Analysis: CBO contradicted the latest case against Obamacare 68 different times

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The Congressional Budget Office wrote 68 reports about the Affordable Care Act during the session that Congress debated the law. Not one of them, a new analysis from Harvard University's Theda Skocpol, ever explored the possibility of limiting insurance subsidies to the state marketplaces.

The analysis could prove relevant in the pending Supreme Court case, *King v. Burwell*, where challengers argue that Congress meant for Obamacare to limit subsidies to state exchanges. If the justices agree, millions of Americans who purchased coverage through Healthcare.gov could lose billions in health-insurance subsidies.

The CBO's whole job is to game out how much different laws will cost. The agency typically looks at different possible scenarios. When the Supreme Court ruled, for example, that the Medicaid expansion was optional, it published new cost estimates for scenarios where some states either did or didn't opt out.

Skocpol points to the fact that CBO never considered a similar, alternate scenario where some states didn't build exchanges as evidence that Obamacare's drafters meant for *all* states to get subsidy money.

She isn't the first person to make this argument: the New Republic's Brian Beutler talked to a former CBO analyst who made the same argument. And Yale University's Abbe Gluck also explored the issue in 2012.

But Skocpol's analysis is the first to comb through each and every CBO analysis of the health-care law to make the point. This includes requests from both Democrats and Republicans. And, each of them shows CBO never considering a situation where only some states get subsidies for their residents.

This is not, by any means, a surefire case for the Obama administration. When I've talked to supporters of the Obamacare challenge, they'll argue that these CBO analyses reflect the assumptions of lawmakers at the time. In November, this is something I talked about with Michael Cannon, a Cato Institute expert who has worked on the lawsuit:

Sarah Kliff: This is something I'm curious to hear your take on. I think there was always the thought that maybe one or two states could screw up and not be ready to open their exchanges in time. Or you might have a state like Texas, where the legislature only meets every other year, and they couldn't get it authorized in time. Under your reading of what Congress meant to do, was the plan to punish a state like that by barring subsidies? That's really hard for me to see and goes back to my initial point about Congress always expecting all states to have subsidies.

Michael Cannon: States had more than three years to establish exchanges. The strongest evidence we have that Congress expected all states to do so in that timeframe is that Congress provided zero funding for federal exchanges in the law.

It may have been the case that — if this legislation had gone to conference — someone would have objected to the conditional nature of the Senate bill's Exchange[capitalized?] subsidies, that someone would have said, "This would knock out one leg of the three-legged stool! Did you pay attention to those town hall meetings in August? We can't let the Tea Party grab onto this because they'll blow up the whole thing! We have to change that!"

But that didn't happen. When Scott Brown won, Democrats only had one bill they could get through Congress. That's how this provision became law.

You didn't ask about it. Julie [Rovner, a health-policy reporter formerly with NPR and currently with Kaiser Health News] didn't ask about it. That doesn't mean that Congress wasn't meaning to do it. That doesn't mean it's not the law. It just means that there was so much else going on that no one examined this. No one questioned them on it.

Skocpol makes a different argument, similar to the idea I raised in my question.

"The larger truth is that no one assumed every state would do this," Skocpol, a professor in Harvard's school of government, says. "It wasn't an issue of politics then, it was one of policy: these were smaller states and there was a thought some of them wouldn't be able to manage the process. It was taken for granted by all parties that some states would need a backup."