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Lawrence O. Gostin

Georgetown University Law Center, gostin@law.georgetown.edu

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Prior to Tuesday's arguments, I believed that the Supreme Court would uphold the health insurance purchase mandate by a comfortable margin. But now I believe that health care reform hangs in the balance. Here are the key arguments on which the future of President Obama's health care reform depends: a greater freedom, cost-shifting, the health care market, acts versus omissions, limiting principles, the population-base approach, what is necessary and proper. If the Court strikes down the individual mandate, everyone's premiums for health insurance could rise inexorably. Is that what a decent society would want or accept?

Monday's arguments before the Supreme Court focused on technical arguments concerning the Anti-Injunction Act, which prohibits lawsuits "for the purpose of restraining the assessment or collection of any tax." The 4th Circuit held that because Congress penalized individuals through the tax system, the Anti-Injunction Act bars the suit from being heard until after the mandate takes effect in 2014. Both parties – the Administration and the states – argued that the Supreme Court should decide the case now. During the hearings, the justices expressed no appetite for delaying a decision on the



case, which makes the rest of the week's hearings all the more important.

Prior to Tuesday's arguments, I believed that the Court would uphold the health insurance purchase mandate by a comfortable margin. Unlike the Rehnquist Court, the Roberts Court has not made federalism a signature issue, and justices such as Antonin Scalia seemed amenable to the exercise of federal powers consistent with commerce clause precedents. My reasoning, discussed in prior O'Neill Institute briefing –http://www.law.georgetown.edu/oneillinstitute/documents/2012-03-19_Affordable_Care_Act.pdf -was that the health care market is the most encompassing national commercial market in America, consuming some 17% of GDP, with pharmaceuticals, medical equipment, electronic medical records, and insurance claims all moving widely across the nation. The Court's precedents all pointed toward a broad scope for the commerce authority.

Having heard the arguments on Tuesday, I now believe that health care reform hangs in the balance. The tenor of the arguments before the Court cannot necessarily predict the result—the highly conservative D.C Circuit upheld the ACA despite a torrent of hostile questioning of the government. Yet, the Court's conservative bloc expressed skepticism about the constitutionality of the mandate. Justice Kennedy, often the pivotal vote in close cases, expressed the view that the mandate fundamentally changed the relationship between the individual and the state. Health care reform does do that, but only in the best possible way: by creating a social contract whereby everyone is entitled to access affordable care. And the ACA establishes this social contract in a way that is squarely within Supreme Court precedents on the commerce power.

Here are the key arguments before the Supreme Court on the individual health insurance purchase mandate. The Administration was on the defensive throughout, but the Solicitor General Donald Verrilli Jr. could, and should, have re-framed the arguments to reflect the real reasons to uphold the ACA.

THE FREEDOM ARGUMENT: A “GREATER” FREEDOM?

Paul Clement, representing the 26 states challenging the ACA, framed the central question as one of individual freedom. The freedom argument dominates public discourse on the ACA, with a majority (51%) of the public opposed to the mandate, according to a N.Y. Times poll conducted March 21-25, 2012. This is so despite the fact that the mandate would benefit all people who take the responsible action of insuring themselves.

The freedom to refrain from buying health insurance is not a particularly robust or compelling freedom. It is purely an economic liberty for those who can well afford coverage. The freedom they are asserting is not deeply personal or intimate, such as bodily integrity or privacy. Further, even under classic libertarianism, a person's freedom extends only so far as her actions do not harm others.



By exercising the freedom not to purchase health insurance, the individual raises insurance rates on everyone else. That is, the exercise of my economic freedom affects the economic freedoms of many others. And by raising the rates of insurance, individuals who assert their liberty not to insure themselves are not merely imposing an economic cost on others. They are making health care itself unaffordable for the poor and working class, which is a much deeper personal interest. What kind of a freedom is it that allows individuals to shun their obligations to society and disregard the sick and injured?

President Franklin Roosevelt talked about four freedoms, two of which are the freedom from want and the freedom from fear. The liberty of the young healthy individual not to purchase insurance is dwarfed by the diminution of freedom by the many who cannot afford health insurance. There is no greater freedom than to have a fair chance of a life with health and wellbeing. Individuals without health insurance have by far a greater diminution of freedom than those who loudly proclaim a liberty to remain uninsured.

THE COST-SHIFTING ARGUMENT: WHO IS THE “FREE RIDER”?

Paul Clement argued that there were two kinds of cost-shifting going on, but he, and the conservative justices, focused almost exclusively on the smaller and less important of the two cost-shifts. The Solicitor General, for his part, did not consistently bring the Court back to the central cost-shifting problem. The smallest cost-shift is the one whereby a young healthy individual is forced to buy health insurance, thereby cross subsidizing the older, sicker, more disabled population. Justice Alito seemed concerned only with the smaller cost-shift from the young healthy individual to the more vulnerable:

A young, healthy individual targeted by the mandate on average consumes about \$854 in health services each year. So the mandate is forcing these people to provide a huge subsidy to the insurance companies for other purposes that the act wishes to serve... Isn't it the case that what this mandate is really doing is not requiring the people who are subject to it to pay for the services that they are [not] going to consume? It is requiring them to subsidize services that will be received by somebody else.

Certainly Justice Alito's observation is true if you view it in isolation from the even larger subsidy the uninsured person receives if he becomes catastrophically ill or injured. More important is Justice Ginsburg's point that complex cross subsidies are in the very nature of health insurance.

The larger cost-shift is the one that occurs when the uninsured individual suffers a catastrophic injury or disease and receives uncompensated care. Virtually everyone will become ill one day and need health care. And by law, and by moral imperative, society will take measures not to allow the uninsured to suffer or die when she can be cared for. As Justice Sotomayor said, Americans would not stand for a system in which children in danger of dying were turned away from emergency rooms.



In 2010, 8% of people with annual incomes of greater than \$75,000 chose not to purchase health care. And if individuals know they can buy insurance at any time at an affordable price under the ACA, many more would delay buying insurance until they became ill or injured. I stress this because the larger cost-shift is that free riders impose more than \$60 billion every year through higher taxes and insurance premiums. Thus all people who insure themselves and all taxpayers foot the bill for those who exercise their “freedom” not to buy insurance.

THE HEALTH CARE MARKET ARGUMENT

The justices had an extended debate about what market the ACA regulated: health care or health insurance. This is a difference without a meaning because health insurance is only about buying needed health services. And without health insurance (which is an affirmative choice to purchase), individuals still participate in the market for health services—either compensated or “free,” somebody always picks up the cost.

Some of the conservative justices seemed prepared to accept that Congress might be able to solve the problem of cost shifting in a more limited way by addressing the market corrections introduced by the new “guaranteed issue” and “community rating” provisions in the ACA. According to several justices, Congress might reasonably have required everyone to purchase at least catastrophic coverage.

Chief Justice Roberts pressed on what he sees as the unfairness of the healthy subsidizing those in need. “The policies that you’re requiring people to purchase involve – must contain provision for maternity, and newborn care, pediatric services, and substance use treatment. [Not everyone will need these services,] and yet that is part of what you require them to purchase.”

Fair point, except that everyone who has insurance coverage subsidizes a host of services they will never need. And it is well within the discretion of Congress to decide as a policy choice that insurance coverage should extend to all conditions reasonably needed by a health individual and population—male or female, young or old. Everyone will not need mental health treatment, prostate surgery, or mammography. What kind of health insurance scheme leaves out services that are essential to a large part of the population?

THE ACT/OMISSION ARGUMENT

The Court’s conservative bloc focused intently on the act/omission distinction, suggesting that the government could not constitutionally regulate “doing nothing.” Justice Kennedy said the mandate was “concerning because it requires the individual to do an affirmative act.... You don’t have a duty to rescue someone if that person is in danger.” This requires a “heavy burden” of justification. According to this argument, a person who chooses not to purchase health insurance is not engaged in commerce at all, and thus cannot be regulated. But philosophers have long discounted the act/omission distinction because there is little, if any, difference in outcome based on an act or failure to act. And so-called inactions are actually the result of



multiple choices and acts.

The truth is that a decision not to purchase health insurance is far from doing nothing. This decision immediately increases the insurance costs of others. And almost all uninsured individuals will participate in the market—tomorrow, next week, next year, no one knows when. They will “act” within the healthcare marketplace, thus affecting insurance premiums and coverage for many others. Thus Congress is simply regulating the manner and timing of commercial activity. It is not regulated non-commercial activity, as conservative justices implied.

As Justice Kagan said, if the Court relies on the distinction between acts and omissions, it will come to regret it—just as the Court erred in other “unhappy periods” when it used tests like direct versus indirect, commerce versus manufacturing. These kinds of artificial categories will prove unworkable.

THE “LIMITING PRINCIPLE” ARGUMENT

Conservatives have argued that if Congress can force an individual to buy private health insurance, it can force anyone to buy any product—the so-called “broccoli” argument. Chief Justice Roberts asked if government to compel the purchase of a cell phone to call 911 in an emergency. The justices, particularly Justice Kennedy, repeatedly asked the solicitor general to clearly enunciate a limiting principle: “Are there any limits on the Commerce Clause?” Sadly, the Solicitor General had a hard time succinctly and clearly stating such a principle, but he should have been able to do so.

The easiest answer is that health insurance is a highly unusual market. It is probably unique, but the government does not bear that burden to show that there are simply no other parallels. Suffice it to say that there are very few markets indeed where it is impossible to know when you will need the service and that the absence of that service is a matter literally of life or death. Nor are there many markets where a person’s choice not to purchase the product has such direct and dire consequences on so many others.

Another straightforward limiting principle comes directly from the Court’s own precedents. Under *Lopez* and *Morrison*, Congress cannot regulate activities that are purely local and non-economic. But, as discussed above, the health care market is quintessentially economic and robustly national in character and scope. A straightforward application of the Courts’ precedents would comfortably uphold the health insurance mandate.

THE INDIVIDUAL VERSUS COLLECTIVE FRAMING

The Solicitor General was placed on the defensive throughout because he allowed the issues to be framed repeatedly as a matter of individual choice. Certainly from any individual’s perspective the ACA is a liberty limiting mandate—that is, if you isolate that single individual’s choice from millions of similar choices and if you fail to take into account the hardship imposed



on all the people who responsibly buy health insurance.

The greater truth is that an insurance market is by definition about aggregate data and actuarial predictions. It is a mistake to think of insurance from an individualistic perspective. This observation is doubly true for health and health care. In public health it is impossible to think only in terms of the regulatory effects on a single individual. Public health, rather, is measured by the collective health and wellbeing of the population. By framing the arguments more from a population-based perspective the SG would have shifted the tenure of the debate.

THE “NECESSARY AND PROPER” ARGUMENT: WHAT IS “PROPER”?

Suppose the Supreme Court goes against the clear weight of its post-New Deal jurisprudence and holds that Congress lacked the commerce power to mandate the purchase of health insurance. The United States still has a compelling argument under the “necessary and proper” clause, which permits Congress to employ all means reasonably appropriate to achieve the objectives of enumerated national powers.

The ACA fundamentally reforms the insurance market through three mechanisms that are clearly authorized under the commerce power: “guaranteed-issue” (requiring insurers to offer coverage to all applicants), “community-rating” (prohibiting insurers from charging differential premiums based on health status), and bans on annual and lifetime caps (barring dollar limitations on coverage). These ACA requirements are hugely popular, as they ensure that everyone can purchase health insurance at an affordable cost even if they have a debilitating prior condition, such as a birth defect, cancer, or cardiovascular disease. The N.Y. Times poll found 85% of respondents favored requiring health insurers to cover those with existing medical conditions.

The mandate is “necessary” for these reforms to work because it ensures that health insurance spreads the risk across the entire population. Risk pools function only if they include enough healthy individuals to keep overall expenditures lower than premium costs. The larger the pool, the more predictable and stable premiums will become. If individuals could gain health insurance at any time and at the same affordable price, why wouldn’t they simply wait to buy insurance until they became seriously ill or injured? Without the mandate, all the incentives would be to delay entering the insurance pool, which would result in a spiral of increasing costs that are wholly unsustainable.

If the mandate is “necessary” for effective implementation of an enumerated power, then the states are left with a fairly weak argument—that the mandate, although necessary, is “improper.” This assumes that what is “proper” is a stand-alone requirement in the constitutional interpretation of the necessary and proper clause. Remarkably, several justices seemed open to the argument that the mandate was not “proper.” Justice Scalia: “Wait, it’s both ‘Necessary and Proper.’ ... Necessary does not mean essential, just reasonably adapted. But in addition to being necessary, it has to be proper.”



The concept of what is “proper” has no objective meaning. How could the Court set clear, defensible criteria for what is “proper” as a stand-alone concept? And even assuming that “proper” can be injected with meaning, on its face the mandate is appropriate and proportionate to its objectives because it gives individuals a fair choice. They may choose between purchasing insurance and paying a tax penalty reaching the greater of \$695 (\$2,085 per family maximum) or 2.5% of household income. This is a modest penalty that is not arduous or intrusive, especially considering the externalities that the uninsured impose on all others in society.

Justice Scalia went on to suggest that the violation of “the sovereignty of the States” is the principle that makes the mandate improper. Could the principle of “limited” or “enumerated” powers itself determine what is proper? If that were true, it would call into question every “necessary” provision because by definition Congress is purporting to act under its enumerated powers in all cases before the Court. The idea of “proper” must mean more than that. And in any case, how could it be improper to create a market conducive to allowing all people, sick or disabled, from gaining access to affordable health care?

DOES HEALTH CARE REFORM HANG IN THE BALANCE?

Suppose the Supreme Court strikes down the individual purchase mandate, but says that it is severable from part, or all, of the rest of the ACA—a distinct possibility. The Court has three options if it invalidates the mandate: strike down the entire act, leave all of the rest of the act in place, or just invalidate the guaranteed issue and community rating provisions.

As Congress was silent on the issue, and since the decision should be left to the political branches, the Court should leave the rest of the act intact. Most ACA reforms are clearly severable because they are unrelated to the mandate, such as funding for public health and community health centers. The Court may well choose this position and leave the truly onerous choices to the political branch.

The Obama Administration is “doubling down,” arguing that community rating and guaranteed issue cannot be separated from the individual mandate because they would result in the so-called “death spiral,” whereby premiums keep rising and as they rise more and more healthy people leave the insurance pool.

What would President Obama do if he had to make the hard political choices? In order to keep the heart of the reform (and its most popular features)—guaranteeing everyone affordable health care even if they are sick or disabled—the President would have to find a way to pay for it. The cost savings in the ACA are probably not enough to cover the full cost, and Congress is deeply resistant to increased general taxation. This would place the reforms in great jeopardy. The only other option is the one most likely to happen, but would be deeply regrettable. That is, the popular reforms stay in place, the young and healthy delay buying health insurance, and everyone’s premiums for health insurance rise inexorably. Is that what a decent society would want or accept?