

JAMA Forum — The Health Care Law Stands: Now What?

BY [DAVID CUTLER, PHD](#) on [JUNE 28, 2012](#)

The Supreme Court has decided the Affordable Care Act (ACA) is constitutional. Their reasoning was tortured, but they got to the right answer. This is very good news. We now have a law passed by Congress, signed by the President, and declared constitutional by the US Supreme Court.



David Cutler, PhD

If these were normal times, we would be finished. But nothing is normal in politics these days. Already, the Right is vowing to push on to call for repealing the ACA this fall and early next year. So, what happens next?

The real political hurdle is the upcoming election. If President Obama wins reelection, the law goes into effect as it stands today—symbolic votes to repeal it notwithstanding. If Mitt Romney wins, the situation is less certain. Romney has promised to repeal and replace the ACA and he reiterated that after the Supreme Court ruling. But go past the requirement to purchase minimum coverage and repeal is not so popular. Should insurers be required to accept all comers, healthy and those with preexisting conditions, at equal rates? Should the “doughnut hole” gap in Medicare’s coverage for prescription drugs be filled in? Should children be able to remain on their parents’ policy up to age 26? These are all popular provisions and are all included in the ACA. Thus, repeal is unlikely to be very popular.

Further, replacement of the ACA is not likely to go well for Romney. As I

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noted in [an earlier post](#), Romney's proposed replacement for the ACA is to dramatically reduce Medicaid payments and reenact the insurance provisions of the Health Insurance Portability and Accountability Act of 1996. Let President Romney propose those ideas and we are likely to find that keeping major parts of the ACA looks even better.

That is why it seems likely that the ACA's major provisions are almost certain to remain the law of the land, regardless of the outcome of this fall's Presidential election. The real issue is how to make the principles in the ACA work. Because of the recession and uncertainty about whether the law would stand, implementation of the health care law has been slower than it might have been. Will it speed up? Here are 3 areas to look for in the next few months:

(1) Do more states set up insurance exchanges? The ACA allows states to establish exchanges, with the federal government stepping in if the states do not. To date, 15 states have established exchanges, 1 is planning for a partnership exchange, and 18 are studying their options. That leaves 17 states with no exchange activity or that have actively decided not to pursue exchanges. Some of the states with no activity were waiting to see if the law would be overturned. With the law in place, will those states start to explore exchanges? Will those mulling their options start to implement? Or will both groups be content to let the federal government operate an exchange on their behalf?

(2) Does the pace of reform of the health care delivery system accelerate? Clinicians and others have been caught in an in-between world where most of Medicare payment is on a traditional fee-for-service basis, but where the federal government is encouraging them to move to bundled payment models. The difference between these models is profound. In the traditional model, providing more care nets more; in the bundled payment world, more care lowers profits. Not knowing which way policy is going makes the investment and care coordination decisions of physicians and hospitals very difficult. Now that there is more certainty about the law, the shift to bundled care payments is likely to accelerate. That could spur action at institutions throughout the country, as clinicians and hospital administrators seek to cut unnecessary care and streamline their operations.

(3) Will states start to plan for the Medicaid expansion? The single modification the Supreme Court made to the ACA was to limit the penalties for states that do not expand Medicaid. The ACA said that if states did not expand Medicaid, they would lose all of their Medicaid funding. The Supreme Court argued that loss of all Medicaid funding would be too coercive and limited the penalty to losing the funding only for newly covered individuals. The additional funds for the newly covered are largely federal: all of additional funds for the newly covered will come from the federal government when the expansion begins in 2014, and the federal government is committed to paying 90% by 2020. Thus, governors and legislators in

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those states need to decide whether their opposition to the ACA extends to turning down hundreds of millions of federal dollars with virtually no commitment of their own. Will they start to plan for Medicaid expansion? If not, how will physicians and hospital executives in those states react?

The Supreme Court decision has allowed health care reform to move forward. If the act had been repealed, the nation would almost certainly have been stuck without change for the foreseeable future. Now, at least, there is a chance for progress in this arena. Whether there's enough follow-through to make this time more successful than in the past depends on whether enmity for the law and for President Obama overwhelms the desire to do more for those in real need.

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