

THE WEEK

The latest ObamaCare decision makes it official: We need more liberal judges

Conservatives are well aware that there's no such thing as an objective judiciary. It's time for liberals to get with the program.

By Ryan Cooper
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After the passage of ObamaCare in 2010, dozens of conservative wonks, activists, and lawyers began poring over the text of the law, trying to find some legal foothold to overthrow as much of it as possible. First they argued that the law's individual mandate was unconstitutional in *NFIB vs. Sebelius*, which was rejected by the Supreme Court in 2012. However, the decision weakened the law by making its expansion of Medicaid optional, which led most conservative states to reject it and deny coverage to millions of poorer Americans.

Then, in *Burwell vs. Hobby Lobby*, conservatives attacked the scope of the law's mandated coverage, arguing that the inclusion of certain kinds of contraception violated the Religious Freedom Restoration Act. That one they basically won, though the damage was minimal.

You'll know these efforts by what conservatives usually call them: "judicial activism." It paid off again today, with a three-member panel of the U.S. Court of Appeals for the District of Columbia Circuit dealing a sharp blow to ObamaCare's subsidy system. Adrianna McIntyre explains:

The suit alleges that subsidies should only be available in states that set up their own insurance exchanges, based on the text of the Affordable Care Act. The government can still appeal, but if it ultimately loses the case at the Supreme Court, it's possible that federal subsidies will no longer be available to help make insurance affordable in over 30 states.

Due to what appears to many outside observers to have been poorly crafted legislative language, Congress arguably wrote a sentence that provides subsidies exclusively to state-based exchanges and not to federally facilitated ones, even while subjectively intending to provide subsidies in both cases. [*Vox*]

Now, *Halbig v. Burwell* is only a preliminary ruling. The government probably will request an "en banc" ruling before the entire appellate court, which leans to the left — thanks to Majority

Leader Harry Reid (D-Nev.) pushing through filibuster reform that filled its long-empty seats with President Obama's appointees. What's more, another ruling hours later by the Fourth Circuit Court of Appeals in Richmond, Virginia, *upheld* the ObamaCare subsidies, deferring to the government's interpretation of the language to mean that it is authorized to dole out those subsidies. It's possible this will all end up before the Supreme Court, increasingly America's only policy-making body of consequence.

God only knows what the high court will decide. Thirty-six states did not create their own ObamaCare exchanges, which means that upholding *Halbig* would swipe the subsidies from something like 87 percent of people who bought insurance on the federal exchange — about 4.7 million of them. Premiums would shoot up by an average of 76 percent, basically crippling the law. An individual mandate is unjustifiable without subsidies for people who can't afford insurance. Chief Justice John Roberts might balk at destroying the keystone achievement of the Obama presidency on what amounts to a trivial technicality — or he might not.

What we do know is that the concept of judicial "neutrality" is nothing but a farce. The conservative goal is to pick at any possible legal thread and mobilize the judicial system to achieve their aim of destroying the law and throwing millions of people off their health insurance, even if the underlying legal rationale is wildly tendentious or weaselly or undemocratic. There will be Republican-appointed judges who will buy such arguments wholesale, as evidenced by the conservative majority in *Halbig*, which didn't even bother to hide their scorn for the government's case.

Indeed, half the reason so many states don't have exchanges in the first place is that a Cato Institute analyst named Michael Cannon has been crossing the nation telling them not to, with the deliberate object of maximizing the damage to ObamaCare if the courts endorsed *Halbig*-style reasoning.

Liberals need to jettison the impossible idea of neutral, objective judges, and just get avowed lefties appointed wherever possible. As conservatives have demonstrated, that's simply how the system works.