

The Affordable Care Act: Implications of the Supreme Court's Ruling

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Ostensible Goals of the ACA

June 2009 Council of Economic Advisers Report

“CEA’s findings on the state of the current system lead to a natural focus on two key components of successful health care reform: (1) a genuine containment of the growth rate of health care costs, and (2) the expansion of insurance coverage.”

Road to Enactment

- **Nov. 2009: House Passes “Affordable Health Care for America Act”**
- **Dec. 24, 2009: Senate Passes “Patient Protection and Affordable Care Act”**
 - Cornhusker Kickback
 - Louisiana Purchase
- **Jan. 2010: Election of Scott Brown Enables GOP Filibuster.**
- **Reconciliation Strategy:**
 - House passes PPACA, immediately passes reconciliation amendments, Senate immediately approves with simple majority.
 - ***Problem:*** Reconciliation process limits amendments. No chance to fix many glitches.

ACA's Purported Achievements

- **Near-Universal Insurance Coverage**
 - Medicaid Expansion for up to 133% FPL
 - For remainder,
 - Employer Mandate
 - Individual Mandate
- **Cost-Savings**
 - Waste, Fraud, Abuse
 - Medicare Payments Board
 - ACOs
 - Preventive Care Investments
 - Comparative Effectiveness Research
 - Excise Tax on Generous Plans

Price Regulation in the ACA

- ***Guaranteed Issue:*** Insurance company must insure you, regardless of pre-existing conditions, etc.
- ***Community Rating:*** Premiums must be set based solely on location, smoker status, and (to some degree) age. Can't charge more to the sick or sickly.

Problem Created by Price Regulation

- **Incentives for young, healthy people?**
 - Insurance is expensive.
 - Don't need it until you need to make a big medical expenditure.
 - No automatic “punishment” for failing to have insurance at the time you need health care.
 - WWYHPD?
- **But what happens when YHP drop coverage?**

How the ACA Deals With Adverse Selection

- **Individual Mandate**
 - Individuals must carry minimum health insurance or pay penalty tied to income.
- **Employer Mandate**
 - If employer with > 50 employees fails to provide qualifying insurance at an affordable rate, and employee buys insurance on a state exchange, employer charged \$2,000/year.

The Constitutional Challenges

- “Individual Mandate” Not Authorized.
- Medicaid Expansion Improperly “Commandeers” the States.

Lower Court Rulings

- 11th Circuit:
 - Individual Mandate U/C, severable.
 - Medicaid Expansion Constl.
- 6th and D.C. Circuits:
 - Individual Mandate Constl. as Regulation of Commerce.
- 4th Circuit:
 - Challenge Dismissed; Barred by Tax Anti-Injunction Act.

Supreme Court's Decision

- Does the Anti-Injunction Act Bar Consideration?
 - *No.*
- Is the Individual Mandate a Valid Exercise of Congressional Power Under the Commerce or Necessary and Proper Clauses?
 - *No.*
- Is the Individual Mandate Scheme Sustainable Under Congress's Power to Tax?
 - *Yes.*
- Is the Medicaid Expansion Consistent with Constitutional Federalism?
 - *Not as written.*

Now What???

- **Constitutional Ramifications**
 - Limits Recognized on Commerce Clause Power
 - Tax Power Expanded
 - A Wash? Probably Not.
- **Effects on the ACA's Prospects for Success**

**#1: HEALTH INSURANCE
PREMIUMS WILL RISE**

Problem: Penalties Are Small

- Suppose parking meter costs \$1, and ticket is \$.75....
- C.J. Roberts: *“[I]ndividuals making \$35,000 a year are expected to owe the IRS about \$60 for any month in which they do not have health insurance. Someone with an annual income of \$100,000 a year would likely owe about \$200. The price of a qualifying insurance policy is projected to be about \$400 per month.”*

Response to Small Penalties: Subsidize Purchases of Insurance

- Subsidies available on state exchanges for individuals and families earning from 133% to 400% FPL.
- **KEY QUESTION:** Is amount of penalty $>$ *out-of-pocket insurance expenditure* (policy cost minus subsidy amount)?

Incentives at Various Income Levels

Family Income	Max. % of Income to be Spent on Ins.	Dollars to be Spent on Ins.	Comparison of Out-of-Pocket Insurance Expense vs. Penalty	Likely Decision
\$35,000	3.97%	\$1,388	Penalty is 50% more than ins	Buy
\$40,000	4.96%	\$1,982	Penalty is 5.2% more than ins	Buy
\$45,000	5.94%	\$2,672	Ins costs 1.28 times penalty	Don't buy
\$50,000	6.77%	\$3,385	Ins costs 1.62 times penalty	Don't buy
\$55,000	7.52%	\$4,135	Ins costs 1.98 times penalty	Don't buy
\$60,000	8.23%	\$4,937	Ins costs 2.36 times penalty	Don't buy
\$65,000	8.85%	\$5,751	Ins costs 2.76 times penalty	Don't buy
\$70,000	9.47%	\$6,626	Ins costs 3.18 times penalty	Don't buy
\$75,000	9.50%	\$7,125	Ins costs 3.42 times penalty	Don't buy
\$80,000	9.50%	\$7,600	Ins costs 3.65 times penalty	Don't buy
\$85,000	9.50%	\$8,075	Ins costs 3.87 times penalty	Don't buy
\$90,000	9.50%	\$8,550	Ins costs 4.1 times penalty	Don't buy
\$95,000	No max	Policy cost	Ins costs > 4 times penalty	Don't buy
\$100,000	No max	Policy cost	Ins costs > 4 times penalty	Don't buy

What If Subsidies Aren't Available in Uncooperative States?

- 26 U.S.C.A. § 36B(c)(2)(A): To be eligible for premium assistance credit, taxpayer must be enrolled in a qualified health plan *“enrolled in through an Exchange established by the State under section 1311”* of the ACA.
- So far, only 13 states and D.C. have committed to establishing state exchanges.
- Oklahoma lawsuit filed last week.

Effect of *NFIB v. Sebelius*

- Limits amount of “no-insurance” penalties.
- C.J. Roberts: *[T]he shared responsibility payment may for constitutional purposes be considered a tax, not a penalty. First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the “prohibitory” financial punishment in Drexel Furniture. Second.... Third....*

In Sum...

Guaranteed Issue +

Community Rating +

Constitutionally Constrained Small Penalties =

Widespread Adverse Selection

**#2: UNDERLYING MEDICAL COSTS WILL
CONTINUE TO OUTPACE INFLATION**

Cost-Constraining Provisions of ACA

- Increased Funding for Reducing “Waste, Fraud, and Abuse”
- Limits on Medicare Payments
- Comparative Effectiveness Research
- Medicare Shared Savings Program / Accountable Care Organizations
- Free Preventive Care
- Excise Tax on Gold-Plated Insurance Plans

The Fundamental Problem

- **Compare uncovered services:**
 - **LASIK:** Price fell 21% from 1999-2010.
 - **Cosmetic Surgery:** Price fell *in nominal dollars* from 2006-2010 despite surge in demand.
- **What Gives?**
- **Why has health “insurance” become pre-paid health care?**

The Preventive Care Ruse

Why don't auto insurance companies raise premiums slightly and cover oil changes and other preventive maintenance?

**#3: COVERAGE EXPANSION FAR
LESS EXTENSIVE THAN PROMISED**

Limited Medicaid Expansion

- 16 million of the 32 million Americans expected to gain coverage under ACA were to do so via now-optional Medicaid Expansion.
- Why Would States Oppose?
 - No guarantee of cont'd funding
 - “Woodwork” effect
- 8 Definite No's; 6 Likely No's; 7 Undecided.

Reduced Employer Coverage

- Effective federal subsidy for employer-provided health insurance = FED TAX RATE * POLICY AMT.
 - E.g., For 45 year-old head of household earning \$35,000: $22.65\% * \$15,000 = \$3,397.50$
- If employer *doesn't* provide, *then* employee can purchase on subsidized exchange.
 - Federal subsidy for same employee = \$13,600.
- **Upshot:** Lower-income employees *benefit* when employers drop coverage.

In Sum...

- Higher insurance premiums because of adverse selection.
- No reduction in underlying medical costs because Act fails to address, and even exacerbates, lack of price competition.
- Far less coverage expansion than promised.

Issues Before SCOTUS

- ***Individual Mandate:***
 - Does the Tax Anti-Injunction Act Bar Court from Considering Challenge?
 - Is the Mandate Valid:
 - As Regulation of Commerce?
 - Under Congress's Power to Tax?
- ***Medicaid Expansion:***
 - Does it Improperly Commandeer the States?