The Heritage Foundation

LECTURE

DELIVERED FEBRUARY 23, 2015

No. 1261 | MARCH 4, 2015

King v. Burwell and the Rule of Law

The Honorable Orrin G. Hatch

Abstract: *From the early days of the Republic, a core component of our constitutional character has been the idea that our government is a government of laws and not of men. The current Administration, however, has engaged in a sustained assault on the rule of law. In the latest instance, notwithstanding Obamacare's unmistakably clear text, which limits subsidies to plans purchased through state-established exchanges, and notwithstanding that this limitation was absolutely fundamental to accomplishing Congress's purpose of incentivizing states to establish exchanges, the President decided that he would also offer subsidies for plans purchased through federally established exchanges. President Obama maintains the law must be rewritten to avoid the consequences the law itself imposes. The American people deserve a health care law that works, and a President who follows the law.*

King v. Burwell is a tremendously important case for a number of reasons. It's important because it may require fundamental changes to be made to Obamacare. And it's important because of its significant implications for the rule of law.

From the early days of the Republic, a core component of our constitutional character has been the idea that our government is a government of laws and not of men. This means that our leaders—elected and appointed—are constrained by the words of the laws in our statute books and in our Constitution. Government officials must follow the law, even when their personal predilections would lead them in a different direction. This prevents arbitrary decision making and keeps executive discretion within proper bounds.

The current Administration, however, has engaged in a sustained assault on the rule of law. In the interest of time, I will not catalog

Key Points

- Despite the unmistakably clear text of the statute limiting subsidies to plans purchased through state-established exchanges and notwithstanding that this limitation was fundamental to incentivizing states to establish exchanges, the President decided that he would also offer subsidies for plans purchased through federally established exchanges.
- President Obama's open defiance of clear statutory text and utter disregard for the balance Congress struck is an affront to the separation of powers and to the rule of law.
- The President and his supporters argue that subsidies for federally enrolled plans are necessary to accomplish Obamacare's overall purpose of reducing costs and improving health care access. Without these subsidies, the President argues, residents of 34 states will be hit with higher costs and unaffordable health care. The law must be rewritten, he says, to avoid the consequences the law itself imposes.
- The American people deserve a health care law that works, and that's why Congress needs to repeal and replace Obamacare.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1261**

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here President Obama's long train of executive abuses. I've spoken many times on the Senate floor about the President's disturbing disregard for the separation of powers and other limits on his authority. His offenses run the gamut from releasing Guantanamo detainees without first notifying Congress, as the law requires; to claiming that congressional inaction somehow clothes him with legislative-like authority to suspend immigration laws; to arrogating to himself the power to determine when Congress is in session. This last affront was one of the most absurd and offensive positions I have ever seen taken before the Supreme Court.

Obamacare Subsidies and the Anti-Commandeering Principle

The President's actions in the *King* case are of a piece with his other executive overreaches. Let me begin with some background. Obamacare requires every person in America to buy health insurance or else pay a penalty. This is the so-called individual mandate that the Supreme Court controversially upheld three years ago. Most Americans receive health insurance through their employer, which pays a large part of the premium. But not all do. Many must purchase insurance on their own. To ensure that such individuals are able to comply with the individual mandate, Obamacare directs states to create health care exchanges—government-operated websites where consumers can go to compare and choose insurance plans.

Obamacare also provides subsidies for individuals who purchase insurance through these state-run exchanges. Remember that most people receive health insurance through their employer and that their employer pays part of the premium. Individuals who purchase insurance on their own through exchanges, however, don't receive this employer subsidy, so they must generally contribute more towards the premium on their own. Obamacare provides subsidies to these individuals to help offset the cost of insurance.

With that background, let me turn now to the legal issue in the case. As I have described, Obamacare directs states to establish health care exchanges. To be precise, the law says, "Each State shall, not later than January 1, 2014, establish an [exchange]" that meets various conditions set forth in the law.[1]

But there's a wrinkle: The Constitution does not permit the federal government to order states to do things. The federal government and the states are co-equal sovereigns. The federal government cannot command the states to do something any more than one state can command another state to do something. This is called the anti-commandeering principle and is well established in Supreme Court case law.

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What the federal government can do, however, is incentivize states to act. And that's precisely what Congress attempted to with Obamacare, although, as I'll explain later, in my view Congress's attempted end-run still runs afoul of the Constitution.

Here's how the incentive works: Another provision of Obamacare—the one at the heart of this case—conditions the aforementioned subsidies on an individual's enrollment in a state-run exchange. According to this provision, a subscriber is eligible for a subsidy for each month she is covered by a plan that she "enrolled in through an Exchange established by the State."[2]

The text of this provision could not be more clear. If an individual enrolls in a plan through an exchange established by the state, she gets a subsidy. If she enrolls in any other plan, no subsidy. The incentive for states to act also could not be more

1. 42 U.S.C. § 18031(b)(1).
2. 26 U.S.C. § 36B(c)(2)(A)(i).

clear. If a state fails to establish an exchange, its citizens lose out on millions—perhaps even billions—of dollars in subsidies. Obamacare's proponents quite reasonably thought this would lead states to set up exchanges and would thus accomplish the same result—creation of state-run exchanges—that Congress could not achieve through direct command.

Congress also recognized, however, that some states might not take the deal. Thus, it provided a backstop. In yet another provision of Obamacare, Congress instructed that if a state does not set up an exchange by the January 2014 deadline, the Department of Health and Human Services shall "establish and operate such Exchange within the State."[3]

Crucially, however, Congress did not similarly provide that subsidies would be available to subscribers enrolled through a federally established exchange. And the reason is obvious. If subsidies were available under both state and federal exchanges, states wouldn't have an incentive to create their own exchanges—to expend time and resources setting up an online insurance marketplace—because the subsidies would come either way. Fewer states would create exchanges, meaning the federal government would have to step in and create more exchanges of its own.

The restriction of subsidies to state-established exchanges was thus a key element of Obamacare's entire cooperative federalism scheme. Without this restriction, the end result would have been a federally run health care market, a result unacceptable to several key Obamacare supporters, including Senator Ben Nelson of Nebraska, whose vote was essential to passage.

Twisting Statutory Text: "X" Means "Not X"

Now we come to President Obama's act of overreach. Notwithstanding the unmistakably clear text of the statute, which limits subsidies to plans purchased through state-established exchanges and notwithstanding that this limitation was absolutely fundamental to accomplishing Congress's purpose of incentivizing states to establish exchanges, the President decided that he would also offer subsidies for plans purchased through federally established exchanges.

President Obama's open defiance of clear statutory text and utter disregard for the balance Congress struck is an affront to the separation of powers and to the rule of law. The President and his enablers argue that subsidies for federally enrolled plans are necessary to accomplish Obamacare's overall purpose of reducing costs and improving health care access. Without subsidies to individuals in the 34 states without state-run exchanges, the President argues, residents of these states will be hit with higher costs and unaffordable health care. The law must be rewritten, he says, to avoid the consequences the law itself imposes.

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Laying aside the fact that the Constitution gives Congress, not the President, the power to amend laws, the President's argument is completely circuitous. The reason 34 states could afford not to establish exchanges is because the President said he was going to pay subsidies regardless of whether a state establishes an exchange. Why would a state go to the trouble and expense of creating an exchange if the end result is the same? Indeed, in these difficult times of tight state budgets, not creating an exchange would be the fiscally responsible decision.

The President also grasps at exceedingly thin textual straws. Because the backstop provision I described above instructs that if a state does not establish an exchange, HHS shall step in and establish "such Exchange" itself,[4] the President says this means that federal exchanges are state exchanges.

3. 42 U.S.C. § 18041(c)(1).
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Now, before you try to wrap your head around the President's X-equals-not-X argument, let me return to the real provision in dispute in *King*, the one that defines eligibility for subsidies. This provision says, again, that an individual is eligible for each month that she is covered by a plan that she "enrolled in through an Exchange established by the State." An exchange established by the federal government is by definition not an exchange established by the state, regardless of whether the federal exchange is a backstop or not.

It gets even worse for the President, because the provision additionally specifies that the state exchange must have been established "under section 1311 of the [statute]."[5] That section sets forth the requirements for creating state-run exchanges. Nowhere does it mention federal exchanges. Rather, the conditions for creation of federal exchanges appear in a different section—section 1321.[6] Under no plausible reading of the text does a state exchange established under section 1311 mean a federal exchange established under section 1321.

Lacking any credible textual basis for their position, the President and his supporters have taken instead to twisting my words—and the words of other Obamacare opponents—to claim that we used to agree with the President's argument. Apparently their thinking is that if we used to agree with the President, then the Supreme Court should, too. The Solicitor General has even dredged up a five-year-old op-ed I wrote for *The Wall Street Journal* that he says supports the President's position. Of course the op-ed does no such thing, as I shall explain.

Why *South Dakota v. Dole* Won't Save the Obamacare Subsidies

The title of the op-ed is "Why the Health-Care Bills Are Unconstitutional."[7] That tells you right off the bat that the op-ed has nothing to do with *King v. Burwell*. The op-ed is about the constitutionality—or rather, the unconstitutionality—of Obamacare, whereas *King* is about the meaning of a specific provision of Obamacare. The op-ed addresses broad constitutional concerns; *King* involves a narrow, albeit highly important, question of statutory interpretation. Different issues, different questions, different analysis.

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The op-ed outlines a number of reasons Obamacare is unconstitutional, including because it exceeds Congress's powers under the Commerce Clause and the Taxing and Spending Clause and because it contravenes the General Welfare clause. The op-ed also explains how Obamacare violates core federalism principles, including the anti-commandeering principle, by ordering states to establish health insurance exchanges.

In the course of describing how Obamacare violates the anti-commandeering principle, the op-ed refers—without citation—to the holding of *South Dakota v. Dole*,[8] a 1987 Supreme Court decision. *Dole* said that Congress can lawfully condition federal funds to states as a means of incentivizing states to act, which is precisely what Congress attempted to do with Obamacare. The op-ed then goes on to explain why, in my view, *Dole* does not save Obamacare. *Dole* involved the payment of federal funds to states. The specific law at issue in the case required states to raise their drinking age or else

5. 26 U.S.C. § 36B(c)(2)(A)(i).

6 42 U.S.C. § 18041(c)(1).

7 Orrin G. Hatch et al., *Why the Health-Care Bills Are Unconstitutional*, Wall St. J. Jan. 2, 2010, *available at* http://www.wsj.com/articles/SB10001424052748703278604574624021919432770.

8. 483 U.S. 203 (1987).

lose a certain percentage of federal highway funding. Requiring states to raise their drinking age in this way was constitutional, the Court said, because states got something out of the bargain—money.

Obamacare violates the anti-commandeering principle by providing that if a state decides it doesn't want an exchange, the federal government will go ahead and create one anyway. This is a bit like telling a child to clean his room and that if he doesn't clean it, you're going to clean it for him.

But Obamacare subsidies don't go to state governments. They go to individuals, or to their insurance providers, in the form of tax credits. Obamacare thus coerces state governments without giving them a monetary benefit in return. It foists new expenses on state governments without accompanying relief. And that is what I wrote in the op-ed: establishing exchanges is "not a condition for receiving federal funds"—for states. The context makes clear that the op-ed is talking about states and what Obamacare requires states to do. Tax credits to individuals and to health insurance companies are a different beast.

The op-ed further explains that Obamacare violates the anti-commandeering principle by providing that if a state decides it doesn't want an exchange, the federal government will go ahead and create one anyway. This is a bit like telling a child to clean his room and that if he doesn't clean it, you're going to clean it for him. No matter how badly the child wants the room to stay the way it is—maybe he likes the way his toys are arranged or prefers a little clutter to a bare floor—you're going to make the room look the way you think it should.

This is not the way two equal partners work together. One doesn't tell the other, either you do what I want, or I'll do it myself. If ordering a state to do something violates principles of federalism, then surely ordering a state to do something and promising to do it anyway if the state refuses also violates federalism. As I wrote in the op-ed, Obamacare's this-is-going-to-happen-whether-you-like-it-or-not approach "renders states little more than subdivisions of the federal government." Now, one can debate the merits of the constitutional argument made in the op-ed. But there is no excuse for twisting my words and imputing to me positions I have never held—not then, not now.

Other Obamacare proponents have dug up old speeches of mine decrying the law's costs and inefficiencies. One writer has even made the perplexing claim that by arguing that Obamacare would lead to higher taxes, I was somehow endorsing the view that subsidies would be available on federal exchanges. Of course I never suggested any such thing. I merely made the commonsense point that as Obamacare causes insurance premiums to rise, increasing numbers of employers will drop coverage, forcing more and more Americans onto exchanges. And because Obamacare provides subsidies to subscribers who obtain insurance through state-run exchanges—we're talking millions of people here—these costs will increasingly be passed on to taxpayers.

To the extent this argument assumes that most subscribers who obtain insurance through exchanges will receive subsidies, this is because—at the time—it was widely expected that most states would set up exchanges. As I have explained, the reason most states ultimately could choose not to establish exchanges was because the President decided he was going to provide subsidies on federal exchanges, too, thus eliminating the incentive for states to create their own exchanges. If I'm guilty of anything, it's not changing my position—it's expecting the President would follow the law.

And that's what is ultimately at stake in *King*: Is the President bound to the law, or can he rewrite or simply ignore provisions he doesn't like in order to further his political agenda? Advocates of the President's position would have us believe that statutes are infinitely malleable—up can mean down, right can mean left, established by a state can mean not established by a state. What matters to them is advancing some vague notion of statutory purpose—regardless of what the statute actually says—that coheres with the President's left-wing agenda. Those of us on the other side, however, insist that text matters, words matter. What the statute says is what matters, because at the end of the day, the words in our statutes and in our Constitution are what bind our leaders and what prevent them from doing whatever they want. Fidelity to text is the foundation of the rule of law.

Conclusion

Ultimately, I believe the Supreme Court is going to side with us. Assuming that's the case, the question becomes: What do we do next? Most of the eight million people who purchased insurance through the federal exchange last year did so based on the Administration's promise that subsidies would be available. Obamacare has already inflicted a lot of damage on our nation's health care system, harming patients, consumers, and employers alike. I don't think we can stand by and simply let the shortcomings of the law harm millions more.

Text matters, words matter. What the statute says is what matters, because at the end of the day, the words in our statutes and in our Constitution are what bind our leaders and what prevent them from doing whatever they want. Fidelity to text is the foundation of the rule of law.

We need to help the people who will be hurt by losing their subsidies because of Obamacare's broken promises. That means providing a reasonable and responsible transition for those who may lose their subsidies while Congress works to repeal and replace Obamacare once and for all. And that's what we have to do: repeal and replace Obamacare. That's the only permanent solution to this and a host of other problems.

We need to take the federal government out of the equation and put individuals back in charge of their health care decisions. We also need to empower states where we can. I have already laid out some long-term reform ideas along these lines. In the coming days, I'll release details on a short-term solution for those Americans who may be affected by the Supreme Court's decision in *King v. Burwell*. That solution will address immediate concerns and set the stage for a more permanent fix in the future. I will continue to work with my colleagues on both sides of Capitol Hill on this issue. The American people deserve a health care law that works, and a President who follows the law. The former we can get started on now.

*—**The Honorable Orrin G. Hatch** represents Utah in the United States Senate, where he serves as Chairman of the Committee on Finance and as a member on the Committee on the Judiciary and the Committee on Health, Education, Labor, and Pensions.*