Should Judges Judge?: The Affordable Care Act, Subsidies, and Judicial Engagement

*By William R. Maurer**

Note from the Editor:

This article is about D.C. Circuit's decision in *Halbig v. Burwell* and the U.S. Supreme Court's decision to grant review in similar case from the Fourth Circuit, *King v. Burwell*. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about statutory interpretation, judicial engagement, and the Affordable Care Act. To this end, we offer links below to other perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

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- Robert Weiner, Symposium: *King v. Burwell*—getting it right (as in correct), SCOTUSblog (Nov. 10, 2014, 3:10 PM): http://www.scotusblog.com/2014/11/symposium-king-v-burwell-getting-it-right-as-in-correct/
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- Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent With the Affordable Care Act's Language and History*, Health Affairs Blog (Jul. 18, 2012): http://healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history/
- David Ziff, *Halbig, Statutory Interpretation, and Lessons I Learned In Practice*, Ziff Blog (Jul. 29, 2014): https://ziffblog.wordpress.com/2014/07/29/halbig-statutory-interpretation-and-lessons-i-learned-in-practice/
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- Jonathan Adler, Symposium: A welcome grant for a straightforward statutory case, SCOTUSblog (Nov. 9, 2014, 8:55 PM): http://www.scotusblog.com/2014/11/symposium-a-welcome-grant-for-a-straightforward-statutory-case-2/
- Patrick Wyrick, Symposium: *King v. Burwell*—a simple case, SCOTUSblog (Nov. 10, 2014, 10:51 AM): http://www.scotusblog.com/2014/11/symposium-king-v-burwell-a-simple-case/

It is rare that a Court of Appeals' decision about whether the Internal Revenue Service's interpretation[1] of a tax law was legal under the Administrative Procedure Act[2] earns critical review from *The New York Times*,[3] MSNBC,[4] and *The Daily Show*.[5] However, when that decision concerns the Patient Protection and Affordable Care Act (also known as the ACA or, more commonly, "Obamacare"),[6] the attention becomes understandable. The decision of the U.S. Court of Appeals for the D.C. Circuit in *Halbig* v. *Burwell*[7] is also notable because it represents a rare bird: a case in which the government lost despite the fact that the judiciary has crafted a set of rules, the application of which usually ensures that the government usually wins in cases involving statutory construction.

In response to the government's petition for rehearing, a majority of judges on the D.C. Circuit voted to vacate the panel decision and rehear the case en banc.[8] Then, on November 7, 2014, the Supreme Court dropped a bombshell. The Court granted review of *King v. Burwell*, a decision from the Fourth Circuit that came to the opposite conclusion as the panel decision in *Halbig*.[9] These cases now raise a national debate about the role of judges in reviewing federal statutes that concern significant issues of public policy.

Halbig and *King* concern the IRS's interpretation of a section of the ACA concerning tax credits for buying health insurance from an "Exchange."[10] Under the ACA, Exchanges are either governmental or nonprofit entities established to provide a marketplace for health insurance.[11] The ACA recognizes two types of Exchanges: those established by the states, and, if a state does not establish its own Exchange, those established by the federal government for the state.[12] The ACA subsidizes health insurance for healthy, but less well-off, people through tax credits. Under the ACA, these tax credits are available for insurance purchased on an "Exchange established by the State."[13] If a person purchased their insurance through the federally established Exchanges, arguably they do not get the tax credit.

The credit is important to the ACA because, besides purportedly driving down the cost of insurance, it also increases the number of people who would buy insurance under the ACA's individual and employer mandates.[14] These mandates require

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that individuals obtain, and large employers offer, insurance or face a tax penalty.[15] This penalty does not kick in, however, if the cost of insurance, minus any tax credits, is too high.[16] Thus, if tax credits are not available in states with only federal Exchanges—and only 14 states and the District of Columbia have established their own Exchanges—fewer people and employers are subject to the penalty. The tax credits thus extend the reach of the individual and employer mandates.

In other words, if one were to read the ACA as it is written and have the tax credits available only for those purchasing through state Exchanges, the law's reach would be significantly diminished.

There is considerable evidence that the government intended this to be the result, including statements by the private-sector "architect" of Obamacare, Jonathan Gruber, and others with inside knowledge.[17] Under this view, Congress wanted to incentivize the states into establishing their own Exchanges by withholding the tax credits to residents of states that refused to do so. If that was what Congress was trying to do, however, Congress guessed wrong—very few states were persuaded by the efforts to create their own Exchanges by providing credits to their residents.

The strongest evidence that this was the result that Congress intended, though, was that Congress wrote the statute to operate this way. The law says the tax credits go only to people to purchase insurance on an "Exchange established by the State."[18] The legislative history simply does not support the assertion that this was nothing more than a "scrivener's error," as some of the law's proponents have argued, but a deliberate decision made by the bill's drafters sometime in the process.[19] Nor does reading the statute this way make other sections of the law absurd, as others claim.[20] The statute still functions, just not as broadly as the government later decided it should.[21]

When the IRS issued its interpretation of the statute,[22] it decided that Congress did not mean what it said. Instead of extending tax credits to only those people purchasing insurance through an "Exchange established by the State," the IRS extended the credit to people who purchased insurance through the federal Exchange.[23] Congress's bad bet was now forgiven.

Many believe that the IRS was completely justified in interpreting the law this way, including the dissenting judge in the panel decision in *Halbig* and the Fourth Circuit panel in *King*. For instance, writing in *Slate*, the well-respected academic Professor Richard Hasen of U.C. Irvine Law School, argued that the courts should defer to the IRS's rewriting of the statute because courts have an obligation to "make the law work."[24] According to Hasen, because Congress itself "is barely working," Congress is much less likely to fix a law with mistakes in it and the courts therefore have an obligation to get the laws to "work for the people."[25]

The critique of reading the ACA as it is written is ultimately directed to an interpretive theory called "textualism." This approach, championed most notably by Justice Antonin Scalia, can be generally summed up by simply saying, "read the text."[26] If the law says "X," a judge should not rewrite the law to make it read "Not X" in order to achieve results the judge likes better. According to the dissenting judge in *Halbig*, the judges on the Fourth Circuit in *King*, and scholars like Hasen, statutes should be read to fulfill their purpose or to achieve the "big picture" and minimize "human costs" (as Hasen puts it).[27]

Under this approach, it does not matter much whether Congress deliberately tried to induce state cooperation with the stick-and-carrot of tax credits, nor does it matter that Congress guessed wrong in doing so. What matters is that the reach of the ACA could be significantly limited by interpreting the law according to its literal language. Courts have an obligation to relieve Congress of either its poor draftsmanship (if the tax-credit restriction was unintended) or the consequences of its bad bet (if the restriction was intended) in order to end up with a statute that those in power prefer.

The "contextual" approach to statute-reading urged by the ACA's supporters is fairly common.[28] But this is just a mechanism courts can use to have the government win when someone sues it, leading inexorably to a larger government with fewer constraints. The courts have created myriad doctrines to help the government win court cases, including things like abstention and justiciability.[29] Anti-textualism can then become a fallback argument when those rules do not hand the government a victory.

But the critics of textualism are unclear as to what benefits come from permitting the courts to rewrite laws except that policy preferences they like remain in effect. The concurring judge in *King*, for instance, faulted those who challenged the law as seeking to "deny to millions of Americans desperately-needed health insurance."[30] But this approach will likely result in more poorly written laws that are unread and unreadable, and it is unclear how this would be a good result "for the people" who have to comply with them.

Congress is perfectly capable of writing a law that extends tax credits to people who purchase insurance on a federal Exchange. If Congress intended to do that but did not, then perhaps it should stop writing laws that are so complex the drafters cannot get the wording right. If Congress cannot fix its drafting error in this instance—if an error it was—then perhaps it should live with the consequences. Call it the "Knowing-What's-In-A-Law-Before-It's-Passed" principle of statutory interpretation.[31] Letting Congress off the hook for drafting a law of unusual complexity and pushing it through before many even had time to read it will simply encourage Congress to pass opaque and poorly-thought-out laws in the future.

This raises the question of why should the courts step in to rewrite a law to fix a mistake in favor of one litigant, especially when, in other legal contexts, like contracts, drafting mistakes work against the drafter?[32] If the answer is, "courts need to make laws work for people," why is that simply not a value judgment whose end result is that one litigant (the government) consistently wins and the other (the individual) consistently loses? Putting aside the fact that the law does not "work" for the plaintiffs in these cases or else they would not have challenged it, the idea that the courts should operate on a "needs of the many outweigh the needs of the few" means that we are not really a country of laws. Instead, we are a country where all the branches of the government work in tandem to achieve policy outcomes, instead of checking one another to protect

individual rights. Besides violating the separation of powers, this approach raises serious issues about whether litigants before the courts are receiving the process that is due to them under the Constitution.

Many of those unhappy with the textualist approach to reviewing the ACA believe that Obamacare is so important that judges should close their eyes to what is written in plain English. Under their view, it is perfectly fine for the Legislature to write laws that say one thing but intend to do another and the Executive to rewrite the law to reflect the prevailing view of what the law should say. The role of the courts is to pretend that this is somehow acceptable so the government will win. That is not judging. That is judicial abdication.

What the panel majority in *Halbig* did was real judging, not, as E.J. Dionne suggested, "judicial activism."[33] It held a co-equal branch of government to account and insisted that the law be read to comply with the policy choices manifested in the law itself (as opposed to what the government says the law means now). Now the Supreme Court must decide whether it will ignore what the law says and simply accept the government's latest explanation of what it meant to do. If they do, then they are doing what we think judges are supposed to do: engage in the facts of every case and require the government to abide by the same standards applicable to other litigants in court.[34] It is "activism" to instead rewrite the law to conform to what the government wishes the law to be, not to what it actually is.

If the Supreme Court affirms the decision in *King*, that will be a victory for Obamacare, but will give Congress the green light to write incomprehensible, unread and sloppily drafted laws, safe in the knowledge that the judiciary will relieve them of the consequences of their errors. That result could help Obamacare limp along for a few more years, but that victory will come at the cost of endangering individual rights, respect for the rule of law and due process.

Endnotes

1 26 U.S.C. § 36(B)(c)(2)(A)(i).

2 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521.

3 Robert Pear, *New Questions on Health Law as Rulings on Subsidies Differ*, New York Times (July 22, 2014), http://www.nytimes.com/2014/07/23/us/court-rules-against-obamacare-exchange-subsidies.html.

4 Steve Benen, *The Speaker, The ACA and The 'Be Careful What You Wish For' Adage*, MSNBC (July 23, 2014), http://www.msnbc.com/rachel-maddow-show/the-speaker-the-aca-and-the-be-careful-what-you-wish-adage.

5 *See* Catherine Thompson, *Jon Steward Tackles Obamacare Subsidy 'Chaos,'* TPM Livewire (July 24, 2014), http://talkingpointsmemo.com/livewire/jon-stewart-obamacare-subsidy-chaos.

6 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

7 No. 14-5018, (D.C. Cir. July 22, 2014).

8 Halbig v. Burwell, 2014 U.S. App. LEXIS 17099 (Sept. 4, 2014).

9 King v. Burwell, 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 2014 U.S. LEXIS 7428 (November 7, 2014) (No. 14-114).

10 42 U.S.C. § 18031(b)(1) ("Each State shall . . . establish an American Health Benefit Exchange.").

11 *Id.* § 18031(d)(1) ("An Exchange shall be a governmental agency or nonprofit entity that is established by a State").

12 *See Id.* § 18031(c)(1).

13 *See Halbig*, No. 14-5018, WL 3579745 at *7 (D.C. Cir. July 22, 2014) ("In other words, the tax credit is available only to subsidize the purchase of insurance on an 'Exchange established by the State . . . .'").

14 *Id.*, at 8.

15 *See generally* 26 U.S.C. § 4980H(a).

16 *Id.* § 4980H(a)(2); *see also id.* § 4980H(b).

17 Felice J. Freyer, *Health Care Law Debate Heats Up*, Boston Globe (July 25, 2014), http://www.bostonglobe.com/lifestyle/health-wellness/2014/07/25/mit-gruber-obamacare-architect-calls-his-statements-video-mistake/q1kkjC9zpQXLJuxhlY2HbJ/story.html. (. . . [I]f you're a state and you don't set up an exchange, that means your citizens don't get their tax credits.").

18 42 U.S.C. § 18031(b)(1) ("Each State shall . . . establish an American Health Benefit Exchange.").

19 *See Halbig*, No. 14-5018, WL 3579745, at *7 ("In other words, the tax credit is available only to subside the purchase of insurance on an 'Exchange established by the State . . . .'").

20 *King*, 759 F.3d at 378 (Davis, J., concurring).

21 *See Halbig*, No. 14-5018, WL 3579745, at *41.

22 26 C.F.R. § 1.36B-2(a)(1).

23 *Id.*

24 Richard L. Hasen, *Bad Readers*, Slate (July 23, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/d_c_circuit_and_4th_circuit_obamacare_rulings_the_perils_of_following_scalia.html.

25 *Id.*

26 *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012).

27 Richard L. Hasen, *Bad Readers*, Slate (July 23, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/d_c_circuit_and_4th_circuit_obamacare_rulings_the_perils_of_following_scalia.html.

28 *See, e.g.*, *id.*

29 Abstention provides courts with a doctrinal means to decline to hear certain cases. For example, "federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass on them." *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). There are many other permutations of abstention doctrine. Justiciability offers courts another way to pass on a case. Specifically, courts may only hear issues involving an actual "case or controversy." Courts may interpret this term liberally in declining certain cases. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

30 *King*, 759 F.3d at 379 (Davis, J., concurring).

31 Recall the now-infamous Nancy Pelosi quote: "We have to pass the bill so you can find out what is in it . . . ." Tommy Christopher, *The Context Behind Nancy Pelosi's Famous 'We have to Pass the Bill' Quote*, Mediaite (November 17, 2013), http://www.mediaite.com/tv/the-context-behind-nancy-pelosis-famous-we-have-to-pass-the-bill-quote/.

32 *See* 11 Williston on Contracts § 32:12 (4th ed.) ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.").

33 E.J. Dionne Jr. *A Conservative Judiciary Run Amok*, Washington Post (July, 23 2014), http://www.washingtonpost.com/opinions/ej-dionne-affordable-care-act-falls-prey-to-extreme-judicial-activism/2014/07/23/4a06dec0-129f-11e4-8936-26932bcfd6ed_story.html.

34 *See* Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the constitution's Promise of Limited Government (1st ed. 2013).