King v. Burwell and the Rule of Law

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ABSTRACT

On March 4, 2015, the U.S. Supreme Court heard oral argument in King v. Burwell, a tremendously important case involving the administration of the Patient Protection and Affordable Care Act, also known as Obamacare. At issue in King is whether the president can lawfully provide subsidies for health insurance plans purchased through federally established exchanges when the text of Obamacare authorizes subsidies only for plans purchased through state-established exchanges. In this Essay, I explain why the president's actions in King were unlawful and why a ruling striking down the president's actions is crucial to ensure the continued vitality of the rule of law.

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TABLE OF CONTENTS

INTRODUCTION..................................................................................................................4
I. Obamacare Background ............................................................................................6
II. The Unambiguous Text.............................................................................................7
III. Congress’s Intent ......................................................................................................8
IV. The Coercion Question ............................................................................................12
CONCLUSION ..................................................................................................................15
INTRODUCTION

On March 4, 2015, the U.S. Supreme Court heard oral argument in King v. Burwell, a tremendously important case involving the administration of the Patient Protection and Affordable Care Act, also known as Obamacare. King is important for a number of reasons. It's important because a lot of money is at stake. It's important because it may require fundamental changes to be made to Obamacare. And it's important—indeed, perhaps it's most important—because of its significant implications for the rule of law. In this Essay, I explain why the president’s actions in King were unlawful and why a ruling striking down the president’s actions is crucial to ensure the continued vitality of 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 in our statute books and in our Constitution.

4. MASS. CONST. pt I, art. 30; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).
5. See Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) (“To be governed by legislated text rather than legislators’ intentions is what it means to be ‘a Government of laws, not of men’” (quoting MASS. CONST. pt I, art. 30)). See also U.S. CONST. art. VI, § 3 (“The Senators and Representatives before mentioned, and the Members of
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. President Barack Obama’s offenses range from releasing Guantanamo detainees without first notifying Congress, as the law requires; to claiming that congressional inaction somehow clothes him with authority to suspend immigration laws; to arrogating to himself the power to determine when Congress is in session.

The president’s actions in King are yet another example of executive overreach. At issue in the case is the president’s decision to grant Obamacare subsidies to individuals who are statutorily ineligible for such subsidies in order to further what he claims are Obamacare’s overall purposes.

This Essay proceeds in four parts. Part I provides an overview of Obamacare’s subsidy regime. Part II demonstrates that the text of Obamacare clearly and unambiguously limits subsidies to individuals who purchase health insurance through state-run exchanges. Part III explains why Congress would have wanted to limit subsidies in this way, and rebuts the president’s claim that denying subsidies for individuals who purchase insurance through federal exchanges would undermine Congress’s intent. Part IV reiterates a point I first made five years ago—a point that became a focus of commentary following questions by Justice Kennedy during oral argument—namely, that Obamacare’s subsidy regime unconstitutionally commandeers states into creating healthcare exchanges. A brief conclusion follows.


I. OBAMACARE BACKGROUND

Obamacare requires every person in America to buy health insurance or else pay a penalty. This is the 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 healthcare 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. Because individuals who purchase insurance on their own through exchanges don’t receive an employer subsidy, they must contribute more toward their premium themselves. Obamacare provides subsidies to these individuals to help offset the cost of their higher premium payments.

At issue in King is whether Obamacare also authorizes the IRS to provide subsidies to individuals who purchase insurance through federally established exchanges. Under the well-known Chevron test, which the Court uses to examine the validity of an agency’s interpretation of federal law, the inquiry begins with the text of the statute. If the statute unambiguously answers the question, the inquiry ends and the agency must follow the clear text of the statute. If, however, the statutory text leaves room for doubt, the Court looks to other indicia of Congress’s intent in determining whether the agency’s interpretation of the statute is “reasonable.”

Here, the text of Obamacare clearly limits subsidies to individuals who purchase insurance through state-run exchanges. That ends the matter. But even if the text is ambiguous, interpreting the statute to permit subsidies on federally established exchanges is not reasonable because it contravenes Congress’s

17. See id. at 843.
18. Id.
intent in conditioning subsidies on creation of state-run exchanges. Under both steps of *Chevron*, this interpretation fails.

**II. THE UNAMBIGUOUS TEXT**

Start with the text of the statute. As I have described, Obamacare directs states to establish healthcare 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.19

Obamacare additionally authorizes subsidies for individuals who purchase insurance through healthcare exchanges.20 But a key provision of Obamacare—the one at the heart of *King*—conditions receipt of these subsidies on an individual’s enrollment in a state-run exchange. According to this provision, a subscriber is eligible for a subsidy only for each month that she is covered by a plan that she “enrolled in through an Exchange established by the State.”21 The text of this provision could not be more clear.22 If an individual enrolls in a plan through an exchange established by the state, she gets a subsidy. If she enrolls in a plan through any other exchange, she doesn’t get a subsidy.

Congress recognized, however, that some states might not create exchanges. Thus, it provided a backstop. In a separate provision of Obamacare, Congress directed that if a state did not set up an exchange by the January 2014 deadline, the Department of Health and Human Services (HHS) should “establish and operate such Exchange within the State.”23 Crucially, however, Congress did not provide that subsidies would be available to subscribers who enrolled in plans through federally established exchanges.

Fast forward to May 2012. Notwithstanding the unmistakably clear text of the statute, which limits subsidies to plans purchased through state-established exchanges, the president decided that he would also offer subsidies for plans purchased through federally established exchanges.24

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20. 26 U.S.C. § 36B.
22. See Transcript of Oral Argument, supra note 1, at 7 (“[T]he only provision in the Act which either authorizes or limits subsidies says, in plain English, that the subsidies are only available through an exchange established by the State under Section 1311.”) (statement of Michael A. Carvin, counsel for Petitioners).
The president grasps at exceedingly thin textual straws to justify his overreach. Because the backstop provision described above instructs that if a state does not establish an exchange, HHS should step in and establish “such Exchange” itself,25 the president says this means that federal exchanges are state exchanges.26 Right is left and up is down.

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. Recall that this provision says 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.”27 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.28

And 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].”29 That section sets forth the requirements for creating state-run exchanges.30 Nowhere does it mention federal exchanges. Rather, the conditions for creation of federal exchanges appear in a different section—section 1321.31 Under no plausible reading of the text does a state exchange established under section 1311 mean a federal exchange established under section 1321.

There is, in short, no ambiguity in the statute. Subsidies are available for plans purchased through state exchanges. Subsidies are not available for plans purchased through federally established exchanges. The president’s decision to grant subsidies for both types of plans contravenes clear statutory text.

III. CONGRESS’S INTENT

Lacking support in the text of the statute, the president focuses instead on arguments about Congress’s intent in passing Obamacare. He claims that subsidies for federally enrolled plans are necessary to accomplish Obamacare’s

28. Transcript of Oral Argument, supra note 1, at 26 (“[T]he Solicitor General is coming here to tell you that a rational, English-speaking person intending to [make] subsidies available on HHS Exchanges use[d] the phrase ‘Exchanges established by the State.’ He cannot provide to you any rational reason why somebody trying to convey the former would use the latter formulation.”) (statement of Michael A. Carvin, counsel for Petitioners).
31. See id. § 18041(c)(1).
overall purpose of reducing costs and improving healthcare access. The solicitor general summed up the president’s argument well when he told the justices at oral argument that denying subsidies to individuals enrolled through federal exchanges would “precipitate[,] . . . insurance market death spirals” and “revoke[,] the promise of affordable care for millions of Americans.” According to the solicitor general, “That cannot be the statute that Congress intended.”

But there is good reason to believe Congress did intend to deny subsidies for federally enrolled plans, and not just because that’s what the statute says. The reason is that Congress needed a way to incentivize the states to create their own exchanges.

Recall that Obamacare directs states to establish exchanges “not later than January 1, 2014.” 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 coequal sovereigns. Just as one state cannot command another state to do something, so too the federal government cannot command the states to do something. This is called the anticommandeering principle and is well established in Supreme Court case law.

What the federal government can do, however, is incentivize states to act. And that’s precisely what Congress attempted to do with Obamacare. By tying availability of subsidies to enrollment through state exchanges, Congress ensured that states would feel tremendous pressure to create their own exchanges. 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 that Congress could not achieve through direct command.

32. Brief for Respondents, supra note 26, at 38–42; see also Transcript of Oral Argument, supra note 1, at 44 (“[O]ur reading is compelled by the Act’s structure and design.”) (statement of Donald B. Verrilli, Solicitor Gen.).

33. Transcript of Oral Argument, supra note 1, at 44–45 (statement of Donald B. Verrilli, Solicitor Gen.).

34. Id. at 45.


Congress’s reasoning in refusing to provide subsidies on federally established exchanges is therefore obvious. If subsidies were available under both state and federal exchanges, states would have no incentive to create their own exchanges—to expend time and resources setting up an online insurance marketplace—because subsidies would come either way. And if fewer states created exchanges, 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 healthcare market, a result unacceptable to several key Obamacare supporters whose votes were essential to pass the law. The president’s parade of horribles also proves too much. Without subsidies to individuals in the thirty-four states that lack state-run exchanges, he says, residents of those states will be hit with higher costs and unaffordable health care. But the president’s argument is completely circuitous. The reason thirty-four states could afford not to establish exchanges is because the president said he would provide subsidies regardless of whether a state established an exchange. The president’s actions destroyed the incentive structure Congress created. 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 might be the fiscally responsible decision.

40. See Transcript of Oral Argument, supra note 1, at 26 (“If you give unconditional subsidies, then . . . there is absolutely no incentive for States to do it, and you have fundamentally undermined that distinct statutory purpose.”) (statement of Michael A. Carvin, counsel for Petitioners).


43. See Brief for Respondents, supra note 26, at 12; see also Transcript of Oral Argument, supra note 1, at 45 (statement of Donald B. Verrilli, Solicitor Gen.).

Lacking support either in the text of the statute or in other markers of Congress’s intent, the president has taken instead to twisting my words—and the words of other Obamacare opponents—to claim that we used to agree with his position.45 The president’s thinking appears to be that if we used to agree with him, then the Supreme Court should, too.

For example, in its brief in the Supreme Court, the administration dredged up a five-year-old op-ed I wrote for the *Wall Street Journal* that the administration claims supports the president’s position.46 Of course the op-ed does no such thing. The op-ed makes a number of arguments why Obamacare is unconstitutional.47 It says nothing at all about whether subsidies are available for federally enrolled plans.

One line in the op-ed, which the administration’s brief pulls out of context, says that establishing an exchange is “not a condition for receiving federal funds.”48 As I explain below, this line was a reference to the Supreme Court’s holding in *South Dakota v. Dole*49 that Congress can use funding conditions to incentivize states to do things that it cannot command them to do directly.50 Because Obamacare subsidies go to individuals or to their insurance providers, not to states, *Dole* does not apply. Establishing an exchange is not a condition for a state to receive federal funds.51

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.52 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.53 And because Obamacare provides subsidies to

45. See Brief for Respondents, supra note 26, at 45.
47. See Hatch et al., supra note 46, at A11–12.
48. Id. at A12.
50. Id. at 212.
51. See infra Part IV.
52. Simon Maloy, Orrin Hatch Is About to Lie: Rebutting His Upcoming SCOTUS Defense, Using His Own Words, SALON (Feb. 12, 2015, 10:31 AM), http://www.salon.com/2015/02/12/orrin_hatch_is_about_to_lie_rebutting_his_upcoming_scotus_defense_using_his_own_words.
millions of subscribers who obtain insurance through state-run exchanges, these costs will increasingly be passed on to taxpayers.\(^{54}\)

To the extent this argument assumes that most subscribers who obtain insurance through exchanges will receive subsidies, this is because—at the time I made the argument—it was widely expected that most states would set up exchanges.\(^{55}\) As I have explained, the reason most states ultimately could afford not to establish exchanges was because the president decided to also provide subsidies on federal exchanges, thus eliminating the incentive for states to create their own exchanges.\(^{56}\)

In sum, Congress passed a statute that authorizes subsidies for plans enrolled through state exchanges but not for plans enrolled through federal exchanges. The statute is unambiguous on this point. Moreover, Congress had a clear reason to structure the statute in this way. It needed states to create exchanges in order to avoid a politically untenable, federally run healthcare market, but could not command states to create exchanges directly. So it came up with an incentive. Subscribers enrolled through state exchanges get subsidies; subscribers enrolled through federal exchanges do not. States would accordingly feel pressure to create exchanges to ensure that their citizens do not lose out on millions of dollars in potential subsidies. In granting subsidies for federally enrolled plans as well, the president’s act of overreach flies in the face of both clear statutory text and Congress’s intent in structuring the subsidy regime that way it did.

**IV. THE COERCION QUESTION**

At oral argument, Justice Kennedy raised the possibility that if Obamacare subsidies are not available on federal exchanges, then the entire subsidy regime might be unconstitutional because it would place *too much* pressure on states to set up exchanges. Alluding to the president’s assertion that denying subsidies for federally enrolled plans would cause insurance markets to collapse in states without state-run exchanges,\(^{57}\) Justice Kennedy suggested that the petitioners’

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\(^{54}\) See id.


\(^{56}\) See Brief for Petitioners, supra note 55, at 14.

\(^{57}\) See Brief for Respondents, supra note 26, at 15, 37.
reading of the statute would arguably tell states, “either create your own Exchange, or we’ll send your insurance market into a death spiral.”

Supporters of the president immediately latched on to Justice Kennedy’s concern as a reason to interpret the statute to permit subsidies for federally enrolled plans. The solicitor general, for his part, argued that if the Court thought that limiting subsidies to state-enrolled plans would “rise to the level of something approaching coercion,” then “the doctrine of constitutional avoidance becomes another very powerful reason to read the statutory text our way.”

But the constitutional avoidance doctrine, which says that statutes should be interpreted to avoid “serious constitutional problems,” applies only when a statute is ambiguous. Here, the statute is crystal clear. Subsidies are available only on state exchanges. End of story.

That does not mean, however, that Justice Kennedy’s concern should be swept aside. The constitutionality of Obamacare’s subsidy regime is highly suspect, and not only under a theory of coercion. As I first wrote five years ago in the Wall Street Journal op-ed, the subsidy regime also violates the anticommandeering principle. It does so in two ways.

First, it orders states to create exchanges without giving them a benefit in return. As noted above, in South Dakota v. Dole the Supreme Court held that Congress can lawfully condition federal funds to states as a means of incentivizing states to act. This gives Congress a way around the no-commandeering rule—Congress can incentivize states to act but can’t order them—and is precisely what Congress attempted to do with Obamacare. However, as the op-ed explains, there is a crucial difference between the regime the Court blessed in Dole and the regime at issue in King.

58. Transcript of Oral Argument, supra note 1, at 16 (Kennedy, J.).
60. Transcript of Oral Argument, supra note 1, at 49–50 (statement of Donald B. Verrilli, Solicitor Gen.).
62. See U.S. v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 494 (U.S. 2001) (“[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity.”); see also Transcript of Oral Argument, supra note 1, at 17 (colloquy between Scalia, J., and Michael A. Carvin, counsel for Petitioners).
63. Hatch et al., supra note 46, at A12.
64. 483 U.S. 203, 212 (1987).
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 lose a certain percentage of federal highway funds. The Court concluded that requiring states to raise their drinking age in this way was constitutional because states received something in return—money.

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 pressures state governments to act without giving them a monetary benefit in return. The Dole escape hatch doesn’t apply.

The second way Obamacare’s subsidy regime violates the anticommandeering principle is by denying states the ability to reject Congress’s directive. Under Obamacare, if a state decides it doesn’t want an exchange, the federal government goes ahead and creates 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.

That 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 2010 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.”

King may not be the right vehicle to address these constitutional infirmities. Neither side raised the constitutionality of Obamacare’s subsidy regime in its briefs, and a decision to strike down a central element of Obamacare should probably be made only with the benefit of full briefing. In an appropriate case, however, the Court should confront these questions head on. Just as the president must follow the law, laws must follow the Constitution.

65. See id. at 205.
66. See id. at 211.
70. Hatch et al., supra note 46, at A12.
71. See SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”); see also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 570 (2001) (“We decline to address an issue that was not sufficiently briefed and argued before this Court.”).
CONCLUSION

What’s ultimately at stake in *King* is the president’s obligation to follow the law. Faced with a statute that doesn’t operate quite the way he envisioned, President Obama decided to disregard the parts of the law he doesn’t like and instead implement a different statute. But the Constitution doesn’t give the president leave to unilaterally rewrite laws. The power to amend laws lies with Congress, and until Congress amends a statute, the president is bound to the text Congress passed.

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 established by the federal government. What matters to them is advancing some alleged statutory purpose—regardless of what the statute actually says—that furthers the president’s 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.

The president’s actions in *King* have undermined the rule of law and contravened important constitutional checks on the president’s authority. As has increasingly been the case under this administration, it is now up to the Supreme Court to rein in the president’s overreach and to reaffirm the fundamental obligation of all government officials to follow the law.

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72. See U.S. CONST. art. 1, § 1; United States v. Gaskin, 320 U.S. 527, 530 (1944) (Murphy, J., dissenting) (“Congress alone has power to amend or clarify . . . a statute.”).

73. See Brief for Respondents, supra note 26, at 35.

74. See John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force,* 89 NOTRE DAME L. REV. 1237, 1266 (2014) (quoting, while recognizing that the source of the quote is disputed, Patrick Henry as saying that “[t]he Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government”).

75. Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81, 122 (2007) (“The only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail.”).