

J. Bradford DeLong

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What Next for Health Care Reform?

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ObamaCare and the Decision: A Precis

The Affordable Care Act

- ⊙ ObamaCare--but also RomneyCare
- ⊙ Leaves Medicare alone: the elderly are happy with their health insurance
 - But does strive to make Medicare more efficient-- Independent Payment Authorization Board, etc.
- ⊙ Medicaid expansion to cover the the near-poor
- ⊙ Middle-class uninsured
 - Creates health exchanges--benefits departments for those who don't work for a bureaucracy
 - Requires insurers to sell at one price to everyone in an exchange
 - Mandates that everybody buy health insurance
 - So people don't game the system by saving money now and only buying insurance when they get sick

The Questions Posed

- ⦿ Is the mandate that everybody purchase insurance a legitimate exercise by Congress of its power to regulate interstate commerce?
- ⦿ Is the requirement that states expand their Medicaid programs or lose *all* of their federal Medicaid funding unduly coercive?

The Questions Answered

- ⦿ Four Democratic justices say that the mandate that individuals buy insurance is a legitimate exercise of commerce-clause power, and that the requirement that states expand Medicaid is not unduly coercive.
- ⦿ Four Republican justices say the reverse.
- ⦿ Chief Justice Roberts thus decides
 - And here things get very tricky very quickly

The Mandate That Individuals Buy Insurance

- ◎ Roberts agrees with the other Republican justices that the mandate is beyond Congress's legitimate power to regulate interstate commerce.
 - But Roberts then pulls a fast one
 - He says that the mandate is a legitimate use of Congress's power to tax

The Requirement That States Expand Medicaid

- ◎ Roberts agrees with the other Republican justices that the requirement is unduly coercive, and intrudes on state sovereignty.
 - But Roberts then pulls a fast one
 - He says that the cure is not to strike the Medicaid expansion provisions as unconstitutional
 - He says that the cure is for the Supreme Court to rewrite the law to say that states that do not expand Medicaid do not lose *all* their Medicaid funding but just the extra Medicaid funding to pay for the expansion

Chief Justice Roberts Has Gone to Malta

- ⦿ Republicans are furious:
“Dishonest John”
- ⦿ Democrats are praising Roberts
as a fine chief justice.

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ObamaCare Is RomneyCare: Two Implications

The Affordable Care Act

- It's ObamaCare
- It's also RomneyCare
- No Republican office holders objected to RomneyCare
- Every single Republican office holder objects to ObamaCare
- The key complaint is that forcing people to buy health insurance is not regulating commerce, but rather regulating the absence of commerce
- But back in 2005 George W. Bush proposed, as part of his Social Security privatization effort, to require everybody to purchase a private pension account
 - And no Republican then complained that that mandate was an unconstitutional regulation of "inactivity"
 - And none of the Four Horsemen would have ever thought to find such a Republican-sponsored mandate to purchase a pension unconstitutional

Partisanship

- ◎ The Supreme Court engages in “Constitutional Moments”
 - It says that henceforth, the law will be different than it was yesterday
 - In such “Constitutional Moments”, the justices become moral and political actors rather than mere text- and precedent-based legal technicians
- ◎ Miranda, Brown, Jones and Laughlin, Lochner, Santa Clara, Dred Scott
- ◎ Past “Constitutional Moments” have been moral and political
- ◎ This moment is purely partisan
 - The mandate that is under attack was a rock-solid conservative-Republican “personal responsibility” principle as recently as 2009

The Future

- ⊙ ObamaCare = RomneyCare
- ⊙ It thus has RomneyCare's weaknesses
 - No public option
 - Hands market power to many near-monopoly insurers
 - Requires state-level bureaucracies to be effective when state politicians have bet their careers on the failure of reform
 - Huge stresses on the system from the expansion of Medicaid
 - Increases in efficiency rest on six largely-untested bets

Six Untested Bets to Improve Efficiency

◎ Six bets:

- Congress will allow the tax on high-cost health plans
- Congress will allow the IPAB to function
- Evidence-based medicine will work
- For-profit hospitals and others will not find new ways to game the system
- That we can double the amount of health care currently received by our 40 million presently-uninsured without demand for care outstripping the ability of our doctors, nurses, and technicians to provide it.
- That the health exchanges will work

◎ The first two are bets on what congress we elect

◎ Preliminary news from Massachusetts on the latter four is good

◎ Nevertheless, I am anxious