

The Supreme Court heard oral arguments today over the Texas v California case about the Affordable Care Act. The Trump Administration is arguing that the mandate to have insurance is unconstitutional and that it cannot be severed from the act as a whole. Justice Kavanaugh stated that there was a “clear case for severability” and that “it does seem fairly clear that the proper remedy would be to sever the mandate provision and leave the rest of the act in place”.

When the Affordable Care Act was passed there was a lot of debate about the mandate to have health insurance. I have always believed that it should have been written differently. I will get to that later in the video.

But let’s talk about the mandate and understand why it exists. Normally I tell people:

“If you are going to ban pre-existing condition clauses in insurance policies, you need to include a mandate or else you risk anti-selection. And if you don’t understand what that means, you’re not informed enough to be discussing this issue.”

Obviously, I like being blunt in making some points. Unfortunately, many people won’t take this as a call to action to look up these terms. So here is what that statement means.

The term anti-selection, sometimes referred to as adverse selection, is defined as

“The tendency for people to enter into contracts in which they can use their private information to their own advantage and to the disadvantage of the less informed party to the contract. For example, an insurance company may charge health insurance premiums based upon the average risk of people falling ill, but people with poorer than average health will be keener to take out health insurance while people with better than average health will tend not to take out such health insurance, so that the insurance company loses money because the high risk part of the population is over-represented among its clients.”<sup>1</sup>

If you only ban pre-existing condition clauses, people will just wait until they are sick in order to buy insurance. That is why the mandate is needed.

In a previous challenge to the affordable care act, the mandate was upheld by Justice Roberts under the authority to tax. In National Federation of Independent Business v. Sebelius, he stated

“ it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.”

In Texas V California, Roberts also seems disinclined to overturn the whole law, and even if five justices overturn the mandate, you won’t see enough justices agreeing to throw the baby out with the bathwater. The act should stand.

But what happens if the Democrats manage to win both Georgia seats in the Senate? This would give the Democrats control and they could do an end run around the Supreme Court and rewrite the mandate thus making the case useless because what they would be ruling on would no longer be the law.

And here is what they should do.

In my typical defense of the mandate I argue that all other things being equal, a person with health insurance will pay less in taxes than someone without. It is also true that, all other things being equal, that a person with kids is going to pay less in taxes than someone without. Does that mean that there is a “mandate” to have children? Of course not. It just means that Congress decided that paying for health insurance should mean you pay less in taxes.

So why not word the mandate the way that the child tax credits are written? Instead of writing the tax code in a way that states that you are assumed to have insurance and then increases your taxes if you do not. Why not write it in a way that charges everyone a slightly higher tax rate as an assumption that they do not have insurance, but then give an insurance tax credit above and beyond the ability to take insurance premiums as a pre-tax deduction.

Could an activist Conservative Supreme Court still strike it down? Sure. But it would require a whole new case and I believe it would be much more difficult to make the argument to eliminate this mandate.

What are your thoughts? Do you agree with this reasoning? Let me know in the comments. And please be sure to like the video and subscribe to the channel.

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And also please make sure to mask up, stay socially distanced, and have a good day.

1) <https://financial-dictionary.thefreedictionary.com/Anti-Selection>