Why 'Obamacare's Critics Refuse to Give Up'

By: Michael F. Cannon - November 25th, 2012

Jonathan Adler and I have a paper titled, "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA." Our central claims are:

1. The Patient Protection and Affordable Care Act explicitly restricts its "premium-assistance tax credits" (and thus the "cost-sharing subsidies" and employer- and individual-mandate penalties those tax credits trigger) to health insurance "exchanges" established by states;
2. The IRS has no authority to offer those entitlements or impose those taxes in states that opt not to create Exchanges; and
3. The IRS's ongoing attempt to impose those taxes and issue those entitlements through Exchanges established by the federal government is contrary to congressional intent and the clear language of the Act.

Over at *The New Republic's* blog The Plank, my friend Jonathan Cohn says this is "preposterous":

> 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.

It appears my friend does not know the statute, the legislative history, or what Congress' intent was.

Cohn writes that the statute is "a little fuzzy" on this issue. Quite the contrary: the statute is crystal clear. It explicitly and laboriously restricts tax credits to those who buy health insurance in Exchanges "established by the State under section 1311." There is no parallel language – none whatsoever – granting eligibility through Exchanges established by the federal government (section 1321). The tax-credit eligibility rules are so tightly worded, they seem designed to prevent precisely what the IRS is trying to do.

ObamaCare supporters just *know* that can't be right. *It must have been an oversight*. *Congress* could not *have written the law that way*. *It doesn't make any sense*.

Those provisions must *take effect in federal Exchanges for the law to work. Why would Congress give states the power to blow the whole thing up??*

The answer is that Congress didn't have any choice. Congress intended for ObamaCare to work this way because this was the only way that ObamaCare could become law.

- The Senate bill had to have state-run Exchanges in order to win the essential votes of moderate Democrats. Without state-run Exchanges, it would not have passed.
- In order to have state-run Exchanges, the bill needed some way to encourage states to create them without "commandeering" the states. In early 2009, well before House and Senate Democrats introduced their bills, an influential law professor named Timothy Jost advised congressional Democrats of one way to get around the commandeering problem: "Congress could invite state participation…by offering tax subsidies for insurance *only in states that complied with federal requirements…*". Both the Finance bill and the HELP bill made premium assistance conditional on state compliance. Senate Democrats settled on the Finance language, which passed without a vote to spare. (Emphasis added.)
- The Finance Committee had even more reason to condition tax credits on state compliance: it doesn't have direct jurisdiction over health insurance. Conditioning the tax credits on state compliance was the only way the Committee could even consider legislation directing states to establish Exchanges. Committee chairman Max Baucus admitted this during mark-up.
- Then something funny happened. Massachusetts voters sent Republican Scott Brown to the Senate, partly due to his pledge to prevent any compromise between the House and Senate bills from passing the Senate. With no other options, House Democrats swallowed hard and passed Senate bill. (They made limited amendments through the reconciliation process. These amendments did not touch the tax-credit eligibility rules, and indeed strengthen the case against the IRS.)

A law limiting tax credits to state-created Exchanges, therefore, is *exactly* what Congress intended, because Congress had no other choice. On the day Scott Brown took office, any and all other approaches to Exchanges ceased to embody congressional intent. If Congress had intended for some other approach to become law, *there would be no law*. What made it all palatable was that it never occurred to ObamaCare supporters that states would refuse to comply. The *New York Times* reports, "Mr. Obama and lawmakers assumed that every state would set up its own exchange."

Oops.

The only preposterous parts of this debate are the legal theories that the IRS and its defenders have offered to support the Obama administration's unlawful attempt to create entitlements and impose taxes that Congress clearly and intentionally did not authorize. (But don't take my word for it. Read the statute. Read our paper. Read this, and this. Watch this video and our debate with Jost. Click on our links to all the stuff the IRS and Treasury and Jost have written.) I wonder if Cohn would tolerate such lawlessness from a Republican administration.

Cohn further claims the many states that are refusing to create Exchanges are “totally sticking it to their own citizens” and people who encourage them “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?” Seriously?

- Fourteen states have enacted statutes or constitutional amendments — often by referendum, often by huge margins — that prohibit state employees from directly or indirectly participating in an essential Exchange function: implementing employer or individual mandates. In those instances, the voters have spoken.
- Only 22 percent of the budgetary impact of these credits and subsidies is actual tax reduction, and the employer- and individual-mandate penalties triggered by those tax “credits” wipe out most of that. The other 78 percent is new deficit spending. So what we’re really talking about here is $700 billion of new deficit spending.
- When states refuse to establish Exchanges, they block that new spending, which reduces the deficit and the overall burden of government.
- In addition, those states exempt their employers from the employer mandate (a tax of $2,000 per worker) and exempt millions of taxpayers from the individual mandate (a tax of $2,085 on families of four earning as little as $24,000).

Who’s for tax cuts now?

Here’s what I think is really bothering Cohn and other ObamaCare supporters. The purpose of those credits and subsidies is to shift the cost of ObamaCare’s community-rating price controls and individual mandate to taxpayers, so that consumers don’t notice them. When states prevent such cost-shifting, they’re not increasing the cost of ObamaCare — they’re revealing it.

And that’s what worries Cohn. If the full cost of ObamaCare appears in people’s health insurance premiums, people will rise up and demand that Congress get rid of it. Cohn isn’t worried about states “sticking it to their citizens.” He’s worried about states sticking it to ObamaCare.

The title of Cohn’s blog post is, “Obamacare’s Critics Refuse to Give Up.” At least we can agree on that much.