

Statutory Tools of Interpretation as Employed in *King v. Burwell*

King v. Burwell (2015) seeks to address the question of the legality of §36B within the tax code of the Internal Revenue Service (IRS), which enables the agency to authorize “federal tax credit subsidies for health insurance coverage that is purchased through an ‘Exchange established by the State under section §1311’ of the [Affordable Care Act] (ACA)” (Carvin, 2015, p. i). Whereas *NFIB v. Sebelius* (2012) and *Burwell v. Hobby Lobby, Inc.* (2014) ask the question of constitutionality, the novelty of this case revolves around the interpretive question of five words, “Exchange established by the State” (Affordable Care Act, §1311, §1321, §1401). Underneath the proposed question of individual tax credits to support state exchanges is the greater issue as stake: the intersection of statutory interpretation and federalism. This paper will argue that the Government should prevail using the statutory interpretation tools of textualism, cannons of construction including the plain meaning rule, presumption of consistent usage, whole act rule, and absurd results doctrine, as well as the ancillary application of Chevron Deference.

Textualism as Interpretive Theory

Employing textualism is not only an appropriate strategy, considering that the Court is overwhelmingly comprised of textualists (Lithwick, 2015), but is also the tool that best addresses the demands of the case. Such critical interpretive work with real life implications for an estimated 8 million Americans demands that the Court¹ apply a higher level of statutory scrutiny,

¹ The Court cannot take this potential outcome into consideration when deciding the case.

predictability, and clarity that cannot be achieved through other interpretive theories such as purposivism and legislative history.

Both the petitioners and the respondents recognize that textualism is the most fitting interpretive theory for this case, yet it is the degree of scrutiny to use when examining the language of the statute that is problematic, and quite possibly the real question before the Court. The challengers posit that the integration of tax subsidies into the ACA shifts the use of the term *Exchanges* in §1321 from an “intrinsic [to]. . . extrinsic characteristic of who established the Exchange” (Adler and Cannon, 2015, n.p.), and therefore the Secretary of Health and Human Services (HHS) cannot establish such *Exchanges* on a state’s behalf. Assuming a strict textualist approach, this understanding of the text holds merit and rejects the respondents’ position that the statute is to be read in a specific, nested order to make sense (Adler and Cannon, 2015).

Yet a strict textual approach does not move the Court past the issue of grammar, focusing on capitalization of the letters *E* and *S* and subject-verb agreement (Adler and Cannon, 2015), rather than what the law actually means. Eskridge (2015) argues that “textualism does not require courts to read statutory provisions in a vacuum” (p. 2), but in a holistic context. Justice Kagan brings this point to light during the case’s oral argument in which she poses a question regarding the tasks she assigns to her clerks. Kagan reminds the petitioners that an appropriate interpretation of her scenario is not test of deductive reasoning or one’s ability to perfectly parse a logic riddle, but rather that the completion of the task at hand is more important than the process that leads to the end result. Such is the case with textualism, in that the Court has a duty to Congress to give “effect to the statute Congress enacted, not just isolated words divorced from their context” (Eskridge, 2015, p. 12).

To assume the petitioner's extreme, literal reading of the statute requires reading each portion of the act in isolation in order to understand it as a whole. This interpretive style lends itself to a dangerous conclusion as seen in *United Savings Association of Texas v. Timbers of Inwood Forest Associates* (1988) where an interpretation's primacy informs and usurps the question of rationality, and values literalism over functionality. When understanding textualism as *hyperliteralism*, deferring to the properties of purposivism is a normal response. Even so, employing purposivism in this case yields the same result. For if the spirit of the law is to make healthcare affordable, tax credits create such an opportunity for citizens to buy insurance, regardless what agency has been given the authority to issue such subsidies. Still, purposivism limits the legislative process as it prioritizes the overall goal of the statute over legislative intent, and therefore limits the power of the law itself, especially when read within the scope as proposed by the petitioners (Eskridge, 2015).

Additionally, the petitioner's reference to "extrinsic characteristic" (Adler and Cannon, 2015, n.p.) triggers the use of legislative history, but the law's backstory provides little to no assistance in the interpretive process as it has proven to be wholly unreliable. The ACA's history is highly politicized and fraught with inconsistent reports of which stakeholders were aware of what information at which time, including the critical notion that states would be penalized for not facilitating their own healthcare exchanges (Lithwick, 2015). The Government maintains that the statute underwent the legislative process with the understanding that not only would the federal government have the authority to create health care exchanges on behalf of states, but that the tax credits would be available to the citizens of those states (Walsh, 2015). For as Scalia reminds the Court, Congress's action came in the passing of the bill and not in committee hearings (Farias, 2015), therefore the ACA's legislative history is most relevant to *King v.*

Burwell is that it was built on the framework of federalism in every step of the process and must be read within that context. Since textualism must be understood as the reading of the language of a statute within context of the entire piece of legislation, it remains the preferred theory and more strongly supports the Government's argument.

Cannons of Construction

Several canons of construction including the plain meaning rule, presumption of consistent usage, whole act rule, and absurd results doctrine sustain this textualist approach, but may only assist in strengthening the Government's position. The challengers, by asking the Court to interpret these five key words in a silo and effectively eliminates the functionality of the entire piece of legislation, build their argument on a paradox without a viable canon of construction to support their claims.

That being said, a fundamental level the plain meaning rule favors the petitioners, as it requires the most commonsense or reasonable understanding of the term in question. Carvin (2015) argues that the actions of the IRS are in direct conflict with the plain meaning of the phrase *Exchanges* by the *state* and therefore cannot stand; but, he contradicts his own argument when claiming that "the regulation then adopt by cross-reference an HHS definition of 'Exchange' that expressly includes any Exchange, 'regardless of whether [it] is established and operated by a State. . . or by HHS'" (Carvin, p. 19). The challengers' focus on the terms *Exchange* and *state* blinds them from the terms *any* and *regardless*, which plain meanings are inclusive of all *Exchanges*. Under this rule, each term must utilize a common vernacular meaning, and thus the language of §1321 applies to such *Exchanges* in §1311. Using only the

challenger's understanding of the plain meaning rule leads to an illogical interpretation of the ACA, rendering all of Congress' actions in the statute meaningless (Verrilli, 2015).

Moreover, under the canon of presumption of consistent usage, which requires the reader to assume that the meaning of terms is constant throughout the whole act, the D.C. Circuit Court held in *Halbig v. Burwell* (2014) that the term *Exchange* is same in both §1311 and §1321 (Eskridge et al., 2015), regardless of which group establishes these *Exchanges*. This canon is applicable to a number of terms throughout the ACA including as *qualified individuals* and *applicable taxpayer*, and the language of §1311 is no exception.

Furthermore, the whole act rule supports and requires the contextual reading of the ACA as a complete document. The petitioners' segmental approach leads to total failure of the statute (Eskridge, 2015), and contradict the rule that Congress does not intentionally draft legislation to collapse on itself. By rejecting the notion that §1321 *Exchanges* are inclusive of the federal government, the challengers "make a fundamental mistake [by giving] one provision a narrow reading 'that is persuasive only to the extent one scrutinizes the provision without the illumination of the rest of the statute'" (Eskridge, 2015, p. 17). As seen in *United Savings v. Timbers* (1988), the whole act canon requires the Court to examine the controversial provision within the statute's own context and scheme, otherwise the reading will most likely be rendered absurd.

The challengers' argue that the absurdity doctrine is not applicable in this case due to the statute's lack of abnormalities (Carvin, 2015), but it is their isolative reading that necessitates the introduction of this canon. The Government suggests that the petitioners' parsing of the terms *Exchanges* and *qualified individuals* creates a contradictory argument against the use of the definition of these terms as seen in the rest of statute, and against the actions of the Legislature

(Verrilli, 2015). The Court assumes that Congress acts rationally with the intent to draft functioning laws, thus the challengers' argument is flawed when suggesting that the legislation's infrastructure is intentionally unstable. It is the petitioners' argument that generates the issue of absurdity and raises the need for the absurd results doctrine, which finds in favor of the Government.

Applicability of the Chevron Doctrine

King v. Burwell may also be reviewed from the perspective of the *Chevron* doctrine if the traditional tools of statutory interpretation yield inconclusive results. As mentioned by Justice Kennedy in oral argument and discussed by Solicitor General Verrilli, the question of *Chevron* deference may be relevant if the Court determines that the statute is ambiguous. Since this case specifically addresses the issue of statutory interpretation as it pertains to agency action, employing this doctrine is appropriate; but the challenge with this process of statutory review with respect to this case rests not with applicability but application. The challengers claim that the Government is intentionally creating a sense of ambiguity in order to compel the Court to evoke *Chevron* (Adler and Cannon, 2015), yet if such is the situation, the question of the term state would not exist, and neither would *King v. Burwell*.

The Government's suggestion for the correct interpretation of §26 U.S.C. 36B rest squarely within the scope of *Chevron's* traditional framework, but the challengers' question of whether or not the statute's language excludes the actions of the federal government for the purposes of issuing tax credits places a stronger emphasis on accuracy rather than reasonableness. The greater burden of proof to demonstrate that the ACA is unwavering clear, making agency deference unnecessary falls on the petitioners (Armando, 2105), and therefore the

application of *Chevron* innately favors the respondents. However, under the traditional understanding of the two-step process of *Chevron*, of which the Court requires, the qualification of ambiguity is contingent upon how the Court applies the plain meaning rule. The petitioners claim that due to the D.C. Circuit ruling in *Halbig v. Burwell* (2014), the plain meaning makes it clear that federal *Exchanges* are distinct and separate from state *Exchanges* for the purpose of tax credits, and that “no absurdity arises from that limitation, which is consistent with the Act’s structure, history, and purpose” (Carvin, 2015, p.18).

In order to further disregard the application *Chevron*, the challengers claim that the issues tax subsidies is too significant to be left to the devices of an agency (Verrilli, 2015), but as *Arlington v. FCC* (2013) demonstrates, the expertise of an agency is suited to address congressional ambiguities more so than the court, regardless of the significance or scope of the issue. Thus, in keeping with *Arlington*, the Court must refute the petitioners’ claim and proceed to step one of *Chevron*. Yet Carvin (2015) continues to suggest that *Chevron* deference is not relevant due to the IRS’ inability to oversee the ACA’s tax credits and HHS’ inability to impose upon the tax code. The petitioners argue that this construction is devoid of ambiguity since both agencies are unable to administer the law, but it is this precise construction that introduces ambiguity into the case.

The Fourth Circuit Court contrasts the D.C. Circuit by invoking *Chevron* by determining that even though the statute may not be inherently ambiguous, the challengers fail to prove unambiguous clarity as required by the first step of *Chevron*. The Court’s inability to assess the definitive actions of Congress as they relate to tax credits within the ACA necessitates an examination of the law under step two, or measuring the arbitrariness of the agency’s actions. Under step two, the Fourth Circuit again finds in favor of the Government due to the challenger’s

inability to demonstrate the IRS's actions to be capricious, and therefore deference to agency is necessary.

The actions of the Fourth Circuit may provide the reasoning behind the petitioners' insistence that the application of *Chevron* is errant since "cannon[s]—not the agency—resolves the ambiguity" (Carvin, 2015, p.53). This argument fails since the challengers only evoke the support of the nondelegation cannon, which resolves constitutional claims and separation of powers. Even though *King v. Burwell* does address separation of powers, it does so within the framework federalism, and on strict statutory basis—not constitutional. The application of the aforementioned cannons is more appropriate, supports the use of *Chevron*, and the authorization of tax subsidies through an *Exchange* as established by the state.

The respondents' brief points to the problematic nature of the challengers' textual argument holding that such a reading cannot be unambiguous, and that "the traditional tools of statutory interpretation confirm that [the] Treasury's reading is at least a reasonable one warranting deference under *Chevron*" (Verrilli, 2015, p.55). This *term of art* as established in §1311 still creates an ambiguity after the tools of interpretation are exhausted because a common sense reading implies a shared responsibility between two agencies, the IRS and HHS. Employing *Chevron* allows the Court to reconcile the tension within the statute while still supporting Congress' ability to delegate its authority to these agencies. This aspect of the argument mimics that of the application of the absurd doctrine and therefore the result must be the same: the Government prevails.

Stephenson and Vermeule (2009) underscore this notion by suggestion that *Chevron*'s two steps are reflections of each other, interchangeable within the framework, and should ultimately be compressed into a single test of reasonableness. *King v. Burwell* exemplifies this

argument since the respondents' question, permissibility of tax credits, requires an assessment on both the merits and capriciousness of the actions taken by the IRS; one cannot be determined without the other. Despite its somewhat circular or redundant nature, *Chevron* may be the best tool to use in the case that the justices are unable to come to a consensus under textualism or the proposed canons of construction, but it should be noted that *Chevron's* application in the Supreme Court may be irrelevant since the lower court has already made the determination that under step two of the doctrine that the agency's actions are acceptable.

Conclusion

Textualism, canons of construction, and the *Chevron* doctrine support the Government's argument that the authorization of tax subsidies through an *Exchange as established by the state* is consistent in both §1131 and §1321. The petitioners' limited textualist approach only reinforces the respondents' argument and requires the Court to defer to the administrative agencies in question. Therefore, in *King v. Burwell* the Court must find in favor of the Government when employing any tool of statutory interpretation.

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