

NATIONAL REVIEW

The Court and Obamacare

Republicans had better be prepared with something better than Obamacare Lite.

By Michael Tanner
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Probably no later than next June, we can expect the Supreme Court to rule on whether the Obama administration can provide subsidies for Obamacare through federally run exchanges despite explicit language in the law that limits subsidies to “an exchange established by a State.”

There is no guarantee, of course, about how the Court will rule. The language of the statute is clear, and the ever-loquacious Jonathan Gruber has stated that the law was set up that way to entice states into establishing their own exchanges. And the fact that the Court reached down to take this case even before the legal process had fully played out in the lower courts suggests that several justices believe the challenge has merit.

But one never knows whether the justices will twist themselves into John Roberts–like pretzels in their desire to avoid upending a president’s signature legislative accomplishment.

Opponents of Obamacare should also realize that even if the Court upholds the challenge to Obamacare’s subsidies, it would not actually strike down the law. Obamacare’s insurance regulations, for example, would largely remain on the books. In fact, it could truthfully be said that what the Court would actually be doing is ordering Obamacare to be implemented exactly as written.

Among Obamacare opponents there will be satisfaction and a widespread feeling of vindication. But after the cheering dies down, what happens next?

If the Court upholds the challenge, some 5 million people in 32 states would lose their subsidies, meaning they would suddenly have to pay more, sometimes much more, for insurance. Not surprisingly, supporters of Obamacare have reacted to the possibility with near hysteria. *The American Prospect* warned of a “swath of human misery, stretching from horizon to horizon.” *Salon* concurs, arguing that “people will die.” Brian Beutler in *The New Republic* agrees that this decision is “a matter of life and death” and proclaims that the Supreme Court has become “a death panel.”

Back in the real world, such drastic outcomes are unlikely. Of course, the predictions do raise the question of why, if liberals truly believe such things, the administration continues to enroll people in Obamacare without even warning them that their subsidies might be at risk.

Still, it is true that, if the Court does insist on the law as written, a great many Americans are going to be very unhappy once they see their new insurance premiums. That means there will be a lot of pressure on legislators in both parties to do something to fix the problem. And, with President Obama, congressional Democrats, and many in the media ready to blame Republicans for the outcome, the GOP had better be ready to respond.

The easiest response, and the one most likely to be pushed by Democrats, would be simply to rewrite the law to reinstate the subsidies. All it would take is a one-page bill declaring that a federal exchange should be considered “an exchange established by a State.” Perhaps Democrats will even try to tempt Republicans with minor concessions on issues like the medical-device tax or the employer mandate. Or Congress might do what it so often does and kick the can down the road, preserving the subsidies until after the 2016 election.

But Republicans should resist any such quick fix. Not only would they be agreeing to lock Obamacare into place for the foreseeable future, they would, in effect, be acquiescing to the Obama administration’s illegal taxes and the usurpation of legislative power.

A second option would be for those states with federal exchanges to try to set up state exchanges instead. Most of the states without their own exchanges are run by Republican governors, but that’s no guarantee against capitulation. Just look at the Medicaid expansion, where, in the last few months alone, Republican governors in South Dakota, Tennessee, Utah, and Wyoming have been unable to resist the lure of “free” federal money. (Those expansions have not yet been approved, however, by either their state legislatures, the Obama administration, or both).

Still, setting up an exchange is easier said than done. Indeed, the trend has actually been for states to abandon their state exchanges for the federal one. Oregon and Nevada, for example, have gone this route, while New Mexico, although it still technically has its own exchange, has decided to use the federal exchange’s enrollment portal for a second year.

But if Republicans at both the federal and state levels can hold their ground, they will be able to use this opportunity to force Congress to open Obamacare up to wholesale revision, possibly even repeal.

To accomplish that, however, Republicans will have to be ready with their own replacement option. So far, they have shown no sign that they can agree on such a policy. Worse, most of the plans talked about so far are little more than Obamacare Lite.

The good news, though, is that June is still six months away. There is still time for Republicans to offer a free-market alternative. Whether or not they can will be a major test of the incoming Congress. If they don’t, it’s an opportunity that may not come again.

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