Three Reasons *King v. Burwell* Doesn't Constitute 'Coercion' under Existing Precedent

By Michael F. Cannon
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During this month's oral arguments in *King v. Burwell*, Supreme Court Justice Anthony Kennedy asked whether the Affordable Care Act effectively coerces states into implementing the law's health-insurance Exchanges. Insofar as such coercion is unconstitutional, the Court's decision — and Obamacare's survival — could hinge on whether it exists in the ACA.

Understanding Kennedy's concerns requires understanding the ACA's insurance regulations.

In the small share (less than 10 percent) of the insurance market where carriers sell directly to consumers, the ACA imposes so-called "community-rating" price controls, which reduce premiums for the old and sick by dramatically increasing premiums for the young and healthy.

If young and healthy consumers respond by refusing to buy insurance, what results is a market with few carriers and even *higher* premiums. In some cases, community-rating price controls can cause insurance markets to collapse.

To mitigate these potential harms, the ACA mandates that everyone purchase coverage, and, in that small corner of the market, subsidizes premiums for moderate-income consumers.

The ACA authorizes such subsidies "through an Exchange established by the State." Yet the IRS is dispensing subsidies in all states — including the 38 states that failed to establish Exchanges. Those states' Exchanges were established by the federal government.

The *King* challengers argue that because those Exchanges were not "established by the State," it is illegal for the IRS to issue subsidies in those states.

Which brings us back to Justice Kennedy. He expressed concern that if the challengers are correct, then withholding subsidies in uncooperative states would make the costs of the ACA's community-rating price controls transparent to consumers, and those costs might have the effect of coercing states into implementing Exchanges.

But would that really amount to coercion? Consider three factors.

1. The ACA's Exchange provisions don't penalize states. They let states make tradeoffs between taxes, jobs, and insurance coverage.

If a state fails to establish an Exchange, the ACA withholds subsidies from a state's *residents*, not the state. In *New York v. United States*, the Court held that imposing burdens on state residents does not coerce states: "The affected States are not compelled by Congress to regulate" when the "burden caused by a State's refusal to regulate will fall on [private actors], rather than on the State as a sovereign."

Moreover, forgoing the subsidies would also confer *benefits* on state residents. It would free many individual residents from the ACA's individual mandate, and all in-state employers from the law's employer mandate. As a result, residents would then see lower taxes, more jobs, more hours, higher incomes, and more flexible health benefits.

2. Roughly half of states appear to consider those costs tolerable.

Prior to 2014, eight states voluntarily imposed this supposedly coercive penalty *on themselves*. Iowa, Minnesota, New Jersey, and Washington adopted community-rating price controls similar to the ACA's, while Maine, Massachusetts, New York, and Vermont adopted price controls even harsher than the ACA's.

Another eight states (Alabama, Georgia, Indiana, Nebraska, Oklahoma, South Carolina, and West Virginia) filed briefs and/or their own legal challenges asking the courts to *enforce* this supposedly coercive condition on them.

Thirteen states appear to prefer this penalty to complicity with the ACA's mandates. Alabama, Arizona, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, Tennessee, and Virginia have enacted statutes to prohibit state officials from assisting in the implementation of the individual or employer mandates — a key function of the Exchanges. Alabama, Arizona, Ohio, and Oklahoma adopted such prohibitions via constitutional amendment. Ohio and Oklahoma voters approved their amendments by a 2-to-1 margin.

Under the *King* challengers' interpretation of the ACA, the number of people who would be freed from the individual and employer mandates would exceed 57 million. That's roughly 10 times the number who would lose subsidies. States may judge those benefits to be worth the cost of having their health insurance market look like Minnesota's.

3. This "deal" is comparable to what the Court allowed in *NFIB v. Sebelius*.

In *NFIB*, the Court allowed states collectively to turn down Medicaid subsidies for as many as 16 million poor people. The Exchange provisions permit states to do the same for 16 million higher-income residents.

As Chief Justice John Roberts wrote in *NFIB*:

> "In the typical case we look to the States to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments when they do not want to embrace the federal policies as their own…The states are separate and independent sovereigns. Sometimes they have to act like it."

Judging by the behavior of states and the Court's existing standard for demonstrating coercion, this seems like the typical case where states will do just that.

I have no objection to the Court lowering the bar for demonstrating that cooperative federalism programs coerce states. But the Court will have to lower the bar quite a bit to find the ACA's Exchange provisions coercive.

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