

# Los Angeles Times

## Dislodging Obamacare

*The healthcare law is still unpopular, unsustainable and vulnerable.*

By: Michael F. Cannon - November 30, 2012

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Republicans believed a Mitt Romney win would seal Obamacare's fate. Democrats — or rather, the lonely two-fifths of Americans who support the president's beleaguered healthcare law — believed an Obama win would secure its future. Both sides were kidding themselves.

Romney may have pledged to repeal the law, but his positions on Obamacare had the life span of a rainbow. He supported an identical law when he got the credit for signing it as governor of Massachusetts. He then opposed Obamacare when that's what GOP primary voters wanted to hear, and later endorsed parts of it when he thought that's what moderate voters wanted to hear. Anyone who put stock in Romney's pledge to fight for repeal simply wasn't paying attention.

Democrats are likewise deluding themselves if they think the law is safe because Obama wields the veto pen. The greatest threat to Obamacare was never a Romney presidency but Obamacare itself.

The law remains vulnerable because of its unpopularity, the compromises that unpopularity forced on its authors and the Supreme Court's ruling that part of it is unconstitutional. These factors guarantee repeal will remain a viable issue, and — I predict — that the president will ultimately sign a bill making major changes, at the very least.

In its ruling on the healthcare law, the Supreme Court gave states the freedom to decline Obamacare's costly Medicaid expansion. Insurers, hospitals and pharmaceutical companies were counting on the subsidies that came along with the expansion to offset the cuts and new costs the law imposes on them. The fact that many states have said they won't implement the expansion will lead to those groups putting pressure on Congress to reopen the law.

There is a similar problem with the law's other entitlement program: the health insurance exchanges Congress created as a conduit for \$800 billion in tax credits and subsidies whose purpose is to hide the cost of the law's health insurance provisions.

Obamacare's instant unpopularity, and the fear of being accused of backing a federal takeover of healthcare, moved moderate senators such as Joe Lieberman (I-Conn.) and Ben Nelson (D-Neb.) to demand the exchanges be run by the states. The bill would not have cleared the Senate without that concession.

As the Supreme Court reaffirmed when it struck down the Medicaid mandate, however, Congress cannot constitutionally command states to implement a federal program. Instead, the law asks each state to create an exchange, and orders the federal government to create one in states that don't. To encourage states to cooperate, it offers health insurance tax credits and subsidies only in state-created exchanges. California's Department of Insurance

estimates that even with those subsidies, premiums could rise — by roughly 25% in West Los Angeles, for example.

Contrary to expectations, more than 30 states have refused to create exchanges or are dragging their heels. And with good reason: State-created exchanges bring higher taxes.

The very tax credits that are contingent on states implementing an exchange are also an essential part of the trigger mechanisms for the law's penalties on employers and individuals who don't purchase health insurance. Since those tax credits are only available through state-created exchanges, states can exempt their employers from penalties of up to \$2,000 per worker simply by not creating exchanges. By my count, states can collectively exempt 18 million Americans from other penalties that, by 2016, will reach \$2,085 on families of four earning as little as \$24,000. California could exempt all employers and 2.6 million residents from those penalties just by scuttling its exchange.

The repercussions would be tremendous. The purpose of those credits and subsidies is to hide the cost of the law's mandates and regulations. Blocking them would not increase the law's costs; it would reveal those costs to insurers and consumers. Under those circumstances, even vulnerable Democratic senators probably would demand that Congress reopen the law. That seems rather likely: 14 states have enacted statutes or constitutional amendments that explicitly prohibit state employees from even assisting in the imposition of such penalties, a key function of an exchange.

To be sure, the Internal Revenue Service is trying to impose those penalties even in states that don't create exchanges. Oklahoma's attorney general has sued to stop them, and additional lawsuits probably will follow.

If any such lawsuits prevail, employers will flee states like California that have created exchanges to seek refuge in states such as Arizona, where those penalties do not apply. Even states that have been eager to implement the law would join the "reopen Obamacare" chorus.

Other legal challenges could also bring down the law. The Pacific Legal Foundation is challenging the individual mandate, which originated in the Senate, even though the Constitution requires that tax measures originate in the House. The mandate is also vulnerable because it is not uniform across all states. And more than 40 lawsuits allege the law violates the 1st Amendment's protections of religious freedom.

Obamacare is unpopular, unsustainable and vulnerable for the same reasons it always has been. It imposes too many costs on too many people and makes healthcare more costly and scarce, not less. It needs to go. That can still happen.