

6-28-2015

## SCOTUS Summary: The Supreme Court's Decision in King v. Burwell on Healthcare

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### Recommended Citation

Huhn, Wilson, "SCOTUS Summary: The Supreme Court's Decision in King v. Burwell on Healthcare" (2015). *Con Law Center Articles and Publications*. 5.

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## Summary of the Supreme Court's Decision in *King v. Burwell*

Welcome to Supreme Podcast. This report analyzes the Supreme Court's decision in *King v. Burwell*, which was handed down on June 25, 2015.

In this case the Supreme Court revisited the Affordable Care Act, the statute whose constitutionality was upheld in the 2012 case of *NFIB v. Sebelius*. In *NFIB* the Court ruled that it was constitutional for Congress to impose a tax on persons who fail to purchase health insurance.

This time the Supreme Court wrestled with a difficult question of statutory interpretation; does the law permit the Internal Revenue Service to grant citizens of all of the states a refundable tax credit to purchase health insurance, or are those tax credits available only to citizens who live in states that have established an “exchange”? (An “exchange” is a marketplace for the purchase of health insurance.)

Underlying this question of statutory interpretation was a jurisprudential question with constitutional significance. The deeper question was this – Should the courts interpret a statute by looking solely to the words of the law itself, or do the courts also have the duty to consider additional evidence of what the legislature meant when it enacted those words into law? In other words, is “the law” the words of the statute, or is “the law” what the legislature meant by those words?

This question has constitutional significance because it involves the proper relation between the judicial branch and the legislative branch in the making of law. The common law is created entirely by the courts, but statutes are created by Congress. It is not always easy for the courts to interpret the meaning of statutes, and that job is made more difficult by the fact that judges do not always agree about how they should go about determining that meaning. Is statutory meaning to be gleaned solely from the **words** of the statute itself, or are the courts bound to inquire into what the legislature **meant** by those words? Do the **courts** have an independent power to decide what the words of a statute mean, or is that power derivative – do the courts have the duty to determine how the **legislature** intended for a statute to be applied?

The conflict between these two jurisprudential approaches to statutory interpretation was highlighted during oral argument during this exchange between Solicitor General Donald Verrilli and Justice Antonin Scalia:

GENERAL VERRILLI: ... If I could now, let me please turn to the merits that summarize what I think are the two key points. First, our reading follows directly from the text of the Act's applicable provisions and it's really the only way to make sense of Section 36B and the rest of the Act. Textually, their reading produces an incoherent statute that doesn't work; and second, our reading is compelled by the Act's structure and design. Their reading forces HHS to establish rump Exchanges that are doomed to fail. It makes a mockery of the statute's express -- status express textual promise of State flexibility. It precipitates the insurance market death spirals that the statutory findings specifically say the statute was designed to avoid, and of course it revokes the promise of

affordable care for millions of Americans. That cannot be the statute that Congress intended.

JUSTICE SCALIA: Of course it could be. I mean it may not be the statute they intended. The question is whether it's the statute that they wrote. ... (Transcript of Oral Argument, page 44 line 14 to page 45 line 7)

On the precise legal question presented by this case, a majority of the Supreme Court ruled that the Affordable Care Act makes these tax credit subsidies for health insurance available to citizens in every state. The vote on this question was 6 to 3. The majority opinion was authored by Chief Justice John Roberts, while the dissent was penned by Justice Antonin Scalia.

On the jurisprudential question, the majority issued a ringing endorsement for the proposition that in the interpretation of statutes it is the duty of the courts to determine what the legislature meant. The majority considered multiple sources of evidence regarding what Congress' purpose was on this issue, and it concluded that Congress intended that tax credit subsidies for the purchase of health insurance should be available to citizens of every state. Because the majority and the dissenting opinions differed as to how judges should interpret a statute, they each accused the other of "rewriting" the law.

Let us consider the dissenting opinion first. Justice Scalia, the acknowledged leader of the school of "new textualism," looked to the words of the Affordable Care Act and found those words to be unambiguous. Section 1311 of the Affordable Care Act (codified at 42 U.S.C. § 18031) provides that

Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an "Exchange") for the State that-- facilitates the purchase of qualified health Plans ....

If a state does not establish an exchange under Section 1311, then the federal government must establish an exchange that will operate in that state. That is accomplished under Section 1321 of the Act (42 U.S.C. § 18041), entitled "STATE FLEXIBILITY IN OPERATION AND ENFORCEMENT OF EXCHANGES AND RELATED REQUIREMENTS". Section 1321 provides:

In general.--If--

(A) a State is not an electing State under subsection (b); or

(B) the Secretary determines, on or before January 1, 2013, that an electing State

(i) will not have any required Exchange operational by January 1, 2014; or

(ii) has not taken the actions the Secretary determines necessary to implement [the exchange]

the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements.

After the Affordable Care Act went into effect sixteen states established their own exchanges for the sale of health insurance, and the federal government created an exchange (healthcare.gov) to serve the other 34 states.

Section 36B of the Affordable Care Act became part of the Internal Revenue Code, and it is the section that directs the Internal Revenue Service to pay the tax credit subsidies to low income households for the purchase of health insurance. Subsection (a) of the Section 36B states:

In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year.

Subsection (b) of Section 36B measures the amount of the subsidy that an “applicable taxpayer” is entitled to. And in a sub-part of subsection (b), the law measures the amount of the subsidy in part by reference to the amount of the monthly premiums for health insurance covering the taxpayer, the taxpayer’s spouse, or the taxpayer’s dependents, that any of those persons was “enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act.”

The reasoning of Justice Scalia’s dissent was simple and straightforward. He found that the words of the statute unambiguously state that the amount of the allowable tax credit subsidy for health insurance is measured by the amount that those eligible persons paid for health insurance in a state that established its own exchange under Section 1311 of the Act. He concluded that the plain meaning of the law is that subsidies are **not** available in states where the exchange was established by the federal government under Section 1321.

The reasoning of the majority was more complex and convoluted, and drew upon a variety of sources of information beyond the words of the statute. The central theme of the majority was that it was clear that Congress intended for the tax credit subsidies to be available to citizens in **all** the states – both to citizens in states with their own exchange, and to citizens in states operating under the federal exchange. The majority arrived at this conclusion in five steps.

First, the majority signaled that it was utilizing a “purpose” rather than a “literal” approach to statutory interpretation by describing, at some length, the efforts by the states to enact some form of universal health insurance during the 1990s. The experience in several states was that it was not sufficient to pass a law requiring health insurance companies to issue policies to all persons (a rule called “guaranteed issue”) at the same price (a rule called “community rating”). Healthy persons have less incentive to purchase these policies, so these policies were purchased mainly by persons in poor health. This in turn led to a rise in the cost of health insurance, driving even more purchasers from the market – creating a “death spiral” in the market for health insurance. To prevent the “death spiral” that occurs when healthy persons exit the market the states discovered that it was also necessary to require all persons to purchase health insurance (a rule called the “coverage mandate”), so that the cost of health care would be borne evenly by everybody in society. The coverage mandate was unworkable, however, because many people cannot afford the cost of health insurance. The solution – the final piece to the puzzle – was to

grant refundable tax credits (government subsidies) to low-income persons to pay for health insurance.

The majority described how the State of Massachusetts finally arrived at this solution in 2006, and how it reduced the rate of uninsured persons in the state to about 2%, the lowest in the nation. The federal government adopted the same plan – the Massachusetts model – in 2010, as the federal Affordable Care Act. The elements of the ACA – guaranteed issue, community rating, a coverage mandate, and tax credit subsidies were all necessary elements to creating and maintaining an efficient and effective market for health insurance.

Why was this opening discussion important? Because it lay the groundwork for the central point of the majority opinion. In the final paragraph of his opinion Chief Justice Roberts stated:

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.

In short, if tax credit subsidies are necessary to the creation of a viable market for health insurance, and if it was Congress' intent to create viable markets for health insurance in every state, then if at all possible the Act must be interpreted in a manner that is consistent with that intent.

In the second portion of his opinion Chief Justice Roberts considered whether this case could be resolved under *Chevron* grounds – that is, whether the Internal Revenue Service has the primary authority to interpret the Act and therefore decide whether the tax credits are available in all the states or only certain states. The Court concluded that the IRS does not have such authority. For one thing the statute does not expressly give the IRS the authority to decide this matter. Furthermore,

The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.

This was a critically important holding of the opinion. Had the Court found that the IRS has the power to determine whether subsidies are available, a future presidential administration could simply end the subsidies by having the IRS issue a contrary regulation. That avenue was closed by the Court.

In the third portion of his opinion Chief Justice Roberts considered whether the words of the statute could be interpreted to permit tax credits to citizens in states using the federal exchange, or whether the statute unambiguously provided that those subsidies were available only in states that had established their own exchanges. He concluded that the words of the statute admitted of both interpretations. In this portion of his opinion the Chief Justice looked only to the words of the statute, but he did read the entire statute in context – that is, he looked to the many different

provisions of the statute as well as the structure of the Act. In explaining his approach, the Chief Justice stated:

If the statutory language is plain, we must enforce it according to its terms. But oftentimes the “meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.” Our duty, after all, is “to construe statutes, not isolated provisions.”

The Chief Justice pointed out that while the States are required to create exchanges under Section 1311 of the Act, that requirement is eliminated in Section 1321 which gives the states the “flexibility” not to create an exchange. Instead, under section 1321, if a state elects not to create an exchange, the federal government is required to establish “**such exchange**” – that is, the federal government is required to establish an exchange for the state.

The Chief Justice then noted that Section 1311 requires that all exchanges “shall make available qualified health plans to qualified individuals,” and defines a “qualified individual” in part as an individual who “resides in the state that established the Exchange.” The Chief Justice pointed out that this creates a “problem” because if a federal exchange is not considered to be “an exchange established by the State under 1311” then there would be no qualified individuals in states using the federal exchange – that is, no-one in those states would even qualify to purchase health insurance at all, with or without a subsidy. Moreover, the law defines an “exchange” to be “an American Health Benefit Exchange established under Section 1311.” If this is taken literally it would mean that the “federal exchange” would not even qualify as an exchange – that the federal exchange would not be subject to the laws regarding guaranteed issue, community rating, or any of the myriad other regulations that the Affordable Care Act imposes on health insurance markets.

As a result, Chief Justice Roberts concluded that the Act is at least ambiguous as to whether it considers the federal exchange to be a separate entity or whether it qualifies as “an exchange established by the state under 1311.” He found that the statute could be interpreted either way. And the tiebreaker in this situation, according to the Chief Justice, depended upon the purpose of the statute. Quoting a 1973 case, the Chief Justice stated,

We cannot interpret federal statutes to negate their own stated purposes.

In the fourth portion of his opinion the Chief Justice discussed which interpretation of the law would be more consistent with the purpose of the Affordable Care Act. At this point he referred back to his discussion of the states’ history of experimentation with creating health insurance markets, where they discovered that to create a viable and stable market guaranteed issue and community rating rules must be supplemented with a coverage mandate and tax credit subsidies. He then quoted a statutory finding that indicated that all of these reforms were necessary:

In a State that establishes its own Exchange, these three reforms work together to expand insurance coverage. The guaranteed issue and community rating requirements ensure that anyone can buy insurance; the coverage requirement creates an incentive for people to do

so before they get sick; and the tax credits—it is hoped—make insurance more affordable. Together, those reforms “minimize ... adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.” 42 U.S.C. § 18091(2)(I).

The Chief Justice then cited three economic studies and an amicus brief from economic scholars that described how the health insurance markets would fail in states that did not have subsidies:

So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer. In 2014, approximately 87 percent of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all of those people would become exempt. ... The combination of no tax credits and an ineffective coverage requirement could well push a State’s individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, premiums outside the Exchange would rise along with those inside the Exchange.

The Chief Justice then quoted from Justice Scalia’s dissent in *NFIB v. Sebelius* to make the same point – that without the subsidies, the insurance market in a state would fail:

It is implausible that **Congress meant** the Act to operate in this manner. See *National Federation of Independent Business v. Sebelius*, 567 U.S. —, —, 132 S.Ct. 2566, 2674, 183 L.Ed.2d 450 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) (“Without the federal subsidies ... the exchanges would not operate as Congress intended and may not operate at all.”). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that **Congress meant** for those provisions to apply in every State as well. [Ed. - emphasis added]

In the fifth portion of his opinion the Chief Justice found that even if Section 36B of the Act is considered in isolation, he would still find that tax credits are payable to citizens of every state. He noted that Section (a) of 36B mandates that payments “shall be made” to an applicable taxpayer – which is defined as any taxpayer whose income is between 100% and 400% of the federal poverty level. He reasoned that if Congress meant to deny tax credits to a taxpayer in a particular state it would not have buried this provision in a minor provision of the Affordable Care Act. He stated:

We have held that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” But in petitioners’ view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. We doubt that is what **Congress meant** to do. Had **Congress meant** to limit tax credits to State Exchanges, it likely would have done so in

the definition of “applicable taxpayer” or in some other prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit. [Ed. – emphasis added]

Notice how in the last couple of quoted passages Chief Justice Roberts four times used the term “**Congress meant.**” Throughout the course of his opinion he repeated that term six times – the last time in conjunction with the word “plainly”:

Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that **Congress plainly meant** to avoid.

Justice Scalia in dissent relied upon the “**plain meaning**” of the words of the law. Chief Justice Roberts based his opinion for the majority on what Congress “**plainly meant.**” Each criticized the other for taking the alternate approach. Justice Scalia accused the majority of rewriting the law, referring to it as “SCOTUSCare” because in his opinion the majority of the Court had improperly upheld and rewritten the law in order to save it. Chief Justice Roberts responded to this criticism with his own view of the role of the Court:

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—“to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.

In *King v. Burwell* a majority of the Supreme Court upheld the availability of tax credit subsidies to citizens of all the states. And the majority of the Court squarely ruled that in the interpretation of statutes judges are not supposed to determine what they think the meaning of a statute is; rather, judges are supposed to determine what the legislature meant when it enacted a statute.

This is Wilson Huhn for Supreme Podcast.