

PPACA's Pyroclastic Plume

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A thick volcanic plume is flowing over the 2010 healthcare law. Rumbles are heard from the U.S. Supreme Court which, in 2012, will issue a fourfold constitutional judgment. To one centrist scholar, the law's constitutional frailty suggests chambers of operational dysfunction beneath the surface. An NFIB study estimates how that dysfunction will waft over small business and the rest of the economy. And a Treasury Inspector General's report indicates that the law's overhyped tax credit provides little shelter. As the law sags beneath the ash, NFIB suggests twelve ways that Congress could begin to replace the law with real reform that improves healthcare and cuts costs.

The constitutional challenge: The U.S. Supreme Court announced on November 14 that in 2012, it will decide the fate of the Patient Protection and Affordable Care Act (PPACA). From the many cases wending their way through the federal courts, the Supreme Court selected [NFIB v Sebelius](#) as the centerpiece of its deliberations. In March, the Court will hear arguments on four questions: (1) Is the unprecedented individual mandate constitutional? (2) If the Court strikes down the individual mandate, must it also strike down the entire law? (3) Does the Anti-Injunction Act require courts to wait until 2014 to consider constitutional challenges, since no penalties will be paid on the mandate until then? (4) Does PPACA's massive increase in Medicaid unlawfully coerce the states into participating? A ruling is likely to come in June.

In 2010, the National Federation of Independent Business (NFIB) joined with 26 of the 50 states to challenge the healthcare law's constitutionality. A Florida federal court ruled that the individual mandate was unconstitutional and ordered the entire law struck down, since it lacked a severability clause. The Eleventh Court of Appeals agreed that the mandate was unconstitutional but allowed the rest of the law to stand. NFIB appealed the second part of that ruling, arguing that without a severability clause, the entire law must fall. More information on NFIB's lawsuit is available at www.nfib.com/lawsuit.

Operational dysfunction: In a penetrating column, [Walter Russell Mead](#) (Bard College) explored the deeper significance of the lawsuit: "Writing a bill that passes constitutional muster should be easy in a Congress so rich in lawyers and legislation writers. Writing a bill that successfully improves American healthcare delivery while controlling costs, on the other hand, is hard. Very, very hard. ... If they did so poorly at the easy part of their task, the part where we can actually measure and monitor their success, what kind of mess have they made of the hard and murky parts that nobody, including the authors of the bill, really understands?"

Job losses: NFIB has supported healthcare reform for decades but strongly opposed PPACA because it failed to do what Professor Mead suggested was important: improving healthcare delivery while controlling costs. As an example, the NFIB Research Foundation has just released a [job-loss study](#) enumerating the damage that PPACA's higher costs will do to small business. "Effects of the PPACA Health Insurance Premium Tax on Small Businesses and Their Employees," by Michael J. Chow, estimates the job losses that will result from just one provision of the law – PPACA's health insurance premium tax. Chow estimates that this tax "will reduce private sector employment by 125,000 to 249,000 jobs in 2021, with 59 percent of those losses falling on small business." This tax falls heavily on small business while bypassing big business, labor unions, and governments; and it is only one of a

constellation of cost-increasers that small business faces in PPACA. NFIB is spearheading a [repeal coalition](#) aimed at dropping this tax; toward this end, [H.R. 1370](#) and [S. 1880](#) have been introduced in the House of Representatives and Senate.

Credit oversold: At the same time, the most heavily-touted cost-decreasing measure in the law turns out to be a dud. PPACA supporters have argued that over 4 million businesses would benefit from a tax credit of up to 35% of the businesses' health insurance costs (50% beginning in 2014). NFIB consistently said that the credit is fine for those who can make use of it, but that relatively few businesses would get much out of it. The preliminary figures are in now, and they are worse than NFIB's pessimistic estimates were. The Treasury Inspector General for Tax Administration [reported](#) that as of mid-October, only 309,000 businesses had claimed the credit for 2010 and that the average credit per business was around \$1,346 – not much of inducement to offer insurance.

Twelve doable reforms: Whichever way the Supreme Court rules, the country will need real healthcare reform that improves healthcare delivery and moderates costs. Toward this end, NFIB has posted a set of twelve [NFIB Healthcare Solutions](#) that could begin the task of replacing PPACA. The proposals include (1) Tax parity between the group and individual markets; (2) Tax parity between insurance purchased by the self-employed and groups insurance; (3) Defined contribution health insurance; (4) More transparent measures of cost, options, and quality; (5) Public and/or private exchanges; (6) Interstate insurance purchasing. (7) More risk-pooling options for small businesses and individuals; (8) Mechanisms to get insurance for those with pre-existing conditions; (9) Greater insurance portability; (10) Greater latitude for consumer-driven health insurance products; (11) Wellness incentives; and (12) Malpractice reform. These reforms are just a start and did not touch on two big areas where reform is needed: healthcare delivery systems and entitlements.

Conclusion

Those who wrote this law ought to go to bed each night fearing two things. Their lesser fear should be that the Supreme Court overturns PPACA, leaving their vision of healthcare reform as dead as Pompeii. Their greater fear should be that the Supreme Court doesn't overturn the law, for then they will spend the next generation explaining the destruction they brought upon American healthcare and the American economy.