

## How Much Did the Supreme Court Settle?

As an economist, perhaps I shouldn't be writing this piece. In delivering the opinion of the Court on the Affordable Care Act, Chief Justice Roberts makes an indirect attack on economists: "To an economist, perhaps, there is no difference between activity and inactivity...But the distinction would not have been lost on the Framers, who were 'practical statesmen,' not [metaphysical philosophers](#)" (p.24). Nonetheless, I will turn here not to the practical issues decided by the court—such as how the individual mandate is a penalty, not a tax that must be paid before people can sue, but is a tax, not a mandate, for being held constitutional, while penalties on states that forgo a Medicaid expansion are unconstitutional because they represent a "shift in kind, not merely degree" (p. 5). Instead I turn to metaphysical issues surrounding many quandaries that remain, such as how the new health laws can be administered, how budgets can possibly be sustained, and whether we can solve any of this mess without some bipartisan cooperation.

In upholding the health mandate and striking down the requirement that states expand Medicaid coverage or lose funds, the Chief Justice cites CBO figures of \$4 billion a year for the revenue impact of the mandate (p. 33), \$100 billion a year for the cost of the Medicaid expansion (p.46), and \$3.3 trillion as the Medicaid funding that was threatened if states did not comply (p.51). The size of these numbers raises the question of whether the fight over this particular individual mandate was all it has been cracked up to be, even relative to the overturned requirement that states accept the Medicaid expansion. At one level states are fully funded for a while to accept the expansion, but some may fear the long-term costs. Then, again, why not just let Medicaid recipients go onto the federally funded exchanges? It will be interesting to see what CBO estimators make of this shift.

The size of the mandate is also small relative to the employer mandate that was not a part of this court case and to the cost of health insurance more generally. Much of the mandate's impact, in my view, would come from its influence on people who really hate to pay penalties (oops, taxes that we call penalties or mandates), regardless of whether they might make economic sense.

An upcoming issue with the mandate is its enforcement. In a recent article in [Tax Notes Magazine](#), law professors Jordan M. Barry and Bryan Camp lay out the limitations IRS would have assessing liens and levies on those owing the additional tax at the end of the year, concluding that many resistant taxpayers can avoid paying any penalty they owe. It's long been understood by tax professionals that collecting taxes is better done as the income is earned and before it is spent elsewhere.

A separate tax collection problem [arises with respect to subsidies that will be available to those on the new health exchanges](#). Households are given tentative subsidies based on tax data that can be over two years old. When household income or employer or marital status or unemployment or number of dependents changes, the taxpayer can apply to have the amount adjusted. There are very limited ways of auditing these revised claims, so taxpayers can end up paying another set of penalties when later they are found to have gotten too much assistance given their incomes. Whether that type of setup can be administered with any degree of fairness or accuracy sits right below the radar screen.

Nowhere, as best I can tell, did the court address (or need constitutionally to address) the "metaphysical" budget issue of why health reformers imposed "penalties" [on individuals not buying insurance, states not maintaining or expanding Medicaid coverage, and employers not providing insurance](#). It's simple. Absent constraining costs, which were not a principal focus of the act, federal taxes were the only alternative.

The health care system, however, had become so expensive (at 18 percent of GDP and 21 percent of personal income) that no member of Congress, Democrat or Republican, would ever suggest tax rates high enough to cover those costs for most people. In effect, the Court may suggest that elected officials can get around their constitutional problems by taxing and subsidizing more, but, as a practical budgetary matter, they can't.

Underlying all of this are the uninsured. It doesn't matter whether President Obama or Governor Romney wins the election. There is no way to go back to a system that left tens of millions of people uninsured and the number rising every year.

I see no way out of this mess without bipartisan efforts that are currently lacking. For instance,

the individual mandate (penalty, tax, friendly persuasion, whatever) could be better administered, and a more powerful incentive for purchasing health insurance provided, by making coverage a condition for getting certain other benefits such as the child credit or itemized deductions. This type of design would be even less likely to raise any constitutional objection and be consistent with both Republican and Democratic principles. Meanwhile, any subsidy system, whether on the exchange or elsewhere, needs to be better designed so that enforcement isn't so onerous on the taxpayer or the IRS. Most importantly, of course, the dilemma that is health care can't be solved without forcing each government health program or tax subsidy to face some budgetary constraint. But I guess those are the types of things we metaphysical philosophers worry about.

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**The Government We Deserve** is a periodic column on public policy by Eugene Steuerle, an Institute fellow and the Richard B. Fisher Chair at the nonpartisan Urban Institute. Steuerle is also a former deputy assistant secretary of the Treasury. The opinions are those of the author and do not necessarily reflect those of the Urban Institute, its trustees, or its sponsors.

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