Written by **Joe Wolverton, II, J.D.** on November 8, 2014

Supreme Court to Hear New Challenge to ObamaCare: Should We Care?

In yet another misguided attempt to use the courts to do what the Constitution has already done, a group of plaintiffs will have their challenge to ObamaCare care heard by the Supreme Court.

On November 7 the Supreme Court announced its intent to hear the case of *David King v. Sylvia Burwell*, the secretary of Health and Human Services.

The issue at the heart of this latest legal attack on the president's legacy legislation is whether the federal government is authorized by the relevant health care statutes to provide health insurance subsidies to people living in states that have opted not to establish an ObamaCare exchange.

If the Supreme Court finds in favor of the plaintiffs, the case could undermine the statists' effort to completely convert states into nothing more than administrative subunits of the central government.

Here's the *New York Times* on the potential impact of the decision:

> The central question in the case, King v. Burwell, No. 14-114, is what to make of a provision in the law limiting subsidies to "an exchange established by the state." (If states do not establish their own exchanges, the health care law requires the federal government to run them instead.)
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> The challengers say the provision means that only people in states with their own exchanges can get subsidies. Congress made the distinction, they say, to encourage states to participate.
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> But the Internal Revenue Service has issued a regulation saying subsidies are allowed whether the exchange is run by a state or by the federal government. The challengers say that regulation is at odds with the law.
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> In response, Solicitor General Donald B. Verrilli Jr. told the justices that the I.R.S. interpretation was correct, while the one offered by the challengers was "contrary to the act's text and structure and would render the act unrecognizable to the Congress that passed it."
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> At the heart of King's complaint is whether Congress in passing the Patient Protection and Affordable Care Act (ObamaCare) intended to deny healthcare subsidies to Americans who have insurance plans purchased outside of the federally established exchanges or whether the law should be interpreted as written, and apply only to those plans purchased under state-created insurance marketplaces.

As *The New American* reported at the time of the Supreme Court's original ObamaCare ruling, these

subsidies were one of many similar financial incentives to state legislatures to participate in federal exchanges. If states demurred, the IRS would set about charging penalties to residents of those states who did not play ball with ObamaCare.

Regarding the plain text of the legislation, 26 U.S.C. § 36B says that the insurance plan subsidies provided by this provision apply only to plans offered in exchanges "established by the State." The IRS disregarded the letter of the law and set about offering subsidies to federally funded healthcare plans, as well.

This interpretation, contrary to the apparent intent of Congress, was codified in an IRS regulation.

According to the *New York Times* piece on the court's granting of certiorari to King, there are legal experts who agree with the plaintiffs' view of the intent of the law:

> Jonathan H. Adler, a law professor at Case Western Reserve University and one of the architects of the new challenge, said the administration's approach may be good policy, but is contrary to the plain terms of the law.
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> "The Supreme Court has the opportunity to reaffirm the principle that the law is what Congress enacts, not what the administration or others wish Congress had enacted with the benefit of hindsight," Mr. Adler said. "Granting tax credits to those who need help purchasing health insurance may be a good idea, and may have bipartisan support, but the I.R.S. lacks the authority to authorize such tax credits where Congress failed to do so."

Sadly, it seems that so many conservatives are hitching their hopes to the wagon on Supreme Court decisions confirming their opinions of the unconstitutionality of ObamaCare. While it is understandable given the generations-long effort by the forces of federal supremacy to convince Americans that the Supreme Court is the final arbiter of what does or does not pass constitutional muster, such a proffer of power was never contemplated by the framers of our Constitution.

What's the solution, then, to the winner-take-all mortal combat between the states and Washington? The routine and unrepentant nullification by the states of every unauthorized federal act. This practice would reduce, over time, the number and ferocity of the confrontations between Congress and state legislatures. As a bonus, the location of the clear boundaries of power will re-appear from the dissipating fog of antagonism and autocracy.

There are those, however, who still believe that there is a limit on the states' power of nullification. As explained above, they believe that when the Supreme Court rules on the constitutionality of an act, nullification of that act is no longer an option.

Thomas Jefferson had something to say in the mattter. In 1804, he wrote that giving the Supreme Court power to declare unconstitutional acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

In this Mexican standoff of states, Supreme Court, and federal government, the last man standing is the people acting in their collective political capacity as states.

How can anyone read Jefferson's statement — or the Tenth Amendment for that matter — and honestly conclude that any branch of the federal government is intended to be the surveyor of the boundaries of its own power? Every department of the federal government was created by the Constitution — therefore, by the states — and has no natural sovereignty. No branch can define its own authority. Such a thought is ridiculous and contrary to any theory of popular sovereignty ever enunciated. If courts,

Congress, or presidents had such power, it would make them judge, jury, and executioner in every case in which their own act exceeding constitutional authority is at bar.

Look at it this way, if the federal government were "the decider," what purpose would the Tenth Amendment serve? Even the most sanguine political observer would admit that the federal government could, would, and does rule that every act is constitutional.

For the time being, the White House is anxious to assure Americans dependent on federal largesse and the legal plunder that funds it that the statist status quo remains the law. As quoted in the *New York Times*, White House press secretary Josh Earnest explained, "American families who have already enrolled, or are planning to sign up during the open enrollment period beginning on Nov. 15, should know that nothing has changed.Tax credits and affordable coverage remain available."

Earnest is right. This is the case today and the consolidators genuinely believe that there is nothing they can't do, no law they can't pass, and no individual or government entity that can prevent them from enforcing those fiats masquerading as laws.

If we don't change our ways, soon we will learn that the loss of liberty is the worst of all possible fates and it always has and always will await the ignorant and the apathetic.

Oral arguments in *King v. Burwell* will likely be heard in February or March 2015, with a decision expected to be handed down sometime in June.

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