

In subsidy battle, too much hand-wringing and not enough analysis

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By Ron Shinkman

Since the U.S. Supreme Court decided last month it would hear the case of *King v. Burwell*, my colleagues in the media have been worrying aloud as to whether the Affordable Care Act will be gunned down just as it's beginning to help millions of people.

The high court will determine sometime next year whether Congress intended the use of income-based tax subsidies to purchase insurance by individuals if they reside in a state that does not operate its own exchange. If the court rules in favor of the plaintiffs in this matter, residents of three dozen states would be barred from purchasing subsidized coverage unless their states operate their own exchanges.

My favorite recent example of this hand-wringing was a front page [story](#) in yesterday's *Los Angeles Times*. It suggested the Supreme Court could rule against President Barack Obama as retaliation for his decision to take executive action on immigration reform, with Chief Justice John Roberts leading that charge.

As far as I can tell, the *LA Times'* longtime Supreme Court reporter David Savage may have conducted a single interview--with an attorney from the right-of-center Cato Institute who said Obama had engaged in a "pattern of lawlessness." It demonstrated neither journalistic digging nor deep legal analysis. I am bewildered as to why the editors of one of the nation's leading daily newspapers not only gave the article such prominence, but also why it was published at all.

Journalism is particularly vested nowadays in creating nail-biting drama. The overarching narrative for the 2012 presidential campaign was that Mitt Romney was always close on Obama's heels. But most news outlets didn't even flinch when they called it for Obama a mere 15 minutes later than when he won convincingly in 2008.

Certainly, striking down the subsidies would pose significant challenges for our healthcare system and one of its key financing mechanisms. Some 4.6 million Americans would lose their subsidies, representing roughly half of those who would have purchased insurance through the state exchanges by the end of the current enrollment period in February. Many would likely drop their coverage, creating a large financial strain on hospitals, particularly in those states that have neither their own exchange nor expanded Medicaid eligibility.

But the media is mostly ignoring the fact that the Supreme Court and its conservative bloc had a much clearer head shot at the entire Affordable Care Act in 2012, but it nonetheless remained

mostly intact. Four of the Republican appointees--Antonin Scalia, Anthony Kennedy, Samuel Alito and Clarence Thomas--were in favor of striking down the ACA's individual mandate and even other parts of the law. It was Roberts who didn't go along. And now Savage has suggested Roberts, due to a completely unrelated issue, may have a change of heart.

Roberts is considered to be as right wing as the rest of his conservative colleagues. However, he also appears far more self-conscious in terms of his conduct compared to the rest of the group. That's likely because as a chief justice he will have much more of a legacy than his other colleagues to live up to--or down. Roberts may have decided he didn't want the nation's first actual effort to expand healthcare coverage to the vast majority of Americans to get taken down during his watch.

There is some precedence for such restraint. Roger B. Taney was a milestone chief justice, the first Catholic on the high court. And although he served nearly 30 years in the post, he's known almost solely for his savagely reactionary decision in the Dred Scott case. Other chief justices--such as Republican appointees Earl Warren and Warren Burger--have been willing to step back from their political origins when they felt it necessary to do their jobs properly.

By contrast, many of Roberts' conservative colleagues on this present court have distinguished themselves for conduct veering toward buffoonery. Antonin Scalia [has inserted Cole Porter lyrics into his legal opinions for his own amusement](#), and much to my everlasting astonishment, [only half-joked on a nationally telecast PBS program that an innocent person facing execution probably deserved it anyway](#). Samuel Alito verged on heckling Obama during a State of the Union address. Clarence Thomas writes his opinions from the context of how they would be interpreted in colonial America, conveniently ignoring how most colonialists would have interpreted him. Have I mentioned his tendency to underreport his household income, his silence from the bench and his pathological insistence that his Yale law degree isn't worth the paper it's printed on? Have I forgotten anything else unbecoming about Thomas?

Only Kennedy has kept a relatively low profile, and again, my colleagues have seemed to have conveniently forgotten his role as a swing in many historic court votes.

And few media outlets have suggested that even in the event the court decides to strike down the subsidies, there are alternatives. Among them is to have the states create corporations for their own exchanges, and then contract with healthcare.gov to provide the service. Or tweak HealthCare.gov's operational bylaws to accomplish the same. Or the administration could simply shut the federal exchange down, providing enormous pressure for those states on the sideline to build their own exchanges. Or Obama could issue another executive order that contains a fix.

In the meantime, I would like to see more analysis as to why there remains a large bloc of people in this nation hell-bent on ensuring that millions of their countrymen have no chance of obtaining access to affordable healthcare services. I find that far more unsettling than anything the Supreme Court might choose to do or not do.