



The Libertarians Who Got SCOTUS and Congress to Consider the Unthinkable

Changes to Obamacare could be coming soon.

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Inside the Supreme Court, Justice Antonin Scalia was trying to give Congress some credit. Why, he asked Solicitor General Don Verrilli, should the court worry about destroying the Affordable Care Act if it ruled against subsidies for states that hadn't created exchanges?

"Congress adjusts, enacts a statute that takes care of the problem," said Scalia. "It happens all the time. Why is it not going to happen here?"

"Well, *this* Congress, your honor," said Verrilli.

Laughter erupted in the room. Outside the court, there was ample proof that any congressional "fix" would be protested by people who had the ears of the GOP's leadership. Some of the Tea Party activists who helped elect a Republican Congress—a Congress that would not amend the ACA to clean up the subsidies language—were waving signs and giving interviews. A sound system at a pro-ACA press conference played the 2012 Obama campaign theme "We Take Care of Our Own," as the protesters chanted "Liberty! Obey the law!"

American Commitment founder Phil Kerpen, meanwhile, was stripping down to a shirt Tea Party Patriots had given him for Christmas. It featured a picture of ACA guru Jonathan Gruber in mid-sentence—mid-lie, probably—and the legend *I'm with stupid*. This was attracting photographers like a corgi riding on a dolphin.

"I've actually experienced what few men experience," Kerpen joked. "People are looking at my shirt, and I want to say: Hey, my eyes are up here."

The fact that *King v. Burwell* made it to the Supreme Court is a triumph for years of libertarian organizing, thinking, and suing, in Washington and in schools across America. Libertarian lawyers and activists convinced the entire Republican polity that a case to blow up the ACA's subsidies system was winnable. They rattled Democrats who—for the second time—

underestimated the legal vulnerability of the law. And they were hardly finished. The *King* case and its aftermath showed just how ambidextrous these challengers could be.

When the first subsidies cases were filed and argued, defenders of the ACA viewed them as not just obscure but dilatory. They warred with Case Western law professor Jonathan Adler and Cato Institute scholar Michael Cannon, who churned out arguments about how ending the subsidies would follow the law and liberate 36 states from mandates. Progressive health care reporters compared the case to an episode of *Seinfeld* in which George Constanza insists that "the Moops," not the Moors, conquered Spain, because a typo said so.

Since then, libertarians have routed the law's defenders on several fronts. Kerpen helped make Gruber infamous by publicizing the video research of Rich Weinstein, a Philadelphia investment advisor who was angry about what the ACA did to his own care. The idea that Democrats always meant for subsidies to be denied to states that did not set up exchanges, which appeared to be a reach, was bolstered by multiple Gruber quotes. Dismayed Democrats went from arguing that the subsidies case was ridiculous, to denying that Gruber played much of a role in the law's construction. Republicans called Gruber before an oversight committee to take turns pummeling him; reporters chased him out the door as the fallen wonk dodged questions. (Since then, Gruber has been removed from advisory jobs by the Democratic governor of Vermont and the Republican governor of Massachusetts.)

When *King* was taken up by the high court, libertarians gave Congress another great idea. In an op-ed for *USA Today*, Georgetown law professor Randy Barnett warned that the court was "reluctant to invalidate a law on which many relied." The solution was for Republicans in Congress to write a replacement bill. "It will be far easier for the justices to enforce the law's existing language if they know there is a viable alternative that can be enacted by both houses of Congress and signed by the president within a week of their ruling," Barnett wrote.

This year, as the arguments approached, senators and congressmen in key committees started promising Obamacare fixes. They largely followed the advice of Avik Roy, a conservative health care wonk who argued that Republicans could set up an "alternative, more market-based" system if the subsidies were struck down. Two days before *King v. Burwell* arguments began, Representatives Paul Ryan, John Kline, and Fred Upton published an op-ed promising an "off-ramp" for states if the plaintiffs won. It would be "a legislative alternative that leads them away from an expensive health-care wreck and toward a patient-centered system." (Ryan, Upton, and Utah Senator Orrin Hatch all attended the arguments.)

Avik Roy made it to Wednesday's arguments. He got to hear Scalia take up a version of this argument, and insist that the Congress would fix the law. After exiting the court, standing near the attorneys who were holding press conferences in front of more than a dozen cameras, Roy surmised that the serious conservative arguments for a post-subsidies health care system had sunk in. "I think the most recent op-ed, by Ryan, Klein, and Upton, had a level of detail that made it more credible," he said.

Cannon and Adler, who had exited the court and were standing nearby, agreed with Roy. "The fact that members of Congress are looking at this and kicking around ideas means that they are

being proactive," said Cannon. "If anything gums up that process it appears it's going to be the administration."

All three men were optimistic about the conservative challenge. "[Anthony] Kennedy and [John] Roberts were asking skeptical questions about whether they should defer to the government on this," said Cannon. "Each of them asked similar pointed questions about whether its argument was reasonable, suggesting that they don't think it is."

In fact, according to Cannon, a court ruling that saved the subsidies would expose the ACA to further danger. If the court ruled for the government, and the IRS had been within its bounds to give subsidies (and administer taxes) in states without exchanges, that might be good news for a sleepy Maine lawsuit that defended the state's right to limit Medicaid eligibility. Ruling for the government, said Cannon, "would overturn a lot of Supreme Court precedent and make vulnerable to challenge a lot of federal programs where the federal government partners with the states, because people would be able to challenge those as unconstitutional."

After he said that, Cannon pulled Adler aside and asked, "Did you hear any indication that they were concerned with the impact of finding the condition unconstitutional?"

Adler hadn't. "There is this idea that they'd be plowing new ground," he said. "I think Kennedy, when he wants to, is very willing to plow new ground. He is not a cautious justice. I think there is some recognition that they may be doing something different. They're certainly aware that if they create a new standard here, it'd be applied broadly. There's a case filed in Maine, a case filed in Ohio."

"It would help Maine," said Cannon. "If they find the conditions on the subsidies coercive, that helps Maine. And they've filed certiorari."

Cannon and Adler kept talking until other reporters sidled up for interviews. One of them happened to be a cameraman for Vox.com.

"Ah, Vox," said Adler. "Is that the site edited by Ezra 'do not read the bill' Klein?"

"Are you recording?" asked Cannon. He held up his iPhone and displayed the family photo on the lock screen. "I just want to make sure Ezra is aware that my twins are one boy and one girl." He was quibbling with a grudging Vox explainer on the case, and having fun doing it.

As they talked, Sam Kazman, the general counsel at the Competitive Enterprise Institute, was wrapping up an interview of his own. He'd been at the table for the arguments, and helped formulate the case that made it to the court. Yet only recently was he deluged with interviews.

"You wouldn't believe how many reporters have called the last two weeks and said, 'so, explain this case to me,'" said Mary Beth Hutchins, CEI's director of media relations.

When one TV interview was done, Kazman wheeled around to sum up the feeling in the room. He was pleased that the questions about the standing of his plaintiffs seemed to peter out after the first round of arguments, but the day could have gone better.

"One interesting thing I noticed about all the disaster claims?" he asked. "You know, if we were to win, all the victims? They largely ignored that Obamacare itself is producing huge numbers of victims. In terms of severity of injury, our plaintiffs are almost at the bottom rung."

There might be a case there. At the least, there would be a Congress ready to act.