



The Daily Dish

The Future of the ACA (Again)

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Eakinomics: The Future of the ACA (Again)

An opening on the Supreme Court in advance of it hearing arguments in *Texas v. U.S.* has raised once more the possibility that the Affordable Care Act (ACA) may be stricken down in whole or in part. Recall that, in the original challenge to the ACA, the Supreme Court ruled that the individual mandate was constitutional because it was a tax (on those who did not buy insurance), and Congress has the constitutional authority to levy taxes. Yet Congress subsequently got rid of the tax-based penalty while retaining the requirement that individuals buy health insurance.

The latest case argues that since the penalty has been repealed, there is no tax and, as a result, the individual mandate is unconstitutional. Moreover, the plaintiffs also argue that the mandate provision is not “severable” and the entire ACA needs to be overturned. With the passing of Ruth Bader Ginsburg, there is increased concern that a conservative appointment to the Supreme Court will result in exactly this outcome. For example, hospital and insurer stocks were down sharply yesterday in reaction to the events.

Perhaps the law could fall, but there are a lot of possibilities in addition to a full repeal of the ACA. The Court could decide that only parts of the ACA should be overturned. For example, if the requirement to purchase insurance is repealed, the other provisions supporting that requirement – essential health benefits, community rating, guaranteed issue, etc. – could be overturned as well. Or, the Supreme Court could decide before another judge was seated, end up in a tie, and kick the decision on severability back to the lower courts. Alternatively, the Supreme Court could uphold the entire ACA.

There are others better suited to recap the horse race on a likely nominee, likely confirmation and timing, and probabilities of various Supreme Court rulings. The important observation from a policy perspective is that voters have come to like the ACA. During Obama’s tenure as president, polling consistently found that individual provisions of the ACA were popular and had bipartisan support, while the law in its entirety was only as popular as then-president Obama. Now, both Mr. Obama and the ACA are overall favored by voters of all stripes. If any of the various scenarios leading to striking down more than the mandate comes to pass, Congress and the president need to be ready to quickly provide replacement legislation.

From a conservative’s point of view, that means retaining control of the Senate is more important than the Supreme Court appointee. If Democrats control Congress (and, thus, likely the White House), either the ACA stands or it is replaced with the ACA on steroids. Only if Republicans retain control of the Senate and legislation is needed will they be in a position to affect the outcomes.