

PPACA'S CORRUPTING LAWLESSNESS

In the pursuit of their goals, the law's proponents have done long-lasting damage to the constitutional order.

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October's disastrous roll-out of the online exchanges for the Patient Protection and Affordable Care Act (PPACA, also known as "Obamacare"), followed by millions of health insurance customers learning that their plans were being cancelled because of the law and that new plans have much higher premiums, appear to have sparked a nationwide debate over PPACA's merits. That debate should have occurred in 2009, but was short-circuited when Congress rammed through the legislation on a party-line vote in the middle of the night on Christmas Eve. As then-Speaker of the House Nancy Pelosi infamously quipped when asked to explain PPACA's contents, "We have to pass the bill so that you can find out what is in it." Now, many who dismissed criticisms of the act as partisan propaganda are finding that what is in it has ruinous consequences for the nation's health care industry.

But PPACA raises an even more disturbing problem. With its many expansions of administrative authority, its unpredictable interpretation by the courts, its arbitrary enforcement, and even the very means by which Congress chose to pass it, the act represents a pervasive disrespect for the concept of the rule of law.

THE PENALTY THAT'S A TAX BUT DOESN'T RAISE REVENUE

The act's problems began with its very passage. As originally written, PPACA's "individual mandate" required every person to whom it applies to buy an insurance policy providing "minimum essential coverage." Anyone failing to do so faces a monetary pen-

alty. Throughout the congressional debates and in the legislation itself, supporters emphasized that Congress could issue this mandate because the Constitution allows it to "regulate commerce ... among the several States." But when, in 2012's *National Federation of Independent Business v. Sebelius*, the Supreme Court was asked whether the Commerce Clause empowers Congress to force people to buy a product against their will, five justices held that the act was valid regardless because the penalty was actually not a regulation of commerce but a tax on not buying insurance. Notwithstanding PPACA's clear use of the term "penalty" and its obvious compulsory intent, the justices ruled that it only imposes a tax on a voluntary act.

Such a sudden and extreme alteration of a statute's meaning is troubling because one of the most essential elements of the rule of law is that the government operate according to fixed, predictable, and uniform standards. The reason legislators write laws and courts carefully parse their meaning is to ensure that the ruling powers do not radically alter their policies or treat citizens in an ad hoc fashion. As James Madison warned in *Federalist* #62, "mutable" legislation

poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

For the Court to suddenly fashion a dramatic reinterpretation of one of the most basic elements of PPACA shakes public confidence in the stability and integrity of the legal process.



The Court's transformation of the mandate into a tax also runs into serious constitutional problems that the Court never seriously addressed. Just one is the fact that the Constitution requires "all bills for raising revenue" to originate in the House of Representatives. But PPACA originated in the Senate, when Majority Leader Harry Reid offered an "amendment" to a bill the House had passed earlier that erased the bill's entire text and replaced it with what became PPACA. Thus, even if the penalty is a tax, it violates the Constitution.

The Origination Clause question is now the focus of a lawsuit brought on behalf of South Dakota businessman Matt Sissel. The Obama administration has argued in that case that Congress did not violate the Origination requirement because PPACA is not a "bill for raising revenue"; rather, it is only meant to penalize those who lack insurance. Yet the Court's June 2012 decision clearly declares that what PPACA calls a "penalty" is not a penalty, only an ordinary, revenue-generating tax. All money raised by this tax goes not into a special, earmarked fund, but into the general treasury for Congress to spend as it pleases. The act also imposes dozens of other taxes that will raise millions of dollars in general revenue. It's irrational to declare the penalty a tax at some times and not a tax at other times.

White House lawyers also argue that the Constitution permits the Senate to use the "gut and amend" procedure to get around

the Origination requirement because the Constitution allows the Senate to "amend" House-passed revenue bills. But if the Senate's power to "amend" is that broad, then the Origination Clause would be meaningless; senators could add taxes willy-nilly to any bill arriving from the House. Indeed, the Supreme Court has already held that the Senate's power to amend is limited. While the Senate can amend House-created bills and even add taxes to them, a Senate amendment must be "germane" to the original House bill. Thus, if the House passes a bill raising taxes on one thing, the Senate can amend it by adding a tax on some other thing. But it cannot simply attach a tax to any House-passed bill regardless of subject. PPACA began life in the Senate. It was substituted in its entirety for a House bill that would have given veterans tax credits when buying their first homes, and which originally had nothing to do with insurance or health care. If the Origination Clause has any force at all, it must prohibit this sort of trickery.

UNCHECKED AUTHORITY

The PPACA's text raises even more significant rule-of-law concerns. Notwithstanding its almost 2,000 pages, the act actually leaves a host of crucial provisions undefined and, instead of establishing clear directives, allows administrative agencies to decide later what rules will apply to the nation's health care industry. Thanks to

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PPACA, these administrative agencies exercise an extremely broad degree of discretion, yet they are not run by elected officials. They are staffed by hired bureaucrats who are purposely insulated from control by voters—and, accordingly, are not responsible to them. This is meant to enable agencies to employ their expertise with a minimum of political manipulation, but it also means that the rules citizens must obey are written by people not directly responsible to those citizens. As Secretary of Health and Human Services Kathleen Sebelius remarked when she came under criticism for the poor performance of the *HealthCare.gov* website in October, “The people calling for my resignation are the people I don’t work for.” Administrative officials like Sebelius and her subordinates do not answer to, and need not satisfy, the people.

The most egregious of PPACA’s myriad expansions of administrative power is the Independent Payment Advisory Board (IPAB), an autonomous super-legislature of 15 presidential appointees tasked with reducing Medicare spending. As its name suggests, IPAB operates independently of Congress, but it is far from advisory. The act empowers the board to achieve its goal of cost reduction by unilaterally enacting laws—which are euphemistically called “recommendations” in the act, but take effect automatically without a vote of Congress, signature of the president, comment from the public, or even review by the courts. Free from executive, legislative, or judicial checks and balances, IPAB has power to take whatever steps it considers “related to the Medicare program,” presumably including establishing price controls, levying taxes, and even—*notwithstanding* the Obama administration’s claim to the contrary—rationing health care. Remarkably, IPAB’s edicts cannot be supplanted unless Congress and the president quickly enact a substitute plan that reduces spending to the same level as IPAB’s own decrees would have. The act even restricts Congress’s power to abolish IPAB—only a resolution to that effect passed by a three-fifths supermajority of both houses during a short window in 2017 can end the board’s operations.

IPAB’s constitutionality is now being challenged in a lawsuit brought on behalf of Phoenix physician Eric Novack. In its defense, Obama administration attorneys have argued that IPAB is sufficiently constrained because the act explicitly bars it from rationing care, increasing deductibles or copayments, or restricting benefits or eligibility. That’s true, but the act also fails to define those terms and it is hard to determine how, short of rationing care, IPAB could possibly meet its mandate of reducing Medicare spending if it cannot increase beneficiary contributions or alter eligibility standards. The board’s remaining option—decreasing reimbursement rates for medical supplies and services—could easily diminish the availability of supplies and services. And if IPAB does ration care, the act provides that the board’s decisions cannot be challenged in court or subjected to administrative review. PPACA’s restrictions on IPAB’s authority are therefore toothless. As Washington and Lee University law professor Timothy Jost, one of PPACA’s most prominent supporters, has acknowledged, IPAB’s vague statutory direc-

tives stand “in stark contrast to the detail and specificity with which Congress has written Medicare payment statutes for the past quarter-century, and these provisions grant breathtaking discretion ... to the IPAB.”

Extreme as these administrative powers are, PPACA also provides that if IPAB fails to meet its cost targets, or if no members are appointed to serve on the board, the HHS secretary alone will inherit its breathtaking authority. President Obama has failed to appoint any members to IPAB, so Secretary Sebelius will now exercise those powers unilaterally.

AMENDING PPACA—WITHOUT CONGRESS

Unilateral exercises of administrative authority have already become commonplace with PPACA, however. In September and again in November, the Obama administration announced that it would delay enforcement of key provisions of the law, ignoring the clear deadlines Congress enacted. One such provision is the employer mandate, which requires businesses that employ more than 50 people at least 30 hours per week to offer government-approved health insurance plans to all full-time employees and their dependents or else face annual fines of up to \$2,000 per full-time employee. Corporate lobbyists convinced the Treasury Department to delay the reporting requirement, which in turn will delay the assessment of penalties. This came as a surprise to some employers, who had already expended substantial resources and made drastic changes to their businesses in order to comply. And in the wake of the *HealthCare.gov* fiasco, agencies also decided to postpone enforcement of the individual mandate.

Another unilateral administrative change in PPACA came in early 2013 when the Internal Revenue Service essentially rewrote a portion of the act governing subsidies and taxes in health insurance “exchanges,” the government-administered insurance websites that serve as the primary vehicles through which the legislation is implemented and enforced. Although the act says each state will have a separate exchange, it also gives each state the choice between establishing its own exchange or having the federal government create one for the state. Because all decisions regarding exchanges are subject to federal approval, states that do create exchanges must pay the costs of operating them but do not exercise final control over them.

In an effort to entice states to cooperate with PPACA, the act offers billions of dollars in taxpayer subsidies for the purchase of health insurance through the state-funded exchanges. The eligibility for those subsidies also triggers the provision requiring employers of 50 or more full-time workers to provide government-approved coverage or be fined. As written, the law authorizes that penalty *only* in states that create their own exchanges; states that choose not to establish exchanges can shield their businesses and citizens from the penalties. What’s more, the opening of a state exchange also triggers subsidies that can push some low-income people into the group to whom the

individual mandate applies. Those harsh realities led most states to refuse to create their own exchanges.

Faced with the risk of having to fund and operate its own exchanges in more than half the country, the administration instead issued an IRS administrative rule declaring that it will impose the same penalties in states with federally created exchanges. This rule is not authorized by PPACA's clear language. Employers and individuals have now filed four separate lawsuits across the country challenging the IRS's unauthorized imposition of those so-called taxes.

Aside from the question of whether bureaucratic decisions like these violate the actual wording of PPACA, they demonstrate the act's most remarkable feature: its extreme delegation of rule-making authority to bureaucratic "experts" insulated from democratic control. While some degree of delegation is inevitable in any political system, it is a dangerous principle that, taken to extremes, can destroy critical elements of the rule of law. Julius Caesar and Napoleon Bonaparte, after all, were granted dictatorial powers by legislatures that chose to give up their lawmaking powers in order to evade tough political decisions. While PPACA may not rise to that level of tyranny, its vast new delegations of authority to agencies like IPAB and the IRS represent Congress's effort to escape hard choices by handing the reins of power to bureaucrats. Those bureaucrats often act in an ad hoc fashion, on the basis of expediency rather than principle, without meaningful public control, and their actions set no reliable precedent to guide future action. Madison's concern about laws that are "so incoherent that they cannot be understood," and that "undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow," becomes real in a society ruled by a multitude of vast, unaccountable agencies that can alter and redefine critical rules and definitions to suit the needs of the moment.

ARIZONA AUTOCRACY

PPACA has even encouraged lawlessness in the states. The latest and perhaps most surprising example is Arizona, once a leader in the coalition that challenged the law's mandate that states expand Medicaid eligibility or lose all existing federal funding. Although the Supreme Court ruled in favor of the states 7–2, Arizona has now reversed course in a striking and lawless way.

This spring, Gov. Jan Brewer (R) declared that she favors expanding the state's Medicaid rolls and proposed to fund the state's resulting liability by imposing a "provider tax" on hospitals. Expansion advocates orchestrated a special legislative session that met in the middle of the night and suspended procedural rules that would have required the proposal to go through committees before being considered by the full legislature. Brewer and her supporters garnered a bare majority to pass the program, including its new tax.

Over 20 years ago, Arizona voters enacted a constitutional provision requiring a two-thirds supermajority of the legislature to

approve any "act that provides for a net increase in state revenues." But Brewer and her supporters shrugged off that requirement, claiming that the new Medicaid tax is not actually a tax but an "administrative fee." They justified this by claiming that, instead of imposing a specific assessment on citizens, the law allows a single appointed bureaucrat—the state's Medicaid director—to identify which hospitals are liable for the payment and what amount they must pay.

Such a dodge ignores not only the Arizona Constitution's explicit supermajority requirement, but also the principle of separation of powers. That concept—central to the American model of constitutionalism—bars legislatures from delegating to another branch of government—or a single, unelected bureaucrat—an essentially legislative power such as the power to tax. Yielding such decisions to independent administrators invites uncertainty and opens the door for special interest groups and lobbyists to obtain special favors, subsidies, and exemptions. Legislators are beholden to their constituents. Bureaucrats face no such accountability.

In his classic 1964 book *The Morality of Law*, Harvard legal philosopher Lon Fuller listed several criteria that mark the breakdown of the rule of law. They include the lack of rules, leading to inconsistent decisions; rules that are secret or unintelligible; the use of retroactive legislation; commands requiring citizens to do the impossible; edicts that change unpredictably; and a gap between the rules and the way government actually operates. A society suffering from those maladies is likely to be governed arbitrarily, rather than lawfully.

Sadly, even in its early stages, PPACA already manifests many of those symptoms. It left many crucial terms unexplained; even "minimum essential coverage"—i.e., what kind of insurance the law requires Americans to purchase—was left for HHS bureaucrats to define later, outside the reach of the ballot box. The employer mandate was unilaterally extended by administrative fiat beyond the statute's clear command—yet Republican demands for a similar extension of the individual mandate were turned away, only to be granted in a modified form weeks later when *HealthCare.gov* proved a failure.

Those and other aspects of the legislation's halting and unpredictable implementation reveal serious flaws in PPACA. But they also demonstrate a deeper crisis. In the pursuit of progressive goals, the Obama administration and its congressional allies have done long-lasting damage to a constitutional order that was meant to preserve individual liberty by cabin government power along clear, predictable, and democratically accountable lines. R

READINGS

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