

Health Reform: An Amicus Brief for the Court of Public Opinion

The Supreme Court will consider the constitutionality of the Affordable Care Act at the end of the month. We the public should be appalled.

It's not that each side can't come up with some good constitutional arguments. It's that the suit is totally unnecessary, caused largely by the unwillingness of the major political parties to work together on anything. Like a divorce between two parties more invested in their fight than in the effect on those around them, it belongs in a domestic relations court that would refer the parties to a mediator.

In theory, the Supreme Court is considering the narrow question of whether the federal government can mandate that individuals purchase health insurance (and, to be technical, whether there really is a "mandate" or just a "tax"). In practice, the Court is responding to a fundamental failure of the legislative process to fix even the simplest of things. To understand the genesis of this failure and of the mandate, one has to go back a bit into recent history.

The modern debate over mandates came about during the Clinton administration, which centered much of its health reform efforts on requiring employers to provide health insurance. Such a mandate, as some of us noted at the time, would operate like a corporate tax passed through to individuals, effectively adding substantially to a minimum wage that had to be paid in the form of health benefits, but very unevenly.

Rather, we reasoned, the basic argument behind a mandate hinged on the individual: you, me, and the other folks down the street. Many people who could have paid for their health care did not. They spent their money on other things, avoided buying insurance, then went to emergency rooms that couldn't turn them away or tried to buy last-minute health insurance when they got sick. Everybody else got stuck covering their costs.

This raises issues of both equity and efficiency. Should one moderate-income family be allowed to get free benefits for which a similar family pays? Should we encourage people not to buy insurance when they think they can go sometimes to the emergency room for free?

Further complicating the issue is the extraordinary cost of health care: the average annual price tag per household (including what they pay for others through taxes) tops \$20,000. It's now almost impossible to tax and spend our way toward universal care. The government would need to set a payroll tax rate surpassing 40 percent to cover all health costs.

So subsidies, or carrots, alone aren't enough. A combination of sticks and carrots might get us a lot closer to universal care, partly because many people don't like the idea of paying any penalty whatsoever.

But sticks have complications, too. We know the IRS and other agencies have huge problems collecting bills from the public, especially large ones. In practical terms, we simply can't implement a mandate, only a modest penalty.

The simplest way to devise a stick, I recommended at the time, was to deny other benefits, such as a child tax credit, or low interest rates on student loans, or itemized deductions to those who did not purchase health insurance. This would be far easier to administer than a scheme of new health mandates or taxes.

And here's the crucial point for the court debate: there is no Constitutional debate over whether the government can set conditions on the receipt of benefits it provides. Done this more effective and easy-to-manage-way, there would be no court case to hear!

But Republicans and Democrats prefer to have their fight. In the hubris of the health reform legislation, Democrats created whole new systems of taxation and welfare, while ignoring the fundamental and difficult history of administering these systems.

Republicans, in turn, cast their attention on any fight they could win politically, legislatively, or in the courts, forgetting that in the early 1990s, they liked the individual mandate. If they win and get fewer or no penalties, after all, they will only add to the number of people who end up getting

subsidized and for whom more taxes need to be collected. Democrats, in turn, didn't like the individual mandate then. They thought that they could hide any new tax better when assessed on corporations.

As with so many other aspects of our deeply partisan divide, we're having a needless fight over something easily resolved. The clean solution can't be adopted because Democrats don't want to admit they made any mistake in the Affordable Care Act and Republicans don't want to fix any part of health reform. A domestic relations court would look at these sparring spouses and send them to a mediator. The Supreme Court decision likely will only confuse the real debate over how subsidies, penalties, taxes, and mandates must combine in any health program, old or new, Republican or Democrat, small or large.

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