

ObamaCare: The Plot Thickens

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I. Exposition

The Patient Protection and Affordable Care Act (PPACA) has had an interesting ride. Enacted over public opposition,¹ it has survived numerous near-death experiences both before and after passage. Most notably, the PPACA lingered on death row for weeks after five Supreme Court justices cast a preliminary vote to strike down the entire law—until Chief Justice John Roberts apparently switched his vote.² Amid such high courtroom drama, one could be forgiven for missing a concurrent and equally dramatic storyline that is only now taking center stage.

The PPACA authorizes up to \$1.2 trillion of health insurance subsidies over 10 years,³ to be distributed through state-established health insurance “exchanges.” Yet two-thirds of the states have declined to establish an Exchange, leaving that task to the federal government.⁴ This unexpected development has major consequences. The PPACA authorizes those subsidies only through state-established Exchanges, not federally run Exchanges. By refusing to establish Exchanges, states have therefore vetoed some \$800 billion of new entitlement spending.

Without those subsidies, the PPACA will collapse of its own weight. Indeed, this development makes the Act so vulnerable to repeal that the Obama administration has hatched an audacious plot to rescue it. In broad daylight, the Internal Revenue Service is attempting to tax, borrow, and spend that \$800 billion—contrary to both the express language of the PPACA and congressional intent. Thus in addition to other abuses that have recently come to light,⁵ the IRS is attempting to tax millions of employers and individuals without congressional authorization.

A few of those employers and individuals are challenging the IRS’s illegal taxes in federal court. If they succeed, they will also block the full \$800 billion of unauthorized spending—which would practically force Congress to reopen, and possibly repeal, the PPACA.

Yes, this story has everything, starting with...

II. Inciting Action

Our tale begins in Nebraska, whose voters re-elected moderate Democrat Ben Nelson to the U.S. Senate in 2006. As the Senate debated health care reform in 2009, Nelson was leery of a federal takeover of health care, or at least the appearance of it. He demanded that state governments rather than the federal government administer the Sen-

ate bill’s new regulatory agencies, called health insurance “Exchanges.”⁶ These agencies would implement or help to enforce the bill’s major provisions, including the ban on discrimination against people with pre-existing conditions and the individual mandate. Crucially, Exchanges were also the conduit for more than \$1 trillion in health insurance subsidies the bill would authorize. The Senate leadership needed the support of all 60 Democratic senators to break a Republican filibuster of the Democrats’ health care bill, so Nelson got his way.⁷ It didn’t hurt that other moderate Democrats made the same demand.

While that solution solved Nelson’s political problem, it created another problem. Congress cannot simply command states to implement federal programs like a health insurance Exchange. That’s a constitutional no-no that courts call “commandeering.”⁸ Fortunately, a law professor named Timothy Jost had a solution.

In early 2009, Jost proposed that Congress get around this problem “by offering tax subsidies for insurance only in states that complied with federal requirements.”⁹ Congress can and does create these sorts of incentives for states all the time.¹⁰ The Medicaid program, for example, offers billions of dollars to states but only if they are willing to implement health care programs that meet federal specifications. If not, states get nothing.

Senate Democrats liked this idea of creating such incentives for state cooperation so much, they incorporated it into both leading health care bills—one reported by the Finance Committee, the other by the Health, Education, Labor, and Pensions (HELP) Committee.¹¹ The incentives were so large, and supporters were so certain that all states would cooperate,¹² no one thought twice about the fact that Jost’s solution to the “commandeering problem” effectively gave each state a veto over the federal subsidies the bills sought to create. Supporters certainly had no incentive to herald the fact that they were giving states veto power over an essential element of the bills’ regulatory scheme. Senate Democrats passed a merged version of Finance and HELP bills—dubbed the Patient Protection and Affordable Care Act—in a pre-dawn vote on Christmas Eve of 2009, without a vote to spare.¹³

House Democrats had earlier passed a bill would have created a single health insurance Exchange run by the federal government,¹⁴ and they were none too fond of the PPACA’s state-run

Exchanges. In a letter to House Speaker Nancy Pelosi and President Obama, eleven Texas Democrats even complained the PPACA’s approach to Exchanges would allow states to block the law’s benefits.¹⁵ President Obama reportedly sided with the House negotiators in favor of a single, federally run Exchange.¹⁶

But then, a somewhat implausible event triggered...

III. Rising Action

In January 2010, Massachusetts voters elected Scott Brown (R) to fill the Senate seat vacated by the death of Edward M. Kennedy (D).¹⁷ Brown’s victory meant Senate Republicans would have just enough senators—41—to prevent a vote on final passage of any House-Senate compromise.

While some observers declared health care reform finished,¹⁸ Brown’s election actually left Democrats with two options. The first was failure. If they insisted on forging a compromise between the House and Senate bills through “regular order,” the legislation would have died in the Senate. The second option was for the House to approve the Senate-passed PPACA as-is, while making limited modifications through the “budget reconciliation” process. Passing the PPACA as-is would send it immediately to President Obama’s desk. And under Senate rules, a simple 51-vote majority could approve the changes demanded by House Democrats.

Supporters urged reluctant House Democrats to choose the second option. Making his second major contribution to this drama, Prof. Jost organized a letter from dozens of left-leaning academics and activists that described the Senate bill as “imperfect” but implored, “The House of Representatives faces a stark choice. It can enact the Senate bill, and realize the century-old dream of health care reform... Pass the Senate bill, and improve it through reconciliation.”¹⁹

Upon receiving assurances that Senate Democrats would approve the House’s modifications through reconciliation, House Democrats passed both the PPACA and the reconciliation bill that amended it on March 21, 2010.²⁰ President Obama signed the PPACA, an achievement Vice President Joe Biden (D) famously described as “a big [expletive] deal,” on March 23.²¹ Senate Democrats made good on their word by passing the reconciliation bill,²² which President Obama signed into law on March 30.²³

At that point, our narrative reaches a...

IV. Plateau

As a result of the political and constitutional constraints congressional Democrats faced, Jost’s recommendation that Congress overcome the commandeering problem “by offering tax subsidies for insurance only in states that complied

with federal requirements” became law. Here’s how it works, and how we know Congress meant it.

The PPACA restricts eligibility for “premium-assistance tax credits” to individuals who purchase health insurance through an Exchange “established by the State under Section 1311” of the Act. If a state fails to establish an Exchange itself, Section 1321 authorizes the federal government to establish one for the state. But the statute nowhere authorizes premium-assistance tax credits through federally run Exchanges. On the contrary, the PPACA explicitly, repeatedly, consistently, and unambiguously restricts eligibility for premium-assistance tax credits to residents of states that establish their own Exchanges.²⁴

That language appeared in Senate Finance Committee chairman Max Baucus’ (D-MT) first draft of his committee’s bill, was approved by the Finance Committee,²⁵ was inserted into the final bill by Senate leaders and White House officials in Senate Majority Leader Harry Reid’s (D-NV) office,²⁶ and garnered 60 votes on the Senate floor. It then traveled to House floor, where House Democrats approved it. When this language landed on President Obama’s desk, he eagerly signed it into law. Prof. Jost’s proposal made the entire journey from the Finance Committee to the U.S. Code without substantive alteration. The PPACA thus creates a tremendous financial and political incentive for states to implement the law, but also gives states the power to veto major

elements of its regulatory scheme.

Just in case Prof. Jost’s contributions to the legislative history and the HELP bill’s conceptually identical provision were not enough to establish that Congress meant exactly what it said, we also have the word of the PPACA’s lead author. During a Finance Committee markup of the language on September 23, 2009, Baucus admitted that his bill conditioned premium-assistance tax credits on states implementing an Exchange. Indeed, he admitted his bill *had* to offer tax credits only to states that established Exchanges and withhold them from states that did not. The power to regulate health insurance resides with the Senate’s HELP Committee; it lies outside the Finance Committee’s jurisdiction. Making each state’s establishment of an Exchange a precondition of residents receiving tax credits was the only way the Finance committee could have jurisdiction to direct states to establish Exchanges in the first place.²⁷

The legislative history further shows House Democrats accepted the Jost language as-is. House Democrats scoured the section of the PPACA containing the tax-credit eligibility rules, amending it no less than seven times via the reconciliation process. Yet despite their dissatisfaction with the PPACA’s approach to Exchanges, the House made no changes to the provisions restricting tax credits to state-established Exchanges.²⁸ The reconciliation bill did add language providing that Exchanges established by U.S. territories would

be treated as state-established Exchanges under the law,²⁹ showing that House Democrats knew how to authorize tax credits in non-state-established Exchanges when they desired. Yet the reconciliation bill did nothing either to authorize tax credits through federal Exchanges, or otherwise to alter the language restricting tax credits to states that establish their own Exchanges. House Democrats—including the eleven Texas Democrats who complained about the Senate’s approach to Exchanges³⁰—approved the PPACA’s language restricting tax credits to states that established Exchanges as-is, and declined to change it through reconciliation.

The clear, unambiguous language of the PPACA shows, and the legislative history of the statute confirms, that Congress intentionally restricted tax credits to states that establish their own Exchanges. This feature received little notice amid the ceremony (and other controversies) surrounding President Obama signing such a “big [expletive] deal” into law. Had the PPACA’s architects been correct that states would be eager to establish and operate health insurance Exchanges, this feature would have remained unremarkable.

Instead, we saw...

IV. More Rising Action

Contrary to supporters’ expectations, a total of 34 states, representing roughly two thirds of the U.S. population, have opted not to establish an Exchange.³¹ In those 34 states, the premium-



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assistance tax credits and related subsidies would, if authorized, carry a total budgetary impact of \$800 billion over the next 10 years.³² But under the statute, those subsidies are not available in those states.

It is difficult to overstate the threat this poses to the PPACA's survival. The purpose of the subsidies is to shift the considerable costs of the law's health insurance regulations from the premium payer to the taxpayer. Without that cost-shift, the full cost of the law would become palpable to consumers, employers, and particularly health insurance carriers. Insurers are the intended recipients of those subsidies. Without them, the PPACA threatens to destroy their business model. In the two-thirds of states that have refused to establish Exchanges, these groups would likely demand that Congress reopen and/or repeal the law. As one trade publication reports:

If premium subsidies are not available in federally established exchanges, "No one would go to those exchanges. The whole structure created by the health care reform law starts to fall apart," said Gretchen Young, senior vice president—health policy at the ERISA Industry Committee in Washington.³³

Indeed, we have already seen such a collapse in another part of the PPACA.

The PPACA also created a long-term care entitlement program known as the CLASS Act. Congress imposed on this program the same insurance "reforms" it imposed on private health insurance markets—i.e., high-risk enrollees would pay the same premiums as low-risk enrollees—but without subsidies or a mandate to mitigate the resulting adverse selection. Experts warned the CLASS Act would prove unsustainable.³⁴ After its enactment, the Obama administration abandoned any hope of implementing the program, and Congress and President Obama repealed it in January 2013.³⁵ The PPACA's Exchange-related health insurance-market "reforms" would collapse and be repealed just as—and for the same reason—as the CLASS Act.³⁶

As if that weren't excitement enough, then came the real...

V. Conflict

When it became evident that dozens of states would refuse to establish Exchanges, the IRS simply rewrote the law. In August 2011, the IRS announced that it was planning to issue premium-assistance tax credits federal Exchanges, even though the statute expressly forbids it.³⁷ In May 2012 it finalized that policy.³⁸

Amid heavy criticism from think tanks, law professors, and members of Congress,³⁹ the IRS offered only perfunctory and post-hoc rational-

izations for its rewriting.⁴⁰ The agency failed to cite any part of the statute in support of its interpretation of the law until October 2012, fourteen months after announcing it.⁴¹ Even then, the provisions the IRS cited failed to support the agency's position, or even to cast ambiguity on the clear language of the statute. The sole piece of legislative history the IRS has offered to support its position—i.e., the Congressional Budget Office score of the PPACA—crumbled when the CBO admitted it had not done a legal analysis of the relevant provision.⁴² The IRS's position reduces to the absurdity that an Exchange established by the federal government is the same thing as an Exchange established by a state. It is little wonder that the agency and its defenders—most notably and ironically, Prof. Jost—have flailed about for nearly two years trying to square that circle.⁴³

The IRS's attempt to spend some \$800 billion without statutory authority turns out not to be a victimless crime. Due to interactions with other provisions of the PPACA, the IRS's illegal tax credits will trigger illegal taxes against millions of employers under the employer mandate, as well as millions of individuals under the individual mandate.⁴⁴

Those victims are fighting back. In *Pruitt v. Sebelius*, Oklahoma attorney general Scott Pruitt filed the first legal challenge to the IRS's illegal tax credits in federal court.⁴⁵ First, Oklahoma claims the issuance of illegal tax credits will trigger illegal taxes against the state under the employer mandate. Second, Oklahoma claims that Congress gave states the exclusive power to decide whether to embrace the taxes and subsidies that come with establishing an Exchange, yet the IRS is usurping that power and therefore infringing Oklahoma's sovereignty.⁴⁶ In a separate lawsuit, *Halbig v. Sebelius*, several private employers and individual citizens have asked the U.S. District Court for the District of Columbia for relief from the IRS's illegal taxes and other injuries.⁴⁷ Legislators in Ohio and Missouri have introduced legislation that would effectively block both the IRS' illegal tax credits and illegal taxes on employers in those states.⁴⁸

Those court cases and that legislation are still in the early stages, which leaves observers wondering when will we arrive at the...

V. Climax

The IRS stands a very real chance of a rebuke from the federal courts. The non-partisan Congressional Research Service writes:

a strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a

state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent...and likely be deemed invalid.⁴⁹

No less an authority than *Harvard Law Review* has urged the Supreme Court to clarify whether the IRS's decision is the sort of "major question" that courts should not allow agencies answer themselves:

In each of the major questions cases, the Court was skeptical that Congress would implicitly delegate a significant determination. Viewed in this light, a reviewing court may have difficulty believing that Congress, without a clear directive, intended to delegate the determination of whether millions of Americans may receive billions of dollars to purchase health insurance.⁵⁰

It's actually hundreds of billions of dollars, but you get the point.

These legal challenges, and the outcome of the Ohio and Missouri legislation, will unfold at the same time the federal government is implementing the PPACA's major provisions. The Act provides that its trillion-plus dollars of tax credits and subsidies, as well as the penalties under the employer and individual mandates, will begin to take effect on January 1, 2014. The health insurance Exchanges must be open for business even sooner, by October 1, 2013. There is considerable doubt whether the Exchanges will be operational by that date, and able to offer Americans the health insurance they will be legally required to purchase. Baucus predicts "a huge train wreck."⁵¹

A ruling against the IRS—whether a final judgment or even a preliminary injunction—would reveal the full cost of the PPACA to consumers, employers, and insurance carriers, and could generate a groundswell of support for delaying, reopening, or even repealing the statute.⁵² The consequences could be so catastrophic that vulnerable Democratic Senators and even President Obama could come to view repeal as the face-saving option.

It bears stressing that such a catastrophe would be the result of implementing the PPACA exactly as Congress intended. The lawsuits do not seek to undermine the PPACA. They seek to force the Obama administration to obey the statute, and to prevent the administration from taxing, borrowing, and spending \$800 billion in clear violation of the law. If implementing the PPACA as Congress intended would lead to catastrophic results, the fault lies with the PPACA itself.

Nevertheless, the outcome of those lawsuits is where the real action is. Their effect on the PPA-



CA is merely...

VI. Denouement

If federal courts uphold the clear, unambiguously expressed will of Congress, it is difficult to see how the PPACA could survive.

Sure, health insurers and the health care industry would pressure those 34 states to establish Exchanges and thereby lift the vetoes they have exercised over major provisions of the law. Yet one of those provisions is the employer-mandate penalties. Thus employers would likely exert countervailing pressure, and urge those 34 states not to establish Exchanges. Employers may even press the 16 states that have established Exchanges to un-establish them.

Few Washington-based groups would be content to wait for the states to act. Some groups, most notably insurers, would no doubt press Congress to authorize tax credits through federal Exchanges. But the chances of the Republican-controlled House of Representatives rescuing the PPACA by expanding its scope are slim. The only real question would be how much of the law House Republicans would demand be jettisoned in return for their support of a legislative fix. Given their unanimous support for full repeal,⁵³ they may demand no less than that.

Were the IRS to prevail, the PPACA may survive yet the catastrophe would be greater. An IRS victory would mean the executive branch of the U.S. government will have succeeded in taxing, borrowing, and spending roughly \$1 trillion dollars not only without congressional authorization, but contrary to the clear, unambiguously

expressed will of Congress. An IRS victory would mean that The Law is not the statutes that Congress enacts, but the arbitrary decrees of unelected government officials. The Law will be neither legitimate nor predictable, but discretionary and arbitrary. Whatever legal pretext allows the IRS to prevail will not confine itself to this case, or to health care. It will be applied in other areas by government officials of all political ideologies. A court ruling that allows the IRS to tax and borrow and spend where it is explicitly forbidden to do so by statute would lend credence to both the perception that the government is no longer bound by the law and the corollary conclusion that therefore neither are the people.⁵⁴

Which brings us to our...

VII. Theme

Our tale, though scripted and set in America's ongoing health care debate, is not actually about health care at all. It is about whether government officials are subject to democratic constraints.

In this still-unfolding narrative, the Obama administration's actions are triply anti-democratic. First, the IRS is violating a direct constraint that popularly elected legislators placed on the executive branch. Second, it is violating that duly enacted statute for the purpose of denying popularly elected state officials the vetoes Congress gave them over certain provisions of the statute. And third, it is violating the statute because administration officials either cannot fathom or will not accept that Congress meant to do what it clearly did.⁵⁵

Obama administration officials continu-

ally emphasize that the PPACA is "the law of the land."⁵⁶ That remains to be seen, in more ways than one. 🗳️

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Image 2: Image courtesy of winifredsoxo via Flickr



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