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Why The Health Care Takeover Failed

By ROBERT A. LEVY

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As the Massachusetts blame game unfolds, the president's unpopular health bill leads the list. But the substantive provisions of the bill were just part of the problem.

Perhaps more important, voters were appalled by how the deal unfolded.

Consider the pre-election giveaway to the labor unions. Negotiators agreed to exempt union contracts until 2018 from the tax on Cadillac health-insurance plans.

That backroom bargain outraged the voters and violated the Fifth Amendment to the Constitution, requiring the federal government to extend equal protection of the laws to all Americans.

Not all voters understood the constitutional nuances, but they sensed that something was very wrong, and they reacted.

For the record, here's the constitutional framework: If government were to discriminate against a specially protected class (racial, religious or national origin), its laws would be rigorously scrutinized by the courts. So too if government infringed on a "fundamental" right (such as speech, press, religion). But enrollees in nonunion Cadillac health plans are not a specially protected class, and the right to an untaxed Cadillac plan is not deemed fundamental. That means the tax would be reviewed by the courts under a more relaxed standard.

Essentially, courts would give great deference to the legislature, which could do pretty much anything that's reasonable. Rarely would a court override the judgment of our elected representatives.

But "rarely" is not the same as "never." Congress may not classify groups for differential treatment based on a criterion that bears no plausible relationship to the asserted goals of the legislation. The justification for discriminatory regulation must be legitimate — not simply a payoff to get the bill passed.

Yes, tax legislation often discriminates among parties. But discriminatory taxes are typically tied to social costs (e.g., cigarette taxes offset public expenditures for smoking-related illnesses) or regulatory objectives (e.g., alcohol taxes discourage excessive liquor consumption) or reciprocal benefits (e.g., gasoline excises pay for highways) or income redistribution (e.g., taxes on Cadillac health plans subsidize policies for the uninsured).

By contrast, the tax on nonunion plans was tied to none of those. Nonunion plans do not impose higher social costs than union plans. There are no regulatory reasons that would justify unequal taxes. No benefits are extended to enrollees in nonunion plans that are denied to enrollees in union plans.

Nor is income redistribution from nonunion to union workers a rational goal of a health care overhaul. Pure and simple, the tax on Cadillac plans was designed to generate revenue for ObamaCare.

That goal might have been reasonable. But the revenue could just as well have been generated by taxing all such plans or even selecting plans at random.

Singling out nonunion plans was merely a sop to the unions — a naked bribe to buy their support.

Paradoxically, the bribe would make it tougher to raise sufficient revenue. Indeed, the Obama-union pact produced a \$59 billion reduction in estimated tax receipts over 10 years. And "bending the health care cost curve," which might justify taxing Cadillac plans, did not justify taxing only nonunion Cadillac plans.

Behind the scenes, the dispute over Cadillac plans threatened to drive a wedge between the White House and its union supporters, who played a major role in Obama's 2008 campaign. The internecine warfare was so intense, AFL-CIO President Richard Trumka tipped off his Democratic friends they might not get union support in the upcoming election. One union even warned it would no longer endorse the

health bill.

So unless Congress revised the tax on Cadillac plans, the president's top legislative priority might be jeopardized and unions might sit on the sidelines while Republicans recapture the House. This sordid episode, piled on top of Sen. Ben Nelson's special Medicaid exemption for Nebraska, bred more voter cynicism about a political process that had gotten out of hand.

A few men and women, negotiating in secret, kowtowed to politically connected special interests. The losers weren't represented at the bargaining table. Predictably, they were left holding the bag — penalized for not having a union-sponsored medical plan.

As the health bill evolved, its victims couldn't see or identify the negotiating parties, couldn't hear the negotiations and couldn't protest their victimization.

Take it for granted, they were told, that one political party would promote the welfare of all Americans. It just wasn't so.

That's why ObamaCare is dead.

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