Written by **Michael Tennant** on March 2, 2011

Obama Agrees to Minor Change to Healthcare Law—But Why?

Similarly, there is also much less to that opt-out provision than meets the eye. "If your state can create a plan that can cover as many people as affordably and comprehensively as the Affordable Care Act does, without increasing the deficit, you can implement that plan and we'll work with you to do it," Obama explained. In other words, for a state to opt out of the federal version of ObamaCare, it must institute its own version of the law — and get its version approved by Washington. Some choice.

The AP notes that "the idea to move up the date for state experimentation did not start with Obama. Democratic Sen. Ron Wyden of Oregon and Massachusetts Republican Sen. Scott Brown have already proposed it in legislation. But the president gave it a prominent endorsement."

Why, the curious observer might ask, is the President endorsing this change, minor though it may be?

Brian Montopoli of CBS News thinks he may have the answer. With half the states suing to overturn all or part of ObamaCare, and with judges variously ruling that portions of it are or are not constitutional, the administration, says Montopoli, may be "trying to find a way around the legal challenges to the law by changing it to make them moot." The White House, after all, does not want to take a chance on the Supreme Court's finding the law unconstitutional.

Gregory Magarian, a constitutional law expert — which, naturally, means that he believes ObamaCare is constitutional — and law professor at Washington University in St. Louis, described to Montopoli the possible reasoning behind the move and what effect it might have on state lawsuits:

> The constitutional challenges depend on the idea that the Affordable Care Act violates states' prerogatives under the 10th Amendment. Following that logic, the opt-out simply gives states the option of capitulating to federal policy or submitting to an intrusive federal bureaucracy that … holds the states to standards of the federal law. The challengers might even argue that the terms of the opt-out amount to 'commandeering' of state governments, which the Supreme Court recognizes as a different sort of 10th Amendment violation, because — in the challengers' view — the alternative to the opt-out is unconstitutional.

For what it's worth, "two senior administration officials," writes Montopoli, denied that the change was "designed to address court challenges to the law."

Montopoli also offers an analysis of the dilemma for Republicans in Congress if Wyden and Brown's

legislation, now endorsed by Obama, comes up for a vote:

> The measure does put Republicans in a difficult position in terms of how to vote. On the one hand, they have railed against the individual mandate as an encroachment of liberty — and this proposal allows states, at least in theory, to avoid it. That would seem to be a reason to vote for the change. On the other hand, the price for opting out is so high that conservatives could see the proposal as an attempt to force an overreaching health care plan onto states by any means possible. And they certainly don't want to change the law in a way that could keep it from being overturned by the Supreme Court.

In fact, because the legislation would change so little — merely advancing the date at which states can choose to institute their own brands of ObamaCare — it wouldn't seem to present a big problem for the GOP. Republicans all voted against the healthcare bill the first time around; and since this legislation doesn't change any fundamentals of the law, they have little to gain by voting for it. The law is, after all, patently unconstitutional. Changing one date doesn't alter that in the slightest.

The fact that the administration may believe that it can tweak the law to avoid challenges to its constitutionality — and may succeed in doing so — underscores the necessity of pursuing repeal of the law at the federal level or nullification of it at the state level. Lawsuits are always dicey, and never more so than in federal courts in the 21st century. Even a successful challenge at the Supreme Court level might only overturn parts of ObamaCare, leaving other, equally dangerous portions intact. With repeal hardly an option as long as Obama is in the White House, "the real answer is for states to nullify" the law, as John McManus, president of The John Birch Society, told *The New American*'s Kelly Holt. "There is," McManus added, "no alternative but nullification of ObamaCare."

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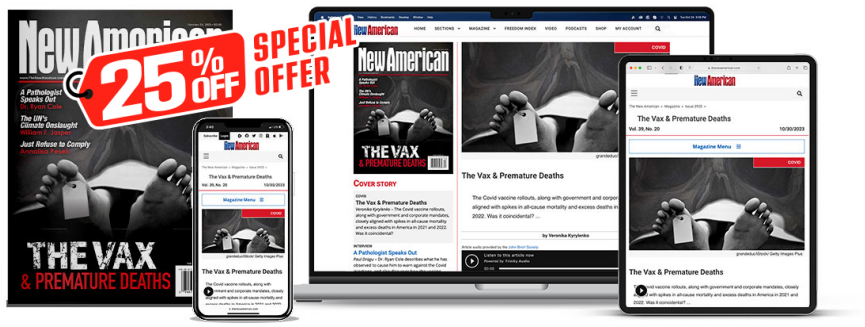

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