

THE NEW REPUBLIC

Why Are Conservative Health Journalists Covering for Halbig Truthers?

By Brian Beutler

July 29, 2014

The unearthing last week of video footage showing MIT professor Jonathan Gruber—one of the Affordable Care Act's key architects—claiming *sua sponte* that the health law's subsidies were conditioned upon states setting up their own exchanges has emboldened a once-marginal faction of Obamacare haters I like to call Halbig Truthers, in honor of the recent D.C. Circuit Court panel's ruling in *Halbig v. Burwell*.

These are the conservatives who claim not just that the plain text of the ACA statute limits subsidies to states that set up their own exchanges, but that the law's drafters—and the Democrats in Congress who voted for it—wanted it this way, and are now disclaiming their own subsidy scheme because too many states called their bluff.

For years now, this has been a fringe position on the right, in part because many conservatives (like liberals and mainstream media reporters) were there to chronicle the legislative debate in great detail. They spoke to members of Congress, immersed themselves in the substance of the legislation, and pored over Congressional Budget Office reports. Some of them even read hundreds of pages abstruse bill text and did their best to reconcile it with their understanding of the policy intent. If in our sleuthing, any of us who covered the debate had divined through interviews or other methods that the law's authors intended to make the subsidies conditional—to coerce states into setting up their own exchanges—it would have been among the biggest scoops of the entire process. If, for instance, Louisiana Senator Mary Landrieu had any reason to suspect that the bill she'd used so much leverage to constrain would allow Governor Bobby Jindal to deny the law's core benefits to her constituents, she wouldn't have voted for it.

To the extent that the question wasn't probed widely, if at all, it's because that would've been almost like asking whether the subsidies were intended to be denominated in Rubles. Indeed, outside the Halbig-Truther fringe, the debate over setting up state-exchanges was one that *divided conservatives*. All of them correctly understood that opting out would cede power to the federal government. But they parted ways over whether it was strategically wiser to hold the feds at bay, or overwhelm them with responsibility for creating more exchanges than they'd anticipated. The flashpoint wasn't over an obscure loophole in the law, but over how best to cope with the obvious universality of Obamacare. Likewise, liberals didn't panic as more and more red states opted not to set up their own exchanges, but rather chuckled at the ironic spectacle of "states' rights" Republicans standing aside and allowing the federal government to gobble up some more of their sovereignty.

Any port in a storm, though, which is why some right-wing activists have spent the last several months fabricating a rival narrative—a ludicrous theory of intent, in which leading Democrats meant to condition the subsidies, but decided to keep the inducement a secret from reporters, back bench members, governors, budget analysts, and health care reform advocates. This kind of deceptive argumentation is perhaps to be expected from activists. What's become incredibly frustrating to me about the *Halbig* brouhaha in the last few days is watching the conservative health care writers who were in the same trenches watching the same debate unfold—attempting, from a very skeptical vantage point, to explain the bill correctly—suddenly turn around and vouchsafe the Halbig Truthers.

"It was a complex law," tweeted the *Washington Examiner's* Philip Klein, who was the right's most industrious health reporter in 2009. "Didn't catch everything." He called the Gruber comments a "bombshell." Certainly nobody caught everything. But according to the theory, this isn't something marginal to the policy architecture. It changes the entire blueprint. And remember, the Halbig Truther claim isn't that Dems accidentally enacted a policy at odds with their unanimous intent. It's that the bill writers meant to do this all along, and the Dems who voted for it either knew what they were doing or didn't get the memo. "Didn't catch everything" doesn't just mean that you missed the key, unintentional phrasing buried in the statute, but that you and everyone around you failed in the most basic execution of duties as reporters, analysts, government officials and so on.

Bloomberg's Megan McArdle called the Gruber video "the closest thing we're going to get to a smoking gun." She posits that the Landrieus of Congress "undoubtedly had little idea what was in it other than 'health care!,'" which requires sweeping five committee markups, scores of briefings, bitter left-center divisions over dozens of provisions, and the centrality of many individual Senate Democrats to much more ancillary measures in to the bill into the dustbin of history. If "the record of congressional deliberation on this matter has been thin," it isn't because the debate in general was rushed and superficial, but because the matter wasn't actually up for debate. No Democrat from a state with a Republican governor would've knowingly voted their constituents out of the bill's core benefit system. And by August of 2009 there was little doubt that Republicans across the country were going to make establishing the benefit as difficult as possible.

Like McArdle, Reason magazine's health care writer, Peter Suderman, doesn't *quite* fall into line for Halbig Truthers. But he infuses Gruber's remarks with the kind of monumental significance he does not accord to any of Gruber's other statements, or the statements of dozens of other key Democratic aides, the director of the Congressional Budget Office, or this former Republican Finance Committee staffer—an "inverse Gruber" if you will.

The appeal of the Halbig-Truther theory is simple. Trying to take health insurance away from five million people on an admitted technicality doesn't wear well. It wears much better if you pretend that's what Obamacare's creators wanted. It also entails asking judges to uphold the law as written and intended, rather than as scolds for legislative syntax and diction. "Liberals feared some states wouldn't set up exchanges, so they deliberately wrote incentives into the law so the states would do so," according to the editors of the *Wall Street Journal*. "This was the conventional liberal wisdom until this year when it suddenly became legally and politically inconvenient for the Administration to admit it."

The one thing about conventional wisdom is that it's easy to evince. If this were the "conventional liberal wisdom" the right would have no shortage of smoking guns, let alone just the Gruber imbroglio, which is more like a dribbling water pistol. By contrast, there's plenty of

evidence for the conventional wisdom that, irrespective of statutory text, Democrats intended for subsidies to flow everywhere no matter what, and that Halbig Truthers came to their position out of convenience.

To take yet another example, evidence suggests states were completely silent about the availability of subsidies when deciding whether or not to establish their own exchanges. That's not how spending power incentives work. Awareness of the incentive is key to its effectiveness. Per Michael Hiltzik, burying the incentive would be like building a Strangelovean doomsday deterrent device and then keeping it a secret from the world.

Even the CATO Institute's Michael Cannon—an original Halbig Truther—once understood the challenge in *Halbig* as a referendum on statutory draftsmanship, rather than Congressional intent, until, to coin the *Wall Street Journal*, it suddenly became legally and politically inconvenient to admit it. In September 2011, he called it a “glitch.” In a December 2011 podcast, Cannon explains to his interlocutor, “It's not clear whether [universal subsidies] was Congress' intent. Certainly some people who endorsed—who support Obamacare want the law to operate that way. But that's not the way the law was drafted, and passed and signed into law by the President.... What the administration's supporters are arguing is that when Congress' intent is ambiguous, then the courts will, or should, give deference to the executive branch in interpreting Congress' intent. But increasingly what the Supreme Court has said is that no, it's not Congress' intent that has to be ambiguous for us to give the executive this sort of deference—the language of the law has to be ambiguous.”

Now I think he was being a little bit coy and a little bit too eager. I'd argue that Congress' intent wasn't ambiguous at all, and that the language of the law is at worst ambiguous, and, when read in toto, quite clear that residents in every state would get subsidies no matter what. He took the other side of that argument. What he wasn't doing is asserting that Democrats miscalculated and are now trying to rub erasers over their bad math.

That's what the *Halbig* argument has become, though—an attempt to create an epistemological grey area where none existed.

If you're an activist attempting to dismantle Obamacare by any means necessary, that's strategy. But if you're a health care journalist playing along, you're implicitly repudiating your reportage from 2009 through 2014, and calling your own integrity into question.