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King v. Burwell Reveals The Threat Of The Administrative State

The question in today's Supreme Court case, King v. Burwell, is whether laws mean whatever the president wants them to mean.

John Daniel Davidson

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The U.S. Supreme Court will hear oral arguments today in what is probably one of the most straightforward questions of statutory interpretation ever to come before the court.

At the heart of *King v. Burwell* is whether the text of the Affordable Care Act (ACA) means what it says. Specifically, the case hinges on what the word "state" means. Does it mean one of the fifty states, or does it mean the states and the federal government?

At issue are the tax credits (subsidies) the law doles out to help Americans pay for health insurance premiums sold through the exchanges. Over and over, the law says premium subsidies are only to be disbursed "through an Exchange established by the State." It says this nine times.

If Obamacare is to be faithfully executed, say the challengers in *King*, then federal subsidies for health insurance are not allowed in the 37 states that failed or refused to set up a state-based exchange and instead have federal "default" exchanges. Two different sections of the law authorize exchanges and distinguish in statute between an exchange a state has established (section 1311) and an exchange the Secretary of Health and Human Services has established in states that fail to create one (1321). Subsidies are available only to those who purchase coverage on a state-based—section 1311—exchange.

(Lest I get too far into the weeds, dear reader, know that Michael Cannon of the Cato Institute has compiled an exhaustive repository of background and reference materials about all this in addition to his prolific writings, and therein you will find answers to all your questions about the minutiae of how the law works and whence come the exchanges.)

Cooperative Versus Competitive Federalism

Suffice to say that Obamacare's exchanges are built on the idea of cooperative federalism: the federal government, unable to simply commandeer state agencies, invites states to implement federal policies in return for federal funding or favorable regulatory treatment.

States carry out a great many federal policies and programs using this scheme, like Medicaid, Common Core, and a host of environmental regulations. Because Obamacare meddles so much with health insurance markets, which states traditionally regulated, it relies on the practice of cooperative federalism to an astonishing degree. Congress had hoped to induce states to cooperate by making subsidies contingent on states setting up their own exchanges—a policy proposition that, like Medicaid expansion, could bring millions or even billions of federal dollars into a state. At least, that's what the *King* challengers contend.

That's where Obamacare's legislative history comes into play. When Senate Democrats passed the ACA in December 2010, they hadn't a vote to spare. When Republican Scott Brown won a special election the very next month to fill the seat vacated by Sen. Edward Kennedy's death, Senate Republicans gained enough votes to filibuster a conference report on the House and Senate bills. Congressional Democrats therefore had to resort to the budget reconciliation process to pass the final version of the law: they opted for an imperfect bill, one that didn't go as far as many Democrats had originally wanted, instead of no bill at all.

Their assumption was that states would set up the exchanges and federal subsidies would flow through them, as described in the law. When 37 states opted instead to let the federal government set up exchanges, it exposed the weakness of the law's reliance on cooperative federalism.

A 'Term of Art' For No Rule of Law?

That's when the Obama administration stepped in with an Internal Revenue Service rule that allowed for subsidies on federal exchanges. In effect, the IRS rule proclaimed that "Exchange established by the State" meant any exchange, regardless of whether a state or the federal government established it. In subsequent court challenges to the IRS rule, including King, the government maintains that subsidies "are available on all Exchanges because the phrase 'Exchange established by the State under Section 18031' is a term of art that includes a federally-facilitated Exchange."

A term of art, indeed. As I wrote last summer when *King* and a sister case, *Halbig v. Burwell*, were still with federal appellate courts, it comes down to a question about the rule of law and whether, in an advanced administrative state, laws can have a fixed meaning:

> On a conceptual level, unfortunately, the administration as well as the Fourth Circuit seem to take precisely this view: Once Congress expresses its desire to achieve a policy goal (or seems to express it), it matters little what the law itself actually says. Hence we have the administration's announcement last week that U.S. territories are exempt from many of the requirements of the ACA on the basis that territories are not 'states' as defined by the law. Hence the absurdity of the administration's position that the federal government should be considered 'one of the 50 States' for the purpose of dispensing subsidies through federal exchanges but territories are not to be considered states for the purpose of the subsidies and mandates — never mind that HHS last year concluded that it 'has no legal authority to exclude the territories' from Obamacare.
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> All this helps illuminate an important question that undergirds the entire Halbig/Kingdebate: Do laws mean anything at all? And if not, on what basis do our rulers govern us, to what or

> whom are they accountable, and to what or whom can we appeal when they attempt to rule by fiat?

King v. Burwell Is About Arbitrary Rule

Some conservatives are concerned that if the Supreme Court rules against the government, millions will lose subsidies, without which they could not afford coverage. To avert this scenario, some say we should extend the current subsidies until 2017 or replace them with something similar.

To this, other conservatives have replied that because subsidies are the mechanism through which the employer and individual mandates operate, including the imposition of penalties, a ruling for the plaintiffs would amount to a massive tax cut. What's more, Obamacare's overregulated exchanges have dramatically driven up the cost of coverage on the individual market, increasing premiums by 100 percent or more in some states. Without federal subsidies propping up the exchanges, states would be free to implement market-based health insurance reforms that would drive costs down.

All of that is wonderful, and we should have a robust debate about it. But what happens to the subsidies should not be the court's concern. The only question that matters in *King* is whether the administration used the IRS to rewrite a law Congress passed.

This latest legal challenge to the federal health-care law stands, as the others have, as a warning: the modern administrative state poses a grave threat to the rule of law. Woodrow Wilson, the progressive most closely associated with the administrative state, called the field of administration "a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study."

Yet the ACA, more so than most laws, was a creation of politics. It was subject to political realities and was obviously marred by them. Governing is not and never will be a matter of mere administration, and in our current era it cannot stand apart from constitutional scrutiny because the White House has so thoroughly absorbed the progressivism of Wilson, whereby a "term of art" can achieve whatever end the government wishes—regardless of the constraints of law.