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Halbig and the Rule of Law

The D.C. Circuit Court's ruling takes a step toward reining in executive overreach.

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A federal appellate court dealt a severe blow to Obamacare today, and in so doing scored a victory for the rule of law, the separation of powers, and the idea that words matter. A panel of the U.S. Court of Appeals for the D.C. Circuit ruled 2–1 in *Halbig v. Burwell* that federal subsidies for health-insurance plans sold on the Obamacare exchanges can be disbursed only through exchanges created by states, not those created by the federal government.

In a surprise twist, shortly after the *Halbig* decision came out, the U.S. Court of Appeals for the Fourth Circuit issued its ruling in *King v. Burwell*, an essentially identical case. The Fourth Circuit came down in favor of the administration's position that there is no difference between state and federal exchanges and that subsidies may flow through either one.

To date, 36 states have refused — or have tried and failed — to set up an exchange under the Affordable Care Act, so the *Halbig* ruling could have a far-reaching effect on the implementation of the health-care law, including the enforcement of the employer and individual mandates. In effect, the decision also means that the Obama administration has been illegally doling out billions of taxpayer dollars to fund subsidies that Congress never authorized.

And why can't subsidies flow through federal exchanges? Simply put: because that's what the law says.

This seems strange, you say. What difference does it make if Americans buy their subsidized Obamacare health insurance on a state-based exchange or a federal exchange? Surely the exchanges are nothing more than a mechanism for the delivery of standardized insurance products, and given the pervasive regulatory framework the ACA imposes on the individual-health-insurance market, there can be no meaningful distinction between a state and federal exchange. Right? Surely *Halbig* is nothing but Obamacare opponents grasping at straws in hopes that semantic distinctions will bring down the law. Surely Congress meant for subsidies to be available to all those who qualify, and not just those who live in states that set up an exchange, as was affirmed in *King*. Surely this is all a big misunderstanding.

But no. To understand why the law would make a distinction between state-based and federal exchanges, we need to take a step back. The ACA created two types of exchanges under two separate sections of the law: an exchange established by a state (section 1311) and a "federally facilitated exchange" established by the Secretary of Health and Human Services in states that fail to create one (section 1321). Subsidies, according to the statute, are available *only* to those who purchase coverage on a state-based (section 1311) exchange. Because penalties for employers who fail to provide affordable coverage to their employees are triggered by the issuance of subsidies to those employees, the distinction between state and federal exchanges also bears on the enforcement of the employer mandate: Namely, in states with federal exchanges, there is no mechanism to enforce it.

No one has written more about all this than the Cato Institute's Michael Cannon, who has compiled every scrap of relevant information over at *Forbes* and painstakingly explained the entire affair over and over again. His grand theme is that by any plain reading of the ACA's text, health-insurance subsidies can be issued only "through an Exchange established by the State," and that this interpretation is entirely consistent with congressional intent. Cannon writes:

> The tax-credit eligibility rules clearly say that taxpayers are eligible for credits if [they are] enrolled in a qualified health plan through an Exchange "established by the State under Section 1311." They employ this restriction repeatedly and consistently. Given such explicit language, it is hard to argue that Congress intended to authorize tax credits in federal Exchanges. It is harder still to argue that Congress intended one thing, expressed the opposite desire in the statute, and yet somehow expressed itself without ambiguity.

The decision to limit subsidies to state-based exchanges was explicit in the text of the ACA, and it was written that way specifically to entice states to implement a federal policy that the administration wanted state governments to carry out on its behalf. Congress could not simply *order* states to set up health-insurance exchanges, so it stipulated that residents of states that established and operated their own exchanges would benefit from federal subsidies that offset the high cost of heavily regulated Obamacare coverage.

What Obamacare's architects did not anticipate — just as they did not anticipate that the Supreme Court would strike down the law's attempt to force states to expand Medicaid — is that most states would simply not set up these exchanges. The *King* ruling admits as much and allows that "the statute is ambiguous and subject to at least two different interpretations." As we have seen in states such as Oregon, Massachusetts, Nevada, and many others, setting up an Obamacare-style health-insurance exchange is technically difficult and very expensive, to the tune of hundreds of millions of taxpayer dollars. A hybrid category of states that opted for a "partnership-exchange" (which isn't even mentioned in the ACA) — including Delaware, Illinois, Iowa, Michigan, New Hampshire, New Mexico, and West Virginia — have all scuttled plans to open state-based exchanges and have defaulted to the federal exchange. That the law as written did not end up working very well, or working the way its supporters hoped it would, does not justify its revision by the IRS or any other agency. Only Congress has that authority.

All of this may seem rather boring and wonkish, but in the end the *Halbig* and *King* cases boil down to a rather simple question: What is the definition of the word "State" in the ACA? Does it refer to one of the 50 states, or is it meaningless? The D.C. Circuit Court ruled that the statute means what it says: The Obama administration must implement the law Congress passed and may not interpret the ACA however it pleases to achieve a desired policy outcome.

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.

All this helps illuminate an important question that undergirds the entire *Halbig/King* debate: 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?

Alexander Hamilton, the Founding Father most associated with a robust executive branch, understood that an energetic presidency was essential to good governance — not because the executive should overpower Congress and subvert the rule of law, but because it is "essential to the steady administration of the laws." This above all is the charge of the president of the United States, a charge that the Obama administration has sorely neglected — and not merely to the detriment of Obama's personal legacy, but more significantly to the rule of law and the idea that public policy can be well-executed and accomplish legitimate aims. "A feeble execution is but another phrase for a bad execution," wrote Hamilton. "And a government ill-executed, whatever it may be in theory, must be, in practice, a bad government."