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RESEARCH BRIEF



Giving the pendulum a push

A legal scholar's role in studying healthcare reform

In March 2010, the Patient Protection and Affordable Care Act became federal law. Two months later, Nicholas Bagley, J.D., joined the University of Michigan Law School faculty. The timing may be coincidental. But the impact of the work the latter has done on the former is not.

In the years since the ACA took effect, Bagley and his co-authors have studied how the government is enacting the law's provisions for a broad array of healthcare reforms—from new insurance programs and requirements, to new incentive models for better care at lower cost. He has also scrutinized the use of the judicial system by the ACA's foes through a legal lens.

Beyond the ACA, Bagley's focus on healthcare-related legal questions ranges from the incentives for medical technology development to the potential for healthcare to be regulated more as a public utility than as a marketplace.

Most legal scholars in his specialty of administrative law study how government agencies regulate certain sectors like environmental protection or transportation.

But few have focused on healthcare law, despite the massive scale on which administrative agencies like the Centers for Medicare and Medicaid Services operate. And fewer still have worked to bridge the divide between an academic view of healthcare law and the public and policymaking spheres, by writing in medical journals and a widely read healthcare research blog.

The result: Bagley has become a sought-after advisor, commentator, and interpreter by journalists, agency officials, and elected representatives. The following summarizes key areas of focus for his work.

ACA delays

Though the ACA set out a firm schedule for its major milestones, such as deadlines for individuals and businesses to meet new health insurance coverage requirements, the Obama administration has made several changes to that timetable.

The changes—such as delaying the requirement that employers offer insurance, and requiring individuals to move from existing coverage to new ACA-approved plans—have been justified as exercises in executive branch enforcement discretion. In other words, because the ACA is being implemented by the executive branch, it can determine exactly when and how to enforce the law.

As a constitutional matter, this pushing back of mandate deadlines doesn't pass muster, Bagley wrote in *The*

New England Journal of Medicine and on *The Incidental Economist* blog. Taken to its extreme, it could shift the balance of power between the legislative and executive branches. Bagley continues to monitor the administration's adherence to mandates and penalty requirements.

ACA rule making

Another aspect of ACA implementation with legal ramifications is how federal agencies determine and roll out the details of programs. For instance, Bagley and U-M colleague Helen Levy, Ph.D., wrote in the *Journal of Health Politics, Policy and Law* about how the administration handled the determination of "essential benefits" that must be covered under ACA-approved insurance plans.

Instead of setting a national, uniform standard of those essential health benefits, the Secretary of Health and Human Services gave the states some limited authority to set different state-specific standards. While this move may seem to skirt the law, Bagley and Levy determined it was just shy of the "line"—and, by avoiding disruption in insurance markets, might actually have been good policy.

As more ACA provisions reach the implementation stage, keeping a legal eye on the process will be important.

King v. Burwell: Four words making the difference

In spring 2015, the entire future of the ACA seemed to hang on how the Supreme Court interpreted a few short words buried in the law's text. The case of *King v. Burwell*, which originated in a legal filing by opponents of the ACA and succeeded in making it to the nation's highest court, would determine whether millions of Americans could receive tax credits to help offset the cost of the insurance plans they bought on the *healthcare.gov* site.

Bagley's writings about the case in the months leading up to this moment, and in the days after, had wide influence in policy, media, and academic circles. His careful and understandable descriptions of just what was at stake, and his specific call for the court to reject the plaintiff's argument, appeared not only in journals and blog posts—but also in an amicus brief filed with the court itself by Bagley and his Yale and Columbia University colleagues.

In short, *King v. Burwell* rested on the meaning of the words "established by the State," as it applied to the exchanges where Americans could shop for ACA-related insurance coverage and determine if their income level qualified them for federal tax credits and subsidies. Because 34 states—largely along political lines—declined



to set up a state-level exchange, attorneys for King argued that their residents could not receive federal tax credits.

According to Bagley, that interpretation would “make a hash” of other provisions of the ACA, and undermine it, while intruding on the balance between state and federal governance. It would also ignore other provisions in the ACA that show no intent to cut such credits if states didn’t establish an exchange.

Administrative law is often dry, complicated, and difficult to understand. But in describing the potential impact of *King v. Burwell*, and then Justice Antonin Scalia’s dissent in the case, Bagley invoked his child’s piano teacher and the children’s literature character Amelia Bedelia. By bringing the case to life through academic and non-academic writings, Bagley helped advance public discourse on the topic. Some have postulated that the amicus brief and other writings may have even influenced the Supreme Court’s decision itself.

Bagley’s work around *King v. Burwell* extended into very practical “what if” planning at the state level. He was a key participant in a May 2015 summit organized by the U-M Center for Value Based Insurance Design and the Milbank Memorial Fund to help states consider alternative state-based exchange options. Representatives from 23 states looked to him as a resource for developing alternative policy options, depending on the Supreme Court ruling.

Technology and health care spending

Outside the ACA realm, but still within the sphere of administrative healthcare law and regulatory oversight, Bagley has teamed with two colleagues to put forward proposals about technology and healthcare.

In a discussion paper for the Hamilton Project, an initiative sponsored by the Brookings Institution, Bagley and colleagues Amitabh Chandra of Harvard University and Austin Frakt of Boston University and Harvard discuss how distorted “signals” in the healthcare landscape have fueled growth in spending on the use of new medical technologies. The forces that drive innovation and the development of new technologies are misaligned with those that drive the diffusion of those technologies once they are developed, they write.

By providing a tax credit, rather than a tax exemption, for the value of employer-sponsored health insurance, strengthening Medicare’s coverage determination process and using reference pricing for certain therapies in Medicare, they write, these signals could be balanced.

Though Bagley and his colleagues accept that these proposals may be politically unrealistic, the alternative would require regulations that neither politicians nor the American public would likely accept. And to do nothing now will only allow the problem of unchecked spending growth on technology to get worse.

Healthcare as a public utility

The making and implementation of laws about healthcare, and the interpretation of those laws during judicial challenges, have reached a critical peak during the past five years with the ACA. Now that the ACA has addressed much of the issue of covering the uninsured, Bagley predicts that the focus will now shift to the economic problems that still remain in the medical marketplace.

It’s enough to make Bagley put forth the idea that, just as in the years after World War II, states may turn again—as they did once before—to regulating health care more as a public utility. Writing in the *Michigan Law Review*, he notes that the pendulum may already be swinging back in this direction. Tracing the history back to the 19th and early 20th centuries, Bagley writes that in the not-so-distant past, America in many ways regulated medicine as a public utility. He says he aims to give the pendulum “a little push” to get the discussion of potential utility-like regulation going again. He notes, however, that trying to closely regulate such a large, complex, and rapidly changing industry would be very difficult. But the alternative may be worse.

About the researcher

Nicholas Bagley teaches and writes in the areas of administrative law, regulatory theory, and health law. Prior to joining the Law School faculty, he was an attorney with the appellate staff in the Civil Division at the U.S. Department of Justice, where he argued a dozen cases before the U.S. Courts of Appeals and acted as lead counsel in many more. He served as a law clerk to Justice John Paul Stevens of the U.S. Supreme Court and to the Hon. David S. Tatel of the U.S. Court of Appeals. Before entering the New York University law school, he joined Teach For America and taught eighth-grade English at a public school in South Bronx. In 2012, he was the recipient of the Law School’s L. Hart Wright Award for Excellence in Teaching. He is a frequent contributor to *The Incidental Economist*, a prominent health policy blog.

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