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# Upholding the Inartful Drafting of Obamacare

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# Upholding the Inartful Drafting of Obamacare

## **Abstract**

Posting about a recent challenge to the national Affordable Care Act (ACA) from *In All Things* - an online hub committed to the claim that the life, death, and resurrection of Jesus Christ has implications for the entire world.

<http://inallthings.org/upholding-the-inartful-drafting-of-obamacare/>

## **Keywords**

In All Things, health care, President Obama, U. S. Supreme Court

## **Disciplines**

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## **Comments**

*In All Things* is a publication of the [Andreas Center for Reformed Scholarship and Service at Dordt College](#).

# Upholding the Inartful Drafting of Obamacare

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 [all in allthings.org/upholding-the-inartful-drafting-of-obamacare/](http://allthings.org/upholding-the-inartful-drafting-of-obamacare/)

Donald Roth

Yesterday the Supreme Court released its opinion in *King v. Burwell*, the most recent challenge to the Affordable Care Act (ACA) also frequently referred to as “Obamacare.” As someone who follows both the Supreme Court and tax law issues as closely as I can, this case has been a keen interest for me. At the same time, since this is a case about tax credits and one of the longer and more convoluted pieces of legislation passed in recent years, the contours of the decision itself can get a bit complicated. At its heart, however, this case is about statutory interpretation, and it raises the deeply important question of whether we are a nation ruled more by law or legislature.

## The Facts

When Congress wrote the Affordable Care Act, it created a carefully balanced system that runs at the heart of this case with the stated goal of increasing the number of Americans covered by health insurance and decreasing the cost of health care. That was to be achieved by the dual process of creating a subsidized marketplace (the Exchanges) and by forcing everyone who wasn’t covered elsewhere to participate in them (the Individual Mandate). The market subsidies are a series of tax credits available to people earning less than 400% of the [federal poverty level](#). These people are required to purchase insurance, but when they file for taxes each April, they are eligible for refundable credits based on the cost of their coverage.<sup>1</sup> On the other side of the spectrum, the stick that enforces this system is a series of tax penalties for both individuals without insurance and employers who fail to offer “minimum essential coverage” to their employees.

The key issue in this case, however, is that both the availability of the credits and the applicability of the penalties are tied to the existence of “an Exchange *established by the State*.” The difficulty with this is that “the State” is specifically defined by the ACA to mean “each of the 50 States and the District of Columbia.”<sup>2</sup> The ACA also provides ways for U.S. territories to be “treated as a State.”<sup>3</sup> Glaringly absent from these provisions is any mention of what happens when the *federal* government establishes an Exchange, something it had to step in and do for all states that didn’t opt to create their own Exchanges. By both rules of interpretation and common sense, then, Exchanges established by the federal government would not be “an Exchange established by the State,” and this would completely short circuit both the tax credit and tax penalty structures in those states who chose not to create Exchanges.<sup>4</sup>

The question before the Court was whether or not it was permissible to read this disputed language to mean “an Exchange established by the State or federal government,” and the stakes riding on this were huge: [experts](#) believed that a victorious challenge to the law would leave 7.3 million people out over \$36.1 billion in credits, and the ripple effects would essentially topple the whole structure that the ACA was constructed upon.

## The Opinions

In the [decision](#), authored by Chief Justice Roberts speaking for a 6-3 majority, the Court held that there was ambiguity in the ACA’s language, but that the clear intent of Congress in passing the law was that the penalties and credits should be available in every state with an Exchange, regardless of who created and operates it. In reaching this decision, Roberts had some choice words describing the Act, saying it

“contains more than a few examples of inartful drafting,” which he blames on the fact that “Congress wrote key parts of the Act behind closed doors, rather than through ‘the traditional legislative process’,” leading him to conclude that “the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.” Roberts says that these flaws created ambiguity, which has to be resolved in light of the design of the overall statutory framework and legislative intent, something which clearly contemplates that the credit and penalty scheme be tied to all Exchanges.

To all of this, Justice Antonin Scalia raises a rather spirited rejoinder.<sup>5</sup> He opens by saying “The Court holds that when the Patient Protection and Affordable Care Act says ‘Exchange established by the State’ it means ‘Exchange established by the State or the Federal Government.’ That is of course quite absurd, and the Court’s 21 pages of explanation make it no less so,” and his quips and barbs only really get sharper from there. Scalia lambasts what this decision, along with 2012’s *NFIB v. Sebelius*, does to precedent regarding statutory interpretation, the function of tax law, and the job of the Court generally. Based on what he sees as the exceptional steps taken to preserve the ACA, Scalia closes by saying “We should start calling this law SCOTUScare.”<sup>6</sup>

## The Implications

So what does this decision by the Supreme Court mean? In its most immediate sense, this means that the ACA has survived all of the most serious legal challenges to its continued enactment. It also means that individuals who were in some state of limbo as to the continued availability of their substantial tax credits can breathe a little easier. However, the broader implications are a bit more troubling.

The first issue has to do with the task of legislating generally: there is no debate in this case that the wording at issue was poorly written. Every court which has addressed this issue has acknowledged this difficulty and the forceful common sense argument that “by the State” means “by the State.”<sup>7</sup> At the same time, it’s not unfair to say that the legislators who wrote this bill were not intending this to be a problem. This mistake not only creates fundamental problems in the way the ACA operates, there’s reasonable evidence that the drafters hardly considered a world where [27 states](#) would leave it up to the federal government to create Exchanges.<sup>8</sup> Taken together, Congress wrote this law a bit sloppily, and one of messages sent by the Court yesterday is that they get a pass on that problem.

The second issue has to do with tax policy: as mentioned in the dissent, the specific wording of the provisions surrounding the tax credits are not unusual in the tax world, which functions in many ways like logic in a computer program would. Like in programming, receiving your credit depends on the yes or no answers to a series of questions. The first that the law asks is “is your income less than 400% of the Federal Poverty Level?” If not, you are not eligible for a credit. If you fall in that category, the law itself then looks to determine your “premium assistance credit amount.” This number is determined by reference to the cost of your policy obtained “through an Exchange established by the State.”<sup>9</sup> In other words, if you didn’t get your insurance from that eligible source, you would be eligible for a credit, but the amount would be \$0.

This type of logical progression is very common in the tax world, and the level of precision and mechanics involved in this type of calculation is an essential hallmark of the way the tax code works. This means that allowing “inartful drafting” in the Internal Revenue Code is especially problematic when it comes to how that body of law hangs together.

Finally, tying both of the first two concerns together, this raises a crucial philosophical question about the way that our country works. If it’s clear that the legislators goofed, but at the same time they goofed not by saying something unclear but by clearly saying something else entirely, how do we fix that? The answer from the Court yesterday is that the Supreme Court steps in and calls “no harm, no foul.”

However, this suggests that the thing that makes up what the law *really is* in this country is not so much what's on the page as what's in the hearts of the people who put it there, and one of those things has a greater tendency toward being fickle and arbitrary. To put it a different way, this raises the question of whether we're a nation ruled by law (word) or legislature (people). Obviously, it's a bit of both, but the thing that troubles me about this opinion is that it seems to lean a bit more toward the latter than I'm comfortable with. I don't quibble with the result of making this structure work properly, but I would rather see different means taken to get there. What do you think?

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## Footnotes

1. That is, the subsidy functions as a reimbursement, rather than an upfront payment. ↩
2. [42 U.S.C. § 18024\(d\)](#). ↩
3. [42 U.S.C. § 18043\(a\)\(1\)](#). ↩
4. This complication is largely a result of the fact that the ACA simply declares, as if by fiat, that the States “shall establish” the Exchanges. Due to the structure of our constitutional system, the federal government lacks the power to make this sort of demand of states, meaning that this language was really just a recommendation, and the law had to make provision elsewhere for what would happen if states didn't comply. ↩
5. Even for Scalia, this is one of his more colorful dissents. ↩
6. SCOTUS stands for Supreme Court Of The United States. ↩
7. In addition to the majority opinion here, see also the lower appeals on this issue in the D.C. Circuit ruling in [Halbig v. Burwell](#) and the 4<sup>th</sup> Circuit's ruling in [King v. Burwell](#). ↩
8. Beyond the “States shall” language that directs creation of Exchanges, the difficulties with the initial roll out of coverage were also linked to underestimation of the volume of applicants that the federal system would have to process. ↩
9. [.R.C. § 36B](#). ↩