



# KING V. BURWELL THE IMPLICATIONS FOR THE MARKETPLACE

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# About Your Presenter

Marcy M. Buckner is the Vice President of Government Affairs with the National Association of Health Underwriters. NAHU represents more than 100,000 health insurance agents, brokers and consultants involved in the sale and service of health, long-term care, disability, Medicare Advantage, Medicare Supplement, and a variety of consumer-driven insurance products.

In this role, Marcy manages the association's policy and state affairs team, including the monitoring of activities of all state legislatures, insurance departments, intergovernmental organizations, and federal agencies to coordinate efforts to advance the interests of professional health insurance producers. Marcy received her Bachelor of Arts degree in Political Science and History from the College of Charleston in South Carolina, and her Juris Doctor from New England School of Law in Boston, Massachusetts.





# Initial Question?

Based on the construct of the ACA, and the IRS regulation, are subsidies available both in State-based exchanges and in Federally Facilitated Marketplaces?



# Statement of Facts


- Plaintiff: Virginia residents
- Virginia has declined to establish a state-run Exchange and is therefore served by the federally-facilitated marketplace
- Without the premium tax credits, the plaintiffs would be exempt from the individual mandate under the unaffordability exemption.
- With the credits the reduced costs of the policies available to the plaintiffs subject them to the individual penalty.
- Plaintiffs claim that because of the IRS Rule they will incur some financial cost/harm because they will be forced either to purchase insurance or pay the individual mandate penalty.



# ACA Language - Statute

Section 1311 of the Act provides that “[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange.” ACA § 1311(b)(1).

However, § 1321 of the Act clarifies that a state may “elect” to establish an Exchange. Section 1321(c) further provides that if a state does not “elect” to establish an Exchange by January 1, 2014, or fails to meet certain federal requirements for the Exchanges, “the Secretary [of HHS] shall establish and operate such exchange within the State. ” ACA § 1321(c)(1).





# ACA Language - Statute

Eligibility for the premium tax credits is calculated according to 26 U.S.C. § 36B. This section defines the annual “premium assistance credit amount” as the sum of the monthly premium assistance amounts for “all coverage months of the taxpayer occurring during the taxable year.” Id. § 36B(b)(1). A “coverage month” is one in which the taxpayer is enrolled in a health plan “through an Exchange established by the State under section 1311.” Id. § 36B(c)(2)(A)(i); see also id. § 36B (b)(2)(A)-(B)



# IRS Language - Regulation

The IRS Rule provides that the credits shall be available to anyone “enrolled in one or more qualified health plans through an Exchange,” and then adopts by cross-reference an HHS definition of “Exchange” that includes any Exchange, “regardless of whether the Exchange is established and operated by a State or by HHS.” 26 C.F.R. § 1.36B–2; 45 C.F.R. § 155.20.





# Interpretation by Lower Court

## *Chevron* Test

*Chevron* determined that the U.S. Congress may delegate regulatory authority to an agency, and that the agency's regulations carry the weight of the law, if the regulations pass the two part "Chevron test":

- "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the ambiguously expressed intent of Congress." If the Court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute...Rather,
- If the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-843 (1984).



# Supreme Court Throws Out *Chevron* Test

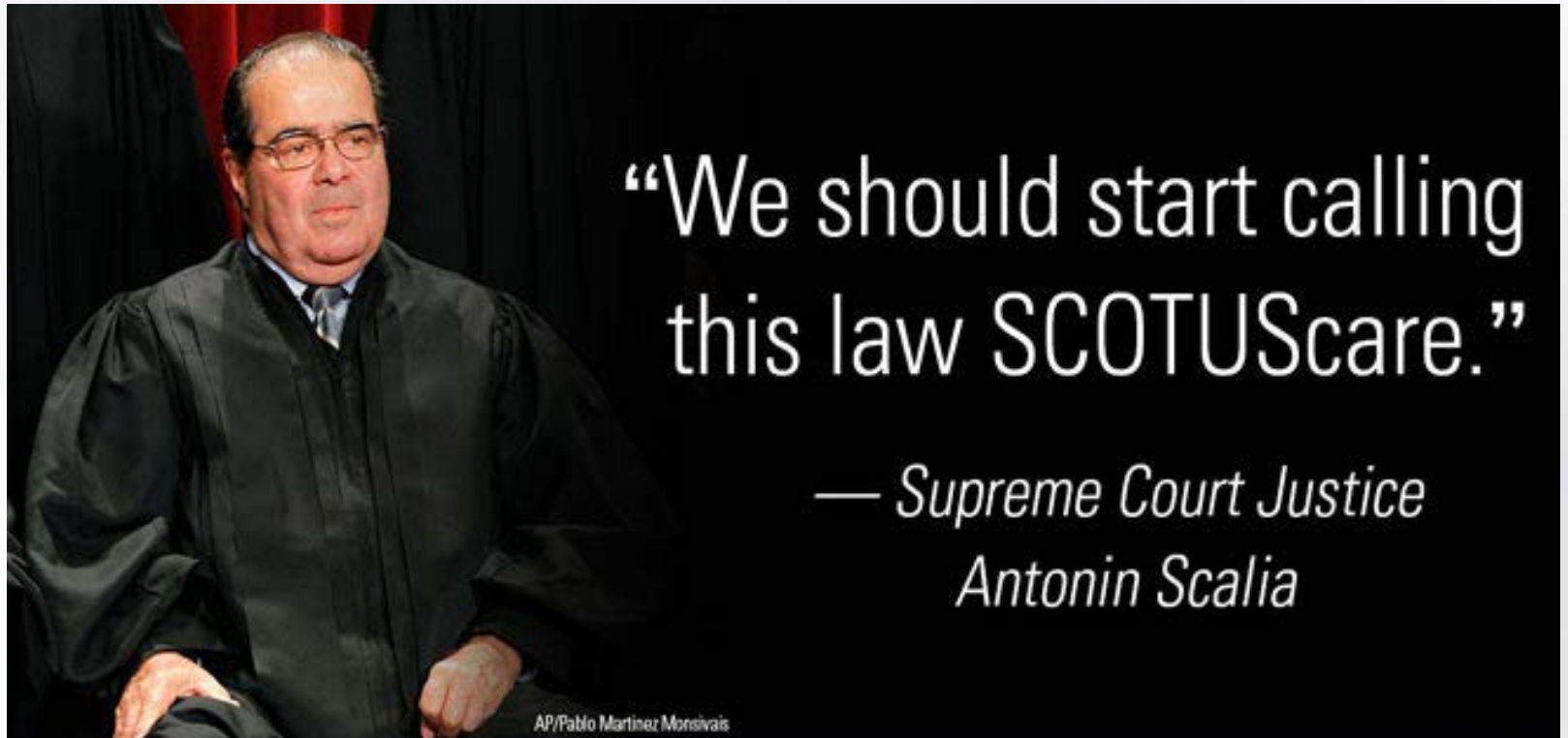
The tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep “economic and political significance”; had Congress wished to assign that question to an agency, it surely would have done so expressly. And it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.



# How Did SCOTUS Make Their Decision?

- “Such Exchange”
- “Established by the State”
- Instructions to Secretary
- Law as a Whole

# Scalia's Dissent



# What Could Have Happened

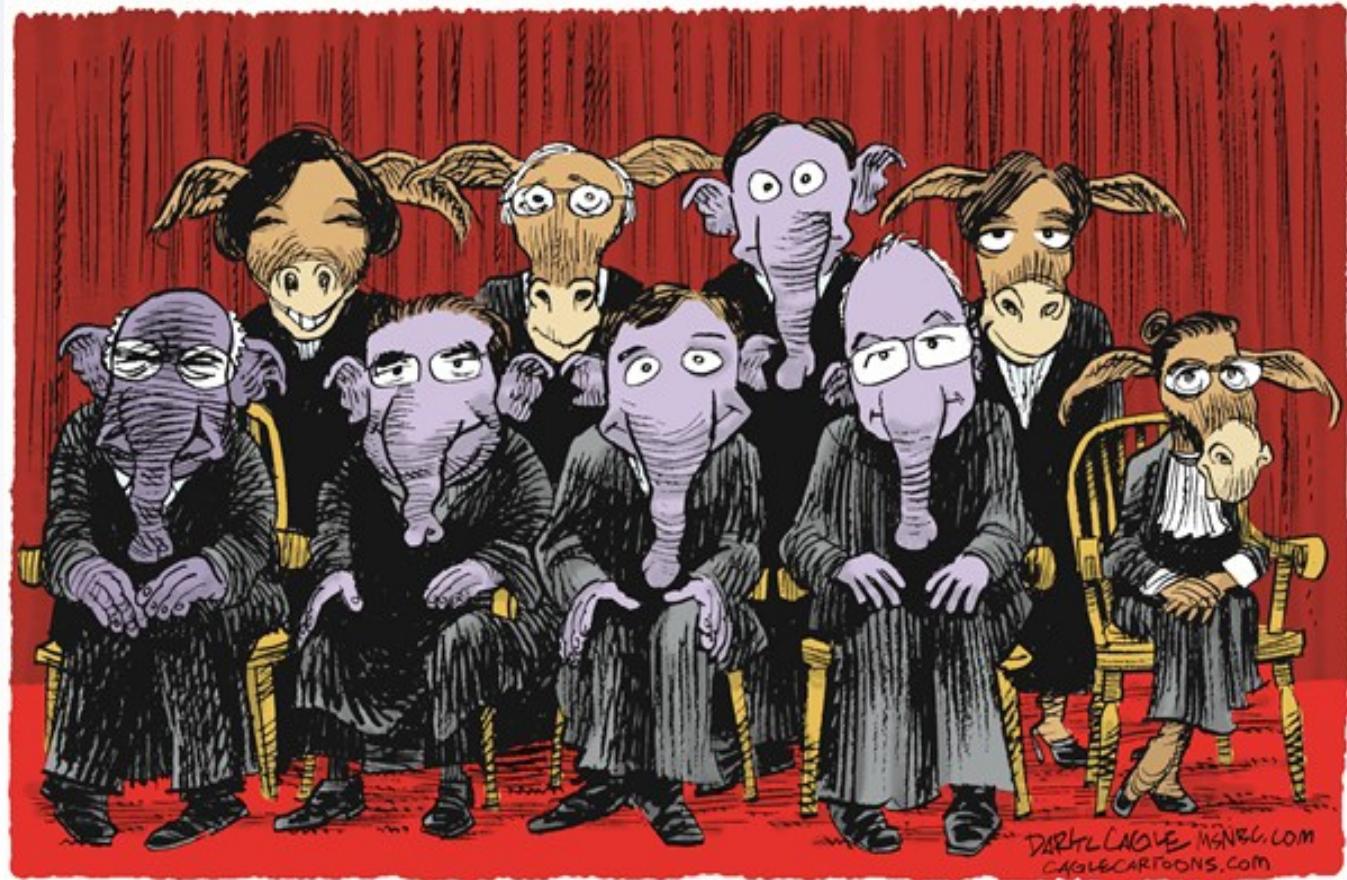


# What Now?





# What Else?





# Marriage Equality

- Public Sector Employers
- Private Sector Employers
- State Laws
- Medicaid
- Subsidy Eligibility





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