



Obamacare and the Rule of Law

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This spring, the Affordable Care Act will make its third trip to the Supreme Court. But *King v. Burwell* is different from its predecessors. Instead of challenging Obamacare's constitutionality, or the way certain regulations burden particular types of plaintiffs, this lawsuit questions how the executive branch has enforced the law generally—or, more precisely, modified, delayed, and suspended it.

After [supporting the challengers' successful request](#) that the Supreme Court take up this case, the Cato Institute has now joined with Professor Josh Blackman on [an amicus brief](#) that alerts the Court to the separation-of-powers and rule-of-law violations attending the ACA's implementation. Through a series of memoranda, regulations, *and even blog posts*, President Obama has disregarded statutory text, ignored legislative history, and remade the law in his own image.

King focuses on tax credits—the subsidies that allow people to pay increased premiums—one of the key pillars of Obamacare that the administration has toppled. To assist those who lack employer-sponsored insurance, and because it couldn't command states to establish exchanges, Congress authorized these credits for residents of states that do create the exchanges. The [statute](#) expresses this design in language that is clear as day: Individuals receive tax credits if they bought a qualifying health plan "through an Exchange *established by the State*."

In other words, if a state failed to establish an exchange, its residents—who would end up buying plans through the federal HealthCare.gov—would not be eligible for the subsidies. (The ACA's Medicaid expansion plan [operated with a similar carrot-and-stick approach](#) until the Supreme Court rewrote it.)

But a funny thing happened on the way to utopia: only 14 states set up exchanges, meaning that the text of the law denied subsidies in nearly three-quarters of states. This result was untenable to an administration intent on pain-free implementation. To obviate the uncomfortable

compromises Congress reached, the executive engaged in its own lawmaking process, issuing a regulation that nullifies the relevant ACA provision.

Under the “IRS Rule,” subsidies would be available in *all* states. As documented in a detailed [report](#) by the House Oversight Committee, the executive branch engaged in a multi-agency process based on a convoluted series of linguistic contortions without any meaningful analysis of the ACA’s history. At least one government attorney recognized that there “*was no direct statutory authority* to interpret [a federal] exchange as an ‘Exchange established by the State.’” But such concerns were squelched, and the rogue rule was released.

Through the IRS Rule, the executive emulates Humpty Dumpty: “When I use a word ... it means just what I choose it to mean—neither more or less.” In response, Alice naturally asked “whether you can make words mean so many different things.” The Supreme Court must answer no and vacate the IRS rule that provides subsidies in states that did not establish exchanges.

Through its oversimplification of how the ACA works as a whole—by arguing for the legality of literally *any* policy that advances “access,” no matter how unmoored from statutory authority—the government incorrectly assumes that the 111th Congress shared President’s Obama’s evolving vision of how to reform the healthcare system (and granted him discretion to advance it accordingly). To paraphrase [Inigo Montoya](#), Congress didn’t think “expand coverage” means what the executive thinks it means.

In *King*, which will be argued on March 4, the Supreme Court should address the president’s disregard of Congress and belief that legislative gridlock allows him to transcend his constitutional authority. A ruling that upholds his behavior sets a dangerous precedent for the nascent ACA superstatute, which will be implemented for years to come by administrations with different views of the law. More troubling, such a precedent could be used in future to license virtually *any* executive action that modifies, amends, or suspends *any* duly enacted law.

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