegal in the federal exchange.

In the analysis, Harvard University sociology and government professor Theda Skocpol suggests that the ACA drafters always intended for every state to receive such subsidies (and, by extension, that the IRS was right to interpret it that way). To reach that conclusion, Skocpol reviewed all 68 reports that the Congressional Budget Office wrote about the ACA during the session in which lawmakers debated the law, finding that not once did the agency look into the possibility of limiting subsidies to just states that established their own exchanges.

In crafting the legislation, lawmakers did look at ways to contain the law's cost, and limiting subsidies to certain states would have been one way to do so, Skocpol notes. As such, "the total absence of this kind of analysis ... is the best objective evidence we have that no one in Congress considered premium subsidies restricted to certain states to be either possible or desirable," she argues. Skocpol adds, "If Congress intended to threaten states with withheld subsidies, nobody said so."

An [amicus brief](#) -- by the Cato Institute's Michael Cannon and Case Western University law professor Jonathan Adler -- filed with the high court offers a different perspective. An earlier version ([S 1679](#)) of the ACA approved by the Senate Health, Education, Labor and Pensions Committee gave states four years to establish exchanges on their own. According to Cannon and Adler, "The CBO scored S. 1679 assuming that some states would establish Exchanges early and some would not," adding, "Thus the agency's cost projections assumed that Exchange subsidies would be available in some states but not in other states." Cannon and Adler also note in the brief that S 1679 also would have permanently withheld exchange subsidies to states that did not implement the bill's employer mandate.

Ultimately, CBO assumed that subsidies would be available in all 50 states. However, [Cannon concludes](#) that "the fact that the CBO assumed there would be subsidies in all 50 states under the HELP bill or the PPACA does *not* indicate that Congress did not intend to condition those subsidies on state cooperation," adding, "The CBO also assumed that the PPACA's Medicaid-expansion subsidies would be available in all states."

### **What Happens If Subsidies Are Limited?**

One of the primary concerns is what happens to health insurance if the subsidies through the federal exchange are declared illegal. A pair of reports recently tried to quantify that effect.

An [analysis by RAND Corporation](#) states that the number of people in the individual market would decrease by 9.6 million and eight million people would become uninsured. A separate [Urban Institute analysis](#) estimates that the number of uninsured U.S. residents would increase by 8.2 million.

Linda Blumberg, who helped put together Urban's report, calls the estimates "incredibly close." Perhaps even more remarkable is that the two reports were so close despite starting from different data. Christine Eibner, one of the authors of RAND's report, notes that researchers from both Urban and RAND based their estimates on completely separate surveys, adding, "So they are two different data sources, but I was pretty surprised given how we started with two fundamentally different data sources."

Ultimately, both Blumberg and Eibner note that the loss of subsidies in the federal exchange would cause a destabilization in the individual market. Younger, healthier people would be more likely to opt out of coverage, leaving only sicker enrollees. Then, because the law requires insurers to cover all applicants regardless of pre-existing conditions, insurers would have to raise rates. As premiums increased, even fewer people would be able to afford coverage. The spiral would continue, and the fundamental goals of the ACA would be at risk.

## Could a Solution Be Simple?

If the Supreme Court declares federal subsidies illegal, some observers have suggested that reinstating subsidies could be fairly easy.

In July 2014, Charles Gaba [offered a workaround](#) that he says could be done in minutes and cost less than \$360. Gaba -- who gained notoriety in late 2013 by [starting a website](#) that tracked ACA signups at a time when the media and observers were clamoring for such data -- [suggested](#): "For just \$9.95 a piece (or less, if you shop around), the United States Federal Government could simply ask the health departments of the 36 states in question to snap up a domain name," such as HealthcareAlaska.gov. He added, "Then, just set up those domain names to repoint to the appropriate sub-section of HealthCare.gov."

In a [later post](#), Gaba said his "dumb-simple solution/workaround" was being "taken seriously by some people in the know."

However, not everyone agrees that addressing the potential influx of uninsured because of a *King* ruling could be so easy.

For example, a group of health policy experts, including Washington and Lee law professor Timothy Jost, wrote in the [New England Journal of Medicine](#) that "[p]icking up the pieces would not be easy." They note that an "exchange is not just a website, and setting one up requires a sizable investment of time and resources." According to Jost et al., the ACA stipulates that "an exchange must be a government or nonprofit entity with the capacity, among other responsibilities, to consult with stakeholders, grant exemptions from the individual mandate to obtain health insurance coverage, operate a program that helps people navigate the system, and certify, recertify and decertify qualified health plans."

Still, they note that states could "delegate some responsibilities to the private contractors that run the federal exchanges," pointing to Idaho, which created its own exchange but used the federal exchange website to process its 2014 enrollments, as an example.

## Waiting for One Answer

Just like when the high court considered the entire ACA in 2012, plenty of pundits will seek to answer the questions surrounding the issue at the heart of *King v. Burwell*. But really, everyone will have to wait to hear the answer to the original question -- Are subsidies illegal in the federal exchange? -- before any other question can be answered.

If the Supreme Court says yes, the answers to all these questions become supremely important to the survival of the ACA. But if the high court justices' answer is no, all the other questions just fade away.