Textualism v. Contextualism – King v. Burwell

Stuart M. Gerson*

The Supreme Court is poised to hear argument in *King v. Burwell*, No. 14-114, a case that touches upon a central mechanism of the Affordable Care Act (“ACA”): tax credit subsidies payable to economically-eligible citizens. This feature of the ACA works in tandem with the individual mandate upheld in *National Federation of Independent Business v. Sebelius*,¹ to allow lower income persons to purchase health insurance and to assure that insurance pools contain healthier, younger people to offset adverse selection that might drive up insurance costs.

Section 36B of the Internal Revenue Code, which was enacted as part of the ACA, authorizes federal tax credit subsidies for health insurance coverage that is purchased through an “Exchange established by the *State* under section 1311” of the ACA (emphasis added).² The question presented in *King* is whether the IRS may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through exchanges established by the federal government under Section 1321 of the ACA.³ This is a classic case that pits conservative textualists, who believe in literal plain-meaning review of specific statutory language, against judicial “contextualists,” who argue that the Court should not focus on a single provision, however specific its terms, that is at odds with the overall legislative scheme.

As even casual observers of the ACA understand, Congress provided for the establishment of insurance exchanges to be marketplaces for health insurance in the states. The ACA provided for the establishment of exchanges by the states themselves but, where states refused to do so (and most did), the federal government could, and did, step in to establish state-based exchanges on its own.

The supporters of *King* argue that the Court need go no further than the literal terms of the provision; in other words, “States” means “States.” And, in the face of the argument that to rely on that view would gut the entire ACA program, these conservatives reply that Congress could have done otherwise but, instead, used the subsidy provision as a “carrot” to get the states to opt in. The Petitioners cite specific evidence of record to support this view and to negate the argument that Section 36B was just the product of sloppy draftsmanship. To them, the failure of that option lies at the feet of Congress (actually the Democratic majority that provided all of the votes to pass the ACA, the extraordinarily lengthy terms of which actually were created by the Executive Branch), and it is not for the Court to rewrite the statute.

Faced with the clear language of Section 36B, the government’s response is often quite tortured but, putting aside the immense amount of handwringing and overstatement in the Solicitor General’s brief to the Court, there are two essential, and potentially attractive, features of the government’s argument. The first is that the tax credit subsidies are a necessary component to make the ACA work and to eliminate them would then keep many people from being able to purchase health insurance and would result in a disparate number of unhealthy, and therefore more expensive, people in the insurance pool. This is demonstrably correct, but does it justify the Court’s (rather than Congress’s) fixing the statute?

The second pillar of the government’s argument is that, taken as a whole, a mosaic of provisions of the ACA demonstrate that Congress intended that the subsidies at issue would be

---

* Member of the Firm, Epstein Becker & Green.
available to the citizens of every state, irrespective of whether a given state had its own exchange or one created by the federal government.

Professor Gamage and other tax specialists argue that the ACA’s definitional sections describe “Exchange” as a statutory term of art so as to specifically include Exchanges that HHS establishes on behalf of the states.” Besides noting that a given state governor might strongly disagree that a federal exchange was established on behalf of, rather than just in, a state, one notes that this argument goes further than does the Solicitor General, who, with a clearly discernible apprehension, argues that the total relevant context of the ACA affords the tax credits to all eligible persons regardless of the sponsorship of the exchange in their states, and spends considerable ink describing what it claims is health insurance disaster that would occur if the government were to lose.

At the risk of oversimplification, I suggest that for those “contextualists,” i.e. Justices willing to expand their analysis beyond the cabined language of Section 36B, a better initial point of reference than an implied term of art defining what an exchange is might be reference to the definition of who is entitled to the subsidy at issue that does not depend upon implication. Thus, the Court might look to I.R.C. § 36B(a), in which Congress provided that a premium tax credit “shall be allowed” to any “applicable taxpayer.” That term is defined as a taxpayer whose household income is between 100 percent and 400 percent of the federal poverty level. Thus, the government can argue, not without force, that Section 36B(a) defines all income-eligible taxpayers as potentially eligible to receive a credit—regardless of their state of residence or whether that state has elected to operate its own exchange. The question then remains: which Justices are likely to reach a contextual conclusion.

Most Court observers believe that there is little question that the three most consistently textualist Justices—Scalia, Thomas, and Alito—will accept the literalist argument and vote to strike down the regulation. It also is likely that the four most judicially liberal Justices—Ginsberg, Breyer, Sotomayor, and Kagan—will accept the government’s “totality” argument. Given Chief Justice Roberts’s surprising position in NFIB and Justice Kennedy’s general unpredictability, those two justices are likely to be determinative in resolving the competing arguments.

It is worthy of note that, only a little more than a week before the argument in King, the Court handed down its opinion in Yates v. United States, No. 13–7451 (decided February 25, 2015). While a bare majority of the Justices (actually a plurality plus one) reached what it described as a literalist application of a provision of the Sarbanes-Oxley Act, Justice Kagan wrote in dissent:

I agree with the plurality (really, who does not?) that context matters in interpreting statutes. We do not “construe the meaning of statutory terms in a vacuum.” Tyler v. Cain, 533 U. S. 656, 662 (2001). Rather, we interpret particular words “in their context and with a view to their place in the overall statutory scheme.” Davis v. Michigan Dept. of Treasury, 489 U. S. 803, 809 (1989).

What is interesting about this dissent is that, with its contextualist emphasis, it was joined by Justices Scalia, Kennedy and Thomas. Indeed, the prevailing Justices argued much the same thing. Time will tell if this presages anything with regard to King.

One final observation: the King case scenario is an example of what one charitably might call poor government. The problematic language of Section 36B is either the product of mere poor draftsmanship and review or of intentionality on the part of Executive Branch drafters whose

---

work was rubber stamped by the legislators who were determined to enact what they were sent by the President. Within days of the oral argument, the Secretary of the Department of Health and Human Services informed the Court that there is no “back up plan” and that if the Fourth Circuit is reversed and subsidies are denied in states where there is no state exchange low-income citizens will experience massive increases in average monthly premiums and significant loss of coverage. These arguments are likely to have resonance with certain Justices, but the Court should not have to hear them because to do so enmeshes the Judiciary in what essentially is a political policy conflict. It is not improbable that the government will be upheld but, in a more responsible environment, the Supreme Court, indeed any court, should be able to decide cases on the basis of literal statutory terms.