

The New R E P U B L I C

Obamacare's Critics Refuse to Give Up

By: Jonathan Cohn - November 20, 2012

They lost at the Supreme Court. And they lost at the ballot box. But opponents of Obamacare aren't giving up yet. Since they don't have the votes to repeal the law, they're trying the next best thing: Crippling it.

Their focus, at the moment, is on the development of insurance "exchanges." Exchanges are basically virtual marketplaces for people buying coverage on their own, because they don't have access to affordable coverage from an employer. Think of the exchanges as the rough functional equivalent of Expedia or Travelocity, only instead of buying an airline ticket you'd go online to buy health insurance. You'd have full information on what the plans covered, and how much they would cost, so you could shop intelligently. And—this is the important part—you'd have access to these policies, at the prices listed, regardless of any pre-existing conditions. If you couldn't afford to pay for the policies on your own, you'd be eligible for assistance from the federal government.

Obamacare calls upon the states to create their own exchanges, or to get together with neighbors and form "regional exchanges," by January 1, 2014. Massachusetts already has one, called the "Connector," and about a third of the states are on their way to creating versions of their own. It's a daunting challenge, administratively and logistically. But states like California and Maryland, where officials support the law and have extensive experience regulating health insurance, should be able to meet the deadline. Many other states will likely opt to participate in special partnerships with the federal government, so that they can get some assistance building and then running the exchanges—at least for the first few years.

But some states with conservative leaders and lawmakers are refusing to create exchanges. Obamacare anticipates this possibility: When state officials opt not to create their own exchanges, the federal government steps in and does the job for them. But

Obamacare critics think they've found a way to undermine that effort, because of some ambiguity in the text of the law: It says very clearly that the federal government can set up exchanges in lieu of the states, but the language is a little fuzzy when it comes to whether the federal government can also offer subsidies through those exchanges.

Michael Cannon, the Cato Institute health care expert who has waged a one-man crusade to stop Obamacare implementation, has been pointing this out for months. In July, he published a paper with Jonathan Adler, of Case Western Law School, arguing that federal attempts to offer subsidies through the exchanges would actually be unconstitutional. Oklahoma has filed a lawsuit in federal court making the same argument. On Monday, conservative intellectuals James Capretta and Yuval Levin raised this argument in an op-ed in the *Wall Street Journal*. (The *Journal* editorial page I don't take seriously; Levin, I do.)

As a legal matter, the argument strikes me as even more preposterous than the original lawsuits challenging the law. No sentient being following the health care debate could argue, in good faith, that Obamacare's architects intended for the federal government to set up exchanges without subsidies. It would completely subvert the law's intent. Then again, I didn't expect the last lawsuit challenging the Affordable Care Act to make it all the way to the Supreme Court, let alone come within one very narrow vote of succeeding. So what the heck do I know?

But that's a topic for another day. For a moment, step back and think about what these states are doing. The subsidies are in the form of tax credits. So Oklahoma officials and everybody else making this argument are essentially calling upon states to block their citizens from receiving federal tax breaks, worth as much as several thousand dollars per person. Aren't conservatives and libertarians supposed to be the party that likes giving tax money back to the people?

Of course, Obamacare critics believe that, by blocking the subsidies, they'll undermine the law's effectiveness and eventually erode support to the point that people clamor for a conservative alternative. It's the same rationale they cite when they urge states to take advantage of the Supreme Court ruling and reject the expansion of Medicaid. The real world effect of both moves, if successful, would be to deprive residents of these states of financial assistance and access to affordable insurance. And most of these people desperately need the help. Whether poor or middle class, insurance is too expensive or simply unavailable to them, because of their age, work status, or medical condition. Keep in mind that, as the (heterodox) conservative economist Josh Barro wrote recently in his

Bloomberg column, the “alternatives” that conservatives and libertarians propose inevitably do little for the uninsured.

Two weeks ago, Republicans making the case against Obamacare suffered a defeat at the polls—in no small part because a majority of voters concluded the Republicans didn’t care about the financial struggles of poor or middle class Americans. Is it any wonder why?