

# OBAMACARE SCOTUS REACTION: WHY NOT FIND A WAY TO MAKE THE BENEFITS WORTH THE PRICE?

I was going to let bmaz handle the ObamaCare debate. But then I read this Jonathan Cohn piece—which asks whether SCOTUS’ likely decision to strike down the mandate will delegitimize the court. And I had to respond.

Cohn started his discussion on legitimacy last week with this post. In addition to, as bmaz argues, downplaying the importance of the limiting principle, Cohn describes how a named plaintiff in the case, Steven Hyder, explained his involvement in the case. Cohn focuses rather more on Hyder’s incoherent TeaParty rhetoric...

“It’s a complete intrusion into my business and into my private life,” he told me. “I think it’s one big step towards a socialist society and I’m purely capitalist. I believe in supply-side economics and freedom.”

Then on his more basic description of why he hasn’t bought health insurance...

He said his motive was straightforward. He’s opted not to carry health insurance because he doesn’t think the benefits justify the price, and he doesn’t want the government forcing him to do otherwise.

I’m rather more interested in this “straightforward motive” bit: Hyder says the benefits don’t justify the price.

I have no idea what Hyder’s income is, but remember that for around 16 to 19% of people

affected by the mandate, buying health insurance would only limit, but not eliminate, the possibility of medical bankruptcy, without making health care for serious but not life-threatening problems financially accessible. That chunk of people would not be able to afford to use the insurance for anything more than the guaranteed preventative care and catastrophic care. And yet they would be asked to pay up to 8% of their income for this badly inadequate insurance.

Hyder may spout TeaParty rhetoric that makes it easy to dismiss him, but he also points to one of the realities of health insurance in this country: it is very expensive and for many people, its benefits may not immediately justify the cost.

With all that as background, let's turn to Cohn's catalog of opinions on whether SCOTUS' decision will delegitimize the institution (note: Cohn doesn't say whether he thinks SCOTUS will throw out just the mandate or the whole kit and kaboodle, which seems rather important, but the Administration's own choices and arguments about severability may be responsible if the latter occurs).

To summarize the arguments Cohn lays out (these are my summaries—apologies for any distortions of the views portrayed):

Cohn: Overruling an act of Congress should erode the Court's authority.

David Bernstein: The ruling won't undermine the Court's legitimacy because those who might object to it—liberal journalists, lawyers, and activists—have too much invested in the Court to make the case.

Scott Lemieux: The ruling won't undermine the Court's legitimacy because a significant chunk of elite opinion and a majority of the public would find the decision legitimate. And also, the ruling won't lead to anything better

because the insurance companies, which are the key agent, won't let anything better arise.

Andrew Koppelman: The ruling will undermine the Court's legitimacy because it will "force" Obama to spend "millions of dollars worth of television ads trying to persuade the American public that the Republicans on the Court are a bunch of despicable political hacks" and negative advertising works.

Of note, look at the differing emphasis on who has agency to affect the Court's legitimacy: the liberal commentariat, insurance companies, and Obama.

Cohn ultimately ends his piece with the question of agency, noting,

Public perceptions of this case, and the Supreme Court, are not some static reality. How people react to the final ruling will depend a great deal on what they hear and read, directly and indirectly. And that's true no matter what the Court decides.

Right: public opinion will be affected in part—as Lemieux acknowledges—by the widespread dislike for the mandate as well as support for other provisions of the law (which, because the Administration is only now getting around to telling people the good parts of the law, many people may only discover were part of ObamaCare if they're taken away) that they really like.

But it will also be affected by what gets written now. It will partly be affected by what people like Cohn write now.

And not only do I agree with bmaz that responding to a legal setback by attacking the legitimacy of the Court is unwise (I'd add that because the polling on the mandate is so bad, it also risks making people side with SCOTUS over

Democrats as a whole on this), I also think there are far better options.

About the only reason to attack the Court, now, as ObamaCare supporters are doing, is if they believe it's going to persuade John Roberts or Anthony Kennedy to change their vote; given the defensive response to Obama calling out the Justices for their Citizens United decision, I think that's a pipe dream.

A better response than Koppelman's plan, then, would not be to attack the Justices (since the public generally dislikes the mandate), but to use their decision—and more politically unpopular decisions—as a call for really pushing court appointments. Such a response would be even better if it were matched both with the commitment to invest the money and effort to make the American Constitutional Society as effective as the Federalist Society has been at packing SCOTUS. Not to mention a commitment from Obama to take a more aggressive approach on judicial appointments, which would mean fighting for people like Goodwin Liu.

I'm skeptical that'd be all that effective a response: not only have Democrats always run by warning about SCOTUS appointees—with marginal effect—but Obama's own history doesn't show the level of commitment to making judicial appointments a politically legitimate issue that you would need to make such an approach credible.

But there is another alternative, one that might have a better impact on the election and help Obama shed the political unpopularity of the mandate. Simply say, now,

Well, we tried to provide health care by relying on the existing insurance networks, but SCOTUS seems like it's going to say such an approach is unconstitutional. So we'll have to roll out a way of doing so—after all, the Court recognized the importance of health care—in a way that would be

Constitutional. I'm planning on fighting for Medicare buy-in.

Now, Lemieux may be right in suggesting the insurance industry dominates Congress to an extent that Medicare buy-in would never pass (the only thing that scotched the idea in 2009 was Joe Lieberman, who will be retiring, though we've lost the majority we once had, in part because of the unpopularity of the mandate). But Medicare buy-in solves all the problems except insuring insurance profits: it would make health care more accessible (and more accessible than it would be under ObamaCare), it would actually help Medicare's funding problem (because more healthier people would enter the pool with our retirees, and they'd be paying a premium for coverage), and it would help Obama pivot away from the unpopular mandate to something widely popular. If Obama made such an announcement now, rather than waiting for an adverse ruling, it might be more persuasive to the corporatist hacks on the Court to uphold the mandate, who wouldn't want insurance companies to lose these captive consumers.

And it would provide a health insurance option that might even be attractive to Steven Hyder.

Cohn is right: what people write and say now will have an impact on the public response. And progressives can either double down on a plan that didn't solve Hyder's problem: that health insurance remains a really shitty deal in this country. Or they can at least threaten to offer a better alternative.