

# The Star-Ledger

## The flaws in Obamacare: Legislate in haste, repent at leisure

By Paul Mulshine

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Forget about Hobby Lobby. This is a whole new toy store.

In the recent Hobby Lobby case, the U.S. Supreme Court invalidated a small section of the Affordable Care Act pertaining to birth control — and only in some highly specific circumstances.

But the decision Tuesday by the U.S. Court of Appeals for the D.C. Circuit in the Halbig case opens the door for wholesale rejection of the plan known as "Obamacare" in 36 states, including New Jersey.

If Obamacare falls, the Democrats will have no one to blame but themselves. In 2010, they could have compromised with the Republicans on a plan that would have solved real problems, such as the lack of coverage for those with pre-existing conditions and the resultant "job lock."

Instead they rammed through a bill that included provisions they knew the Republicans couldn't tolerate, such as that birth-control mandate. But thanks to some complicated timing revolving around the death of Massachusetts Sen. Ted Kennedy, they were forced to make do with a Senate version of the bill.

The Democrats passed that bill in the brief interval after Kennedy died and before he was succeeded by Republican Scott Brown. They then had to stick with it because they no longer had a filibuster-proof majority.

That bill had some fatal defects, and over the past few years I've discussed them with Michael Cannon, the Cato Institute health-policy expert who was an architect of the legal challenge in Halbig.

After his court victory Tuesday, I called Cannon to talk about those flaws. He said the key to the decision was language in the act that permits the federal government to give subsidies only to people who purchase insurance through health insurance exchanges set up by the states.

"The authors assumed all the states would establish exchanges," said Cannon. "That proved not to be the case. They thought they would be greeted as liberators by the states and they were not."

Among those resisting the "liberation" was our own Gov. Chris Christie. He vetoed a bill to set up a state exchange. That meant the federal government had to set up our exchange.

That made little difference until Tuesday. But then two of the court's three judges agreed the act does not permit the federal government to pay subsidies in federally run exchanges such as New Jersey's.

That may sound like bad news. But it's good news for those who oppose Obamacare. That's because of sections of the law stating that if there are no federal subsidies, then the mandates in the act don't apply.

The bill's authors didn't want employers letting their workers go on Obamacare, so the act includes language requiring employers to provide insurance if even a single employee receives a federal subsidy. No subsidy, no mandate.

The same is true when it comes to the individual mandate. The Senate version exempted individuals from the mandate if premiums would exceed 8 percent of household income. Without subsidies, premiums would be well in excess of 8 percent for almost everyone, Cannon said. (Here's a piece quoting Cannon on another flaw in the bill - you could escape the mandate by simply claiming to be a smoker.)

The case is likely to go to the Supreme Court. Cannon's not predicting how that will come out. But others have observed that the court has an easy way out. Denying the subsidies wouldn't kill Obamacare; it would just send it back to Congress and to the states. The court would just be passing the buck.

Among those receiving the buck would be Christie. If a few hundred thousand New Jerseyans lost their subsidies, the Democrats would be clamoring for him to start a state exchange. But doing so would likely wreck any chances he'd have of winning the 2016 Republican presidential nomination.

"Given the intense opposition to the Affordable Care Act by Republicans generally and Republican primary voters in particular, it would be very difficult for a contender to defend the implementation," said Cannon.

That means Christie would likely join other Republican governors in calling for Congress to go back to the drawing board and start at the beginning.

Here's the funny part: Obamacare didn't begin with Obama. He entered the 2008 Democratic presidential primary running as an opponent of the individual mandate. Its biggest proponent at the time was a certain Mitt Romney, the guy who'd just left the Massachusetts governor's office after passing a plan based on the same type of mandates Republicans now oppose.

There was room for bipartisanship back then.

As for the future, that could be a different story.

