

# ACA: A Second Act of Judicial Creativity

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**Prediction:** Chief Justice John Roberts will once again cast the deciding 5-4 vote to uphold a part of the Affordable Care Act when it hears the case of *King v. Burwell* next year.

**Caveats:** One: There's no crystal ball for SCOTUS predictions. Two: Assume here that there's no change in the Court before *King* is decided.

My reasons for the prediction:

- *He already upheld it once.* To the surprise of many who thought a GOP appointee would not uphold Obamacare, the Chief Justice already cast the deciding vote in the first ACA case upholding the "individual mandate" part of the ACA.
- *The way he did it is the clue.* How did he uphold the ACA the first time? By artfully shifting the focal point of the case to a word the ACA never uses: tax. Renaming the "penalty" for the uninsured a "tax" was the way Chief Justice Roberts upheld the ACA's constitutionality. This enabled him to uphold an act of Congress on a huge national issue rather than substitute the judgment of the Court: i.e. judicial deference toward the ACA was in line with his overall jurisprudence. The larger the national issue, the more comprehensively the legislative branch acts in a democracy, the more careful the jurisprudence of a Justice like John Roberts becomes.
- *A second act of judicial creativity?* Having read the word tax into the ACA, is it logical to predict that he will use judicial creativity again to uphold the ACA's federal premium subsidies in 36 states (the issue in *King*)? I think yes. *King* involves statutory construction: i.e. the meaning of a few words ("through an Exchange established by the State"). If Chief Justice Roberts can artfully design, as he did, a legal argument around a word *not* in the ACA (tax), he can artfully design a legal argument around these few words *in* the Act.
- *Deference to Congress doesn't necessarily mean a literal construction of the statutory words.* Those who would strike down the federal subsidies argue that they are deferring to Congress by just mechanically applying the literal statutory words. Prediction: Chief Justice Roberts will take a broader "whole statute" approach and interpret the words so as to uphold the subsidies and thereby defer to Congressional enactment of the ACA.

- *It will be close.* It took 4 SCOTUS votes to bring the *King* case in the door for review. Those are likely the Justices who voted to strike it down in *Sebelius*. But it takes 5 to decide the merits.

Okay, we may be out on a limb with this prediction, but we'll wait and see!