Obamacare Is Over (If You Want It)

Why 2014 will see many more threats, legal and otherwise, to the Affordable Care Act.

By: David Weigel – December 17, 2013

The year that's about to end gave the Republican Party—sorry, *the American people*—one last desperate chance to dismantle the Affordable Care Act. All they needed to do was nix all funding for the law. Texas Sen. Ted Cruz said so, and said so, and said so a few hundred more times.

"You're here because now is the single best time we have to defund Obamacare," he told one crowd in Dallas. "We have, I believe, the best opportunity we will have, and possibly the last good opportunity we will have to defund Obamacare," he told another crowd at the Heritage Foundation's Washington, D.C. offices.

As any furloughed federal worker or Grand Canyon–adjacent hotelier could tell you, a great battle ensued but the law remained intact. But what does "last opportunity" mean, anyway? Earlier this month, a U.S. district court heard arguments in *Halbig v. Sebelius*, a legal challenge to the Affordable Care Act brought by plaintiffs who live in states that didn't set up health care exchanges.

It's a fairly simple argument. The Affordable Care Act stated that "individuals who are identified by an Exchange established by the State" would be eligible for subsidies when they bought health care. People living in the many exchange-free states were getting subsidies (and becoming subject to fines) anyway, seemingly contradicting the letter of the law. So shouldn't those states be denied the subsidies? Sure, it would devastate all the insurers expecting new customers, and it would bring down the law, but a "state" is a "state."

One *Halbig* plaintiff is a Republican consultant, another is a Bush administration veteran, and the intent of the lawsuit is extremely hard to miss. It's also hard to find a sympathetic expert on the law who buys into the theory. "That this is a drafting error is obvious to anyone who understands the ACA," wrote Washington & Lee law professor Timothy Jost two years ago. "Section 1311 of the ACA requests the states to establish American Health Benefit Exchanges and sets out the duties of the exchanges. Section 1321 of the ACA, however, provides that if a state elects not to establish and exchange or fails to do so, HHS must 'establish and operate' an exchange in such a state and 'take such actions as are necessary to implement' the other requirements of title I of the ACA, which includes section 1401."

See? If the state chooses not to participate, the federal government steps in to serve individuals trying to buy health insurance, subsidies and all. Easy. Unless you're a conservative who wants to scrap the Affordable Care Act, in which case Jost must be wrong, and an argument born in a contrarian Cato Institute research paper is obviously right.

“The plain text of the statute contradicts the way the Obama administration has implemented it,” Cruz told me when I asked about *Halbig*. “The law is clear that the individual mandate and the accompanying subsidies only apply if a state sets up an exchange. The Obama administration simply said, ‘we’re not following that part of the law. We’re going to apply it without a state exchange.’ In our constitutional system, if a president doesn’t like a law, there’s a mechanism to address that. You go to Congress, and you change the law.”

Cruz wasn’t in the Senate in 2009, when the Senate cobbled together the Affordable Care Act out of Heritage Foundation policy papers, long-held liberal designs, and stuff written on napkins that Max Baucus found in his office. Republicans who were around either plead unfamiliarity with the legal challenge or agree readily with the plaintiffs.

“The law is written that way, that people who live in states that are getting insurance through a federal exchange, not a state exchange—none of them are eligible,” said Wyoming Sen. John Barasso, a medical doctor often called on by the GOP to shape anti-Obamacare messaging. “It’s an interesting question, about when a law is passed, what it actually says, what power a president has to change it without going back to Congress.”

This worries supporters of the law. Several times now, they’ve laughed off a legal or constitutional challenge to their work as the moonlight raving of tricorner-hat-wearing kooks. Several times, they have watched these challenges rise to high courts and impact the law. Last year’s Supreme Court rulings rescued the individual mandate while allowing states to opt out of the Medicaid expansion. The result has been more than 4 million people in red America tumbling into a “Medicaid gap.” As Alec MacGillis has reported, the Cato Institute’s Michael Cannon spent much of the Obamacare era lobbying red states not to build exchanges. He wasn’t alone, but he was unusually explicit: He said in May 2012 that he wanted to maximize the number of states “in a position to drive a stake through the heart of this very bad law.”

There’s a heated competition over the right to wield that stake. Next year, South Carolina’s Senate will probably take up the Freedom of Health Care Protection Act. Passed by the House, stalled for a while by committee, the brief law was crafted “to render null and void certain unconstitutional laws enacted by the Congress of the United States taking control over the health insurance industry.” Republican legislators tried to Obamacare-proof the state with a few direct measures:

No agency of the State, officer or employee of this State, acting on behalf of the state, may engage in an activity that aids any agency in the enforcement of those provisions of the Patient Protection and Affordable Care Act of 2010.

Whenever the Attorney General has reasonable cause to believe that a person or business is being harmed by implementation of the Patient Protection and Affordable Care Act and that proceedings would be in the public interest, the Attorney General may bring an action in the name of the State against such person or entity.

No agency, department, or other state entity, including, but not limited to, the Department of Social Services and the Department of Health and Human Services, may authorize an employee, contractor, vendor, or any other person acting on behalf of the department to conduct or participate in an involuntary maternal, infant, and early childhood in-home visitation pursuant to Section 2951 of the Patient Protection and Affordable Care Act of 2010.

A South Carolina resident taxpayer who is subjected to a tax by the Internal Revenue Code under 26 U.S.C. Section 5000A of the Patient Protection and Affordable Care Act shall receive a tax deduction in the exact amount of the taxes or penalty paid the federal government pursuant to 26 U.S.C. Section 5000A.

Yes, the state would effectively pay citizens for having the courage to defy the health insurance mandate. Republicans certainly like the *thinking* behind the bill. "I think it has merit," said South Carolina Sen. Tim Scott, "though I'm not sure how it gets done." The "how" is a problem because, well, states can't just nullify laws, as fun as it sounds.

"It is absolutely unconstitutional," said Timothy Jost after I emailed him the bill. "South Carolina legislators are attempting to nullify a law adopted by Congress, signed by the president, and upheld by the Supreme Court. It seems to me that South Carolina tried to secede from the union before, and it didn't work."

Wonks like Michael Cannon view the South Carolina bill as a flawed cousin to a much more effective attack. Ohio and Missouri have already debate a bill nicknamed "the Health Freedom Act 2.0," which would suspend the licenses of insurers who accepted federal subsidies. Modeled by the American Legislative Exchange Council, it's seen as a far smarter sneak attack on the ACA.

"If South Carolina legislators want to push back against Obamacare, they could be more effective," advised Cannon. "First of all they should drop 'null and void.' You can't nullify fed law and they should stop pretending to. They'd be more effective if the tax rebate—which is an interesting idea—was a credit, not a tax deduction. And they'd be most effective if they put the Health Care Freedom Act 2.0 back in."

Conservatives can argue about the most effective Obamacare-killer—and that's the point. Progressives (and insurers) who thought they'd settled all this need to strap in for another year of challenges and end-runs. If *Halbig* gets to the D.C. circuit and fails, conservatives have pre-blamed the new judges Barack Obama placed on the bench after last month's filibuster reform. If *Halbig* doesn't get to SCOTUS, maybe one of the other versions of the case will, or maybe a state will succeed with one of the new Health Care Freedom Acts.

The Obamacare wars of 2013 already seem quaint. Telling conservatives that a funding bill was "the last chance" to kill the law was great for fundraising. It was true, as Cruz repeatedly said, that subsidies could make the law more popular. But reports of Cruz's ultimate defeat were written too soon. Last week, to little fanfare, his office released a helpful list of probable constitutional problems with Obamacare. Just in case any lawyers wanted to look into that.