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The Supreme Court is About to Get Another Chance to Gut Obamacare

BY Simon Lazarus May 13, 2013

After the Supreme Court upheld the Affordable Care Act last June, Senator Jim DeMint and Representative Michele Bachmann wrote Republican governors, urging them to refuse to establish ACA-prescribed "exchanges"—statewide health insurance markets—for small businesses and individuals not covered by employer-sponsored health plans. At the time, it seemed unlikely that many governors would follow this cut-off-your-nose-to-spite-your-face advice, since the ACA directs the Federal government to step in and run an exchange for states if they opt out. Hence, no real harm to the ACA, just to Republican governors and legislators, who would lose credit for a valuable constituent service. But Tea Partiers have kept up their resist-resist-resist drumbeat, and over half the states have stuck with the refusenik option.

Why has partisan obstructionism continued to trump what would ordinarily seem good politics and policy? A major reason is that ACA bitter-enders have insisted that they have an ace in the hole: right-wing federal judges sympathetic to their avid distaste for Obamacare.

On May 2, they played that ace. Michael Carvin, hardy perennial pleader of high profile conservative causes, filed in the District Court for the District of Columbia a complaint backed by the Competitive Enterprise Institute. Carvin's legal argument, which originated with CATO Institute economist Michael Cannon and Western Reserve law professor Jonathan Adler, is that, due to a drafting glitch in the ACA, only state-run exchanges, not federal ones, can provide tax credits and subsidies to enable lower-income individuals to afford ACA-mandated health insurance. Threading the Carvin-Cannon-Adler argument through the intricacies of the ACA and the Internal Revenue Code could make even a seasoned tax lawyer's head hurt. But the bottom-line is not hard to grasp: If the case makes its way to the Supreme Court, and all five members of the Supreme Court's conservative bloc buy Carvin's rationale, the result would, in rejectionist states, subvert the ACA's central purpose and stiff the very population the law was enacted to benefit. The Obama administration has estimated that 80 percent of the millions of individuals expected to purchase insurance through exchanges will require some tax subsidies. Without those subsidies, in states with Federally facilitated exchanges, the individual mandate, constitutional though the Court has declared it, simply won't work.

Unsurprisingly, the Obama administration has said that credits and subsidies will be available through exchanges in every state, whether run by the state or the Federal government, in Treasury Department regulations finalized in May 2012. Treasury has a strong case. ACA advocates point to complementary statutory language clarifying that Health and Human Services "stands in the shoes" of the state as administrator, but that such a federally-run exchange retains its functions, legal status, and operates subject to the same terms. Health reform supporters have also mined the legislative history to show that key sponsors, the drafting committee, and the Congressional Budget Office expected credits to be available on federal no less than state-run exchanges. Finally, given the centrality of exchanges to the ACA's design, and the necessity of premium assistance to enable the exchanges to work, opponents' blinkered version makes no sense in light of the law's purpose.

At worst, Treasury's regulation represents a permissible interpretation, even if it is not the only one. By itself, that should ice the case. Under bedrock administrative law doctrine, courts must defer to an agency's interpretation of a law it is charged with administering, whenever its decision "is based on a permissible construction of the statute."

So, could rejectionists have any basis for hoping to overturn Treasury's rule? Yes, they could. All the Obama administration's arguments, however well-founded, could be shoved aside, if the case reaches the Supreme Court, and the Court's conservative bloc deploys a "methodology," long touted by Justice Antonin Scalia, for interpreting statutes. Scalia's approach, which he calls "textualism," holds that judges must tease out the meaning of individual statutory words or phrases in isolation, rather than giving weight to the statute's overall structure, design, purpose, or legislative history. In practice, this functions as a right-wing stratagem—phrased in politically neutral terms but, in the words of Judge Richard Posner, inherently "conservative," and applied, as noted by former Justice John Paul Stevens, to "skew interpretation," and "defeat the purpose for which a provision was enacted." Not infrequently, Scalia's conservative colleagues have utilized his loaded textualist packaging for improbable interpretations that, as Senator Patrick Leahy observed in a 2008 hearing, "turn laws on their heads, making them protections for big business rather than ordinary citizens."

Quite plausibly, if he gets the chance, Justice Scalia will try to persuade his conservative colleagues that invoking his textualist algorithm to "skew" the ACA will be doing just what has often come naturally for them. Will he get five votes? Maybe not. Last year, Chief Justice Roberts chose the path of prudence and rejected the high profile Constitution-based bid to strike down the individual mandate and abort Obamacare. But the opacity of this new claim could present him and his usual allies with a different, less risky, political calculus—a way to maim the law without technically overturning it.

If and when this challenge arrives at the Court, the main variable affecting that calculus will be its timing—specifically, whether the targeted tax benefits are already flowing. The pertinent provisions take effect on January 1, 2014. Routine Federal trial and appellate court procedures should keep the case from

reaching the Supreme Court until well after that, probably not before 2015. Presumably, however, Carvin's legal team has plans to try to short-circuit those procedures—plans the Department of Justice will, in turn, be well-prepared to oppose.

However such maneuvers play out in court, the administration and its allies need to play their game out of court as well. Specifically, they need to not repeat their near-death experience with the individual mandate challenge, when they left their adversaries free to frame the legal issues, unanswered, for the media, politicians, and the public, long before Solicitor General Donald Verrilli faced off against a phalanx of hostile justices. Health reform opponents have this point down pat. Just last month, Randy Barnett, architect of the strategy that blew past literally centuries of precedent and won four Supreme Court votes to throw out the ACA, counseled an American Enterprise Institute conference to "take very seriously" the lesson that, "an argument that many other people thought was frivolous is only going to get traction in the courts if there's a political valence that allows it to get traction."

For sure, the team behind this new guerilla assault takes that lesson very seriously. They have pushed out their message through conservative blogs, Fox News, and some major mainstream media outlets. Countering their message will not require public relations wizardry. To observers across the political spectrum, their upside-down core contention—that the Congress that enacted Obamacare actually "intended" to deny benefits necessary for millions of low-income Americans to afford health insurance—can be portrayed as just as in-your-face preposterous as, in fact, it is. But the truth won't prevail, if it isn't told.