

Arnold Rosoff on the Supreme Court Case

Knowledge@Wharton: The debate in the Supreme Court centers on the individual mandate, which requires all adults to buy health care either through their employers or by buying it themselves. Are you in favor of this provision, and why or why not?

Arnold Rosoff: I think the individual mandate was as good a solution politically to getting the law passed as they could have come up with. If it was possible to start with a clean sheet of paper, I wouldn't have used the individual mandate. But the individual mandate ... was a Republican idea [when it was initially introduced in 1989] and as part of President Obama's and the proponents of the law's compromise, [Democrats] reached across the aisle and took a Republican idea. [The idea for the individual mandate] came from the Heritage Foundation initially, was endorsed early on by Newt Gingrich and was adopted in Massachusetts in Romney Care. I think [Democrats] thought that was a big step toward the compromise that had to be necessary to get a universal health care law passed. So given the political realities, I think the mandate was a decently good way to go about it.

It turns out now that doing it that way exposes the law to some very significant Constitutional challenges, which everybody seems to have underestimated while the law was being considered and after it was first passed. I don't think anybody felt that the legal challenges were going to be taken as seriously as they are. But the mandate may bring the whole law down.

Like I said, if I started from a clean sheet of paper, I would do it differently. I would do it as a tax, which probably makes it clearly constitutional, beyond challenge, and a voucher system. Everybody in the country would have to have money deducted from their paycheck, just like they do for Social Security [and] Medicare. And in return for that you get a voucher that would enable you to go out and buy health care. You could buy it from a government entity like Medicare, but I think this being America, you would be able to buy it from private vendors. And if it was structured that way, I don't think there would have been any Constitutional infirmity to it.

Knowledge@Wharton: Overall, what are your views on the different provisions of the Affordable Care Act?

Rosoff: Our health care system in this country is so complex and so distorted in the way it's set up that it requires reform from top to bottom. More people who go into medicine are going into high-priced surgical sub-specialties and other sub-specialties [rather] than primary care. That needs to be changed. The health insurance provisions where people with preexisting conditions aren't allowed to buy

insurance or where your rates go up astronomically if you use health care, these are very bad things.

So it requires A-to-Z reform. And the law got to be 2,700 pages in bill form. They keep talking about the law being over 2,000 pages. I think actually it only comes out to 975 pages, but the bill was 2,700 pages. And if you look at that bill, there are only a few paragraphs that deal with the individual mandate. Notwithstanding that, the mandate is the centerpiece of the legislation. There are many other things, particularly all the health insurance reforms that one could argue are inextricably intertwined with it.

On the insurance industry side, what the health insurers gave up was the right to exclude from coverage people who look like they would need too much health care or the right to kick people out of their policies if they use too much health care. The insurance companies accepted community ratings, so that they couldn't charge you an exorbitant premium if you needed more health care. Those are all difficult pills for the insurance industry to swallow.

What they insisted on in return was an individual mandate or some kind of mandate so that everybody would get into the game. Otherwise, they said they'd be eaten alive by adverse selection, that people who considered themselves healthy would stay out until they needed health care and then they would come in and they would be able to insist, because of the provisions of the law, that they be insured at that point. It would be like a home owner coming running into a home owner's insurance company saying, "Sign me up quick, my house is on fire!" And so the mandate was put in as the quid pro quo, the negotiated deal to get those other patient protections.

Knowledge@Wharton: If the court strikes down the individual mandate, or even the entire law, what would that mean for health care going forward?

Rosoff: I sat in on the arguments, I listened to the judges' questions and I've read a lot of analysis since then. I think there's a pretty good chance the court will strike down the mandate. The other question then that becomes very important is will they strike down the whole law? There is a long-standing constitutional principle in favor of presumption of constitutionality. The court has to show allegiance to the Constitution. So if Congress puts something in a law that's unconstitutional, the court has no choice but to take that out. But everything else in the law that's constitutional they should leave in as a part of the separation of powers, the respect of democratic majority. I don't mean Democrat versus Republican, I mean representative democracy.

There's so much else in the law that they could keep in place, but they would have to be able to decide what stays and what goes. And in the one and a half hours of oral argument over severability, the justices made it clear that they didn't have much of a clue where to begin in deciding what stays and what goes. Justice Scalia

-- and this is a little bit of a mischaracterization -- but other justices, I guess it was Justice Kagan, quipped that it would be too difficult for Justice Scalia's law clerks to have to go through the whole 2,700 pages of the bill and figure out what stays and what goes. They would probably throw it all out.

If the court is supposed to keep as much of the law as it can and they throw it all out, that would throw it back to Congress to say, "If you want all these other provisions ..." -- let me tell you what some of the other provisions are, things that have nothing to do with the mandate, like nutritional labeling. You go into McDonald's [and there are labels to tell] you how much a Big Mac has by way of calories. Other things, like loan forgiveness for people's medical school loans if they go into primary care or go to work in an underserved area, that have nothing to do with the individual mandate: Funding for black lung disease, for research into cancer and things of that nature. Those things don't have to go just because the mandate goes.

But for the Supreme Court to sit down and try to figure out, provision by provision, with hundreds of provisions, what is tied and what isn't tied [to the individual mandate], what Congress would have intended if it didn't have the mandate, it's pretty much a legislative function. And so the court can say, "We don't want to wade too far into Congress' legislative function." Which is respecting Congress more? To say, "We're going to take it all out" or ... saying, "We the court are going to try to decide what you wanted to leave in and what you wanted to take out." Both of them are an encroachment upon Congressional legislative domain. And which is the greater? One of the justices asked that question.

Knowledge@Wharton: If the individual mandate is thrown out, what would have to happen in order to keep some of the other aspects of the law intact? Do you think the majority of it could move forward without the mandate, or are there certain things that the Obama administration or Congress would have to go back and do? And if so, what would they have to do or what would you advise they do?

Rosoff: Let's imagine an alternative universe where the Congress is bipartisan, or nonpartisan, and functional and the court took out an important piece of their legislation and there were many other pieces that were unconnected. The day after the court did that, Congress could meet in session and say, "Let's put back these 200 provisions or 300 provisions," and so forth. The concept that our Congress at this point in time, given how fractious and divided they are, would do that is ridiculous.

At one point in the argument in the Supreme Court, one of the attorneys for the government was talking about the court's job being to ascertain the will of Congress: "What would Congress want us to do in terms of keeping the rest of the law intact?" And Justice Kennedy, who's really going to be the decider here, because you've got the four liberal justices and the four conservative justices and Kennedy's the swing justice. I predict what happens with the mandate, by the way,

will happen with a five-to-four vote. Anyway, what Kennedy said was "Is that the real Congress or a hypothetical Congress?" because a hypothetical Congress, the day after the court struck down the whole law, would meet and they'd put back in all the parts that weren't controversial. But every part's controversial now because politics makes everything controversial. That's a very, very long winded way of saying I can't answer your question.

Knowledge@Wharton: Given that environment, and I think most people would agree that you are correct in characterizing that environment, what would you say is one thing that should be done to reform the American health care system?

Rosoff: I don't know. I don't think it's likely to happen at this point in time. I'm not sure it will happen in my lifetime. But one of the things that could happen is that the American public, realizing the need for universal health care and realizing that we've gone down a dysfunctional road in relying to the extent that we have on for-profit health care, will say, "Okay, let's just wipe it all out and start with a clean sheet of paper and come up with something like governmental health care, like France has or like Italy has or like Britain has."

But the thing is that none of those countries are just sailing along happily now. With aging populations, advancing technology and sagging economies, all of the countries that have universal health care in Europe and elsewhere are struggling to maintain that national commitment. I think it's a shame, an embarrassment that our country is the only major nation on the face of the planet that hasn't made a national commitment to universal health care, and there are a lot of reasons why we haven't. I don't think it's because Americans are inherently selfish or greedy. But we have kind of let the system evolve piece by piece by piece over generations and we've essentially painted ourselves into a corner.

When you ask me, "What should we have?" I'm not sure how we can get from where we are to where we need to be. When this law was being debated in Congress, you may remember that a lot of people who were against the law made a big point out of the fact that it was over 2,000 pages. [They asked,] "Why should it be that long? Why should it be so long that most members of Congress say, 'We haven't read it. Our staffs have read it piecemeal.'" The thing is, we've got a very complex system -- or non-system, as some would say -- and almost every piece of it has to be changed in some way. You can't do that with a 50-page law or a 100-page law. And whether we can get there from where we are now is anybody's guess.