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Broccoli and U.S. Healthcare Insurance Legislation: The Constitutional Conundrum

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Would anyone have believed that health insurance legislation in the United States would, in 2012, become a constitutional and moral battleground? Yet, that is exactly what the Affordable Care Act has achieved.

The ACA, or mandatory health insurance law for the uninsured, has divided the country in a way unseen since the Vietnam War. Supporters and opponents of the law battle each other with the virulence of crusaders. On one side, some see national health insurance as an economic and moral necessity; on the other, it is a constitutional and civil rights violation. And, even though the Supreme Court of the United States recently upheld the constitutionality of the health insurance law, most Americans oppose it and Republicans have vowed to repeal it if they get into office in November 2012.

1. The Background

To quickly review, in 2010, the United States was the only advanced country in the world without comprehensive health care.

Nearly 55% of the population was enrolled in private or group health plans. About 29% more of the elderly or poor had Medicare and Medicaid coverage. But there still remained a 16% gap in uninsured coverage, mainly the self-employed, part-time employed, and employees of small business, and jobless. This amounted to between 50 million and 80 million Americans (depending on the length of time you measure their uninsured status).

Obviously, many uninsureds *do* get essential medical treatment, because virtually all hospitals have to provide *emergency* services without regard to ability to pay. Uninsureds may also receive non-emergency or even preventive medical care through charitable organizations, get discounted medical services at a clinic, or just use services and never pay for them.

But, obviously, the cost of their medical and hospital care is always passed on to paying users of health services as much higher insurance premiums or taxes. In 2008, the uninsured collectively used $116 billion worth of medical services. They imposed a cost of over $*1000 per family* on those who *did* pay for health insurance. Plus, it is especially ironic that those who can't pay are actually billed far *more* for medical services than insureds (because insureds' insurance carriers have negotiated medical and hospital discounts up to 66% off the "rack rate").

The Affordable Care Act of 2010 was designed to cover about 50 million uninsureds and expand Medicaid coverage for low income people. But, as we explained in an earlier article,[2] the partisan politics involved in health coverage, together with the peculiarities of the American constitutional system, led to a major legal battle over health insurance reform.

2. The "Tangled Web"

Most Americans do not want to leave their fellow Americans unprotected from health disasters. But many disagree with the convoluted technical legal acrobatics that were used to devise or justify the new health insurance legislation.

The Federal government could simply have provided socialized or national health coverage similar to that in Britain, Canada, and other countries. But it didn't. Instead, in a political deal to avoid confrontation with private health insurers, it agreed to rely exclusively on private carriers to provide health insurance to uninsureds. However, to get acceptable rates, those private insurers needed a huge risk pool. That meant that almost every uninsured American had to be *compelled* to buy private health insurance. But the government did not have the power to actually force people to buy a product. Instead, the government decided to *urge* the purchases with a penalty (called a "tax," to be paid with your annual Federal tax return). The legislation calls this the "individual mandate." Its critics call it "coercion." But whatever its name, the convoluted and compromised scheme raised serious practical and legal problems.

To make the whole program work, uninsureds need to sign on to state or regional exchanges, available on the internet, to review and buy private health plans. Depending on their financial status, they may be entitled to Federal subsidies to help them buy insurance.

The first problem is that lower income uninsureds may not have computers or internet access. And even if they did, they may choose to buy food for their families instead of paying for health insurance that they don't need right away. Of course, they face a hypothetical "tax" (a penalty) for not buying health insurance. But since about 46% of Americans (or about 76 million people) paid no Federal income tax in 2011, this is hardly a convincing threat.

The second problem is that the "tax" is capped so low that even young, healthy people entering the work force — the very people who *can* afford health insurance — may simply decide that it is cheaper to pay the "tax" than buy the insurance. As the Supreme Court decision pointed out, "for most Americans the amount due will be far less than the price of insurance."[3]

These are two *practical* problems with the healthcare law that have been identified. So far, the administration has not provided a reassuring answer to either.

The *legal* problem starts with the "individual mandate" — the requirement that uninsured people buy health insurance. A Federal law that regulates local (state) behaviour raises serious Constitutional issues because of the division of power between the Federal and state governments. The Federal government has jurisdiction *over* interstate commerce[4] and matters that *affect* interstate commerce.[5] But the question now was whether the spiralling cost of national health care actually "affects" interstate commerce to the extent that the

Federal government has jurisdiction to regulate it and pressure people to buy health insurance. (Again, the Federal government could have *created* a national health plan without a Constitutional problem. Instead, it chose to pressure people to buy a product, sold on a local level, that they may not want. That choice generated the Constitutional problem, because the states are sovereign entities of their own within their own jurisdiction.)

Finally, the Obama administration expanded Medicaid coverage for lower income Americans, triggering vastly increased costs. Medicaid is now a combined federal/state program, with the states having already agreed to fund a specific package of coverage. By expanding Medicaid, the Federal government also expanded the states' costs of funding Medicaid. The Federal government then threatened to cut off *all* Medicaid subsidies to states that did not buy into the expanded coverage requirements and agree to make their own matching expanded cash contributions. In other words, the Obama administration changed the existing Federal/state Medicaid pact by saying, in effect, "you get no money at all if you don't agree to my new terms." This change in the existing Federal/state pact raised Constitutional issues.

These issues became the basis for judicial review of the health insurance legislation.

3. The American Doctrine of Judicial Review

Under the American system of government, Federal courts can review Federal and state laws, decide if they are constitutional, and void any laws that are not.

Curiously, that power does not appear in the Constitution. Instead, it was established by the US Supreme Court in *Marbury v. Madison*, 5 U.S. 137 (1803). In that case the Chief Justice, John Marshall, looked at the intention of the drafters of the Constitution as well as different provisions in the Constitution, and concluded that the Constitution was supreme and overrode any contrary statutes:

> "the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument."[6]

The United States thus gained the doctrine of judicial review. Judicial review became the critical issue in health insurance reform.

4. Oral Argument at the Supreme Court

The Affordable Care Act was fiercely partisan legislation. It passed in Congress without a single Republican party vote in the house or senate. Literally minutes after passage, 26 states — more than half the states in the country — filed a lawsuit to declare the Act unconstitutional. It took two years for that case to reach the Supreme Court.

When it did, in March 2012, the Court scheduled almost six hours of oral argument over three days — the longest allotment in recent memory. People waited on line for over 48 hours for the chance to get inside to watch the arguments.

The three days of Supreme Court arguments covered three issues.

1. The Anti-Injunction Act

The first question was whether the appeal could even be heard.

Under the 1867 "Anti-Injunction Act," a court cannot enjoin the payment of a tax. Someone who challenges a tax needs to pay first, then sue.

Because the Act "forced" people to buy insurance by imposing a "tax," some argued that the issue was not even "ripe" until the first taxes were paid in April 2013. The Obama administration had made this argument in the early stages of this case, then dropped it when they lost.

In the Supreme Court, neither the states nor the Federal government raised this issue. The Court *itself* appointed an "amicus" to make the argument. He put in a valiant effort, even though he himself did not seem too convinced by his own argument that the law imposed a tax penalty for non-compliance:

> So I — so I do think, although it's — I certainly wouldn't argue it's clear — that that's the best way to understand the statute as a whole.[7]

In response, the Solicitor-General, Donald B. Verrilli, argued that the administration wanted an immediate decision, that the Court should not apply the Anti-Injunction Act, and that it should *not* consider the penalty to be a tax. This caused some consternation, as when Justice Alito remarked,

> "today you are arguing that the penalty is not a tax. Tomorrow you are going to be back and you will be arguing that the penalty is a tax."[8]

In any event, the Justices were visibly unconvinced by this threshold issue and everyone understood that the real test was on the merits over the next two days. However, the argument focused attention on the administration's shifting technical arguments.

2. Interstate Commerce

The second day of hearings revealed a Court dramatically split on the critical issue of Interstate Commerce.

In the past, Congress used its Interstate Commerce power to regulate *existing* commerce. But now, this power was used to force individuals to buy a product they might not want, on the grounds that *failing* to buy it affected interstate commerce. In effect, the law created a new market that was then regulated.

The Solicitor General argued that the Act was a legitimate response to an economic crisis that affected the national market for health insurance. The requirement to buy health insurance, he said, simply regulated how people would pay for services they were certain to use at some point. But he spoke for only a minute before interruptions began. Justice Kennedy demanded, "[c]an you create commerce in order to regulate it?" Justice Scalia followed with:

> "Could you define the market — everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli?"[9]

"Broccoli" was mentioned eight times as an example of compelled purchases. The "broccoli" debate soon became a national pastime, with commentators either analyzing whether the need for food or healthcare were really the same — or simply offering broccoli recipes!

A few minutes later, Justice Alito, obviously not a broccoli fan, tried a different tack:

> "All right, suppose that you and I walked around downtown Washington at lunch hour and we found a couple of healthy young people and we stopped them and we said, 'You know what you're doing? You are financing your burial services right now because eventually you're going to die, and somebody is going to have to pay for it, and if you don't have burial insurance and you haven't saved money for it, you're going to shift the cost to somebody else.'
>
> "Isn't that a very artificial way of talking about what somebody is doing?"

For some, the government's highly technical position was grating. Justice Kennedy remarked,

> "it can be argued that this is what the government is doing; it ought to be honest about the power that it's using and use the correct power."[10]

3. Severability and Medicaid Expansion

The third day of argument dealt with two questions. *First*, if the mandate were unconstitutional, would the whole statute fail completely, or could the Court try to salvage (or "sever") the redeemable parts, even though the remaining scheme might be different. And *second*, could the Federal government really threaten to cut off *all* state Medicaid aid, if the states did not agreed to Medicaid *expansion* and pay their expanded share?

5. The President's Attack on "Unelected Officials" and Judicial Review

On April 2, 2012, soon after the Supreme Court argument but before the decision, Obama issued a public statement. He said that the Supreme Court's overturning of

his legislation would be an "unprecedented, extraordinary step." He added:

> "I'd just remind conservative commentators that for years what we've heard is, the biggest problem on the bench was judicial activism or a lack of judicial restraint, that an unelected group of people would somehow overturn a duly constituted and passed law. Well this is a good example and I'm pretty confident that this court will recognize that and not take that step."

It did not take long for a reaction. The *Washington Post* reported that "legal analysts and historians said it was difficult to find a historical parallel to match Obama's willingness to directly confront the court."

The day after Obama's statement, in an unrelated case before the Federal Court of Appeals for the Fifth Circuit, the presiding judge ordered the Department of Justice to submit a

> "letter . . . at least three pages single spaced, no less . . . stating specifically and in detail in reference to those statements what the authority is of the federal courts in this regard in terms of judicial review."[11]

The government backed down, and meekly agreed that judicial review was the law of the land.[12]

6. The Decision

On June 28, 2012, the "unelected" Supreme Court issued its divided 5-4 decision.[13]

It upheld the "individual mandate," but *not* on Interstate Commerce jurisdiction. The Court decided that would be a major intrusion on individual rights:

> "Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government."[14]

> "The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent."[15]

In fact, the Court pointed out that the government's theory "would justify a mandatory purchase to solve almost any problem."[16] Putting it a different way, that theory would allow the government to force people to do whatever the government wanted. The Court rejected that notion, saying, "[t]hat is not the country the Framers of our Constitution envisioned."[17]

Instead, the Court decided that, while Congress could not force people to buy health insurance, it could at least tax them if they didn't.[18] As a result, the Court upheld the constitutionality of the "individual mandate" on this technical ground. But, as we pointed out before, the only "mandate" is a very minor tax. It may not achieve the desired result of universal health insurance purchases at all.

The Court also ruled that Congress *could* expand Medicaid. But it could *not* strip the states of their *existing* Medicaid reimbursement funds if they refused to go along with the Federally-imposed *expansion* of benefits:

> "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."[19]

Finally, the Court concluded that "Congress would have wanted to preserve the rest of the Act," so the Court decided that the unconstitutional parts of the Act did not taint the entire legislation.[20] However, by snipping and trimming as they did, the Supreme Court restructured the law in ways Congress never intended. The dissent argued that, "[t]he Court today decides to save a statute Congress did not write."[21]

Chief Justice Roberts, a conservative who seemingly opposed the Act during the oral arguments, switched sides at the last moment, and voted with his liberal colleagues to upheld the law. In 2005, Obama had voted against Roberts' confirmation.

7. The Aftermath

President Obama naturally hailed this "victory for people all over the country." His opponent, Romney, declared that "Obamacare puts the federal government between you and your doctor." The Republican party is committed to repeal the Act if they win the election in November.

Finally, it seems that the country as a whole is suspicious of creeping federal power over personal freedom. *The New York Times* concluded that, regardless of the judicial outcome,

> "most evidence suggests the heath care law has lost miserably in the court of public opinion. National polls have consistently found the law has far more enemies than friends, including a June 2012 New York Times/CBS News poll that found more than two-thirds of Americans hope the court will overturn some or all of it."

Another critical issue is the long-term view for civil rights. The Supreme Court's dissent observed,

> "The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn."[22]

Proponents of health care may rejoice today at the Court's upholding of federal jurisdiction. But would they feel the same way tomorrow if, for example, a conservative Republican administration wielded exactly the *same* jurisdictional power to impose other obligations on the country that they didn't like? Suppose, for example, that the Federal government imposed a tax if people failed to buy and eat broccoli — an acknowledged anti-oxidant that could suppress diseases and reduce national health costs. Or suppose the

government taxed people who did not buy an American flag — a law that could arguably save the U.S.'s failing domestic textile industry?

The next year may bring some answers to these very open questions.

Endnotes

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[2] "U.S. Healthcare Reform 2010-2011," *Journal of the British Insurance Law Association* (No 124, March 2012), p. 3.

[3] 567 U. S. ____ (2012), p. 35. Available at http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf

[4] U.S. Constitution, Article I, Section 8, Clause 3. Available at http://www.archives.gov/exhibits/charters/constitution_transcript.html

[5] United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000).

[6] 5 U.S. at 180.

[7] Official Transcript, Supreme Court argument, March 26, 2012, p. 28. Available at http://s3.documentcloud.org/documents/328234/supreme-court-health-care-argument-monday.pdf

[8] Official Transcript, p. 31.

[9] Official Transcript, p. 13.

[10] Official Transcript, p. 24.

[11] *The Wall Street Journal*, "Law Blog," April 3, 2012. http://blogs.wsj.com/law/2012/04/03/dojs-homework-assignment-tell-fifth-circuit-whether-it-supports-judicial-review/

[12] http://foxnewsinsider.com/2012/04/05/text-read-eric-holders-doj-response-to-5th-circuit-on-authority-of-the-supreme-court/

[13] 567 U. S. ____ (2012). Available at http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf

[14] Decision, p. 23.

[15] Decision, p. 26.

[16] Decision, p. 22.

[17] Decision, p. 23.

[18] Decision, pp. 42-44.

[19] Decision, p. 48; also see p. 55.

[20] Decision, p. 58.

[21] Decision, p. 64.

[22] Decision, p. 65.