

## JAMA Forum: The Supreme Court Flunks Economics— and That’s Bad News for Patients and Physicians

BY [DAVID CUTLER, PHD](#) on [MARCH 29, 2012](#)

This week, we were treated to the spectacle of the US Supreme Court debating economics. They called it a discussion about the Affordable Care Act (ACA), but it was more economic than legal. They spent an enormous amount of time on markets for health insurance and food (broccoli, to be specific); they spent little time analyzing precedent. Between the 9 justices and the 7 lawyers, there were 16 people who took part in the debate. As best as I can tell, not one of them had any training in economics.



David Cutler, PhD

As a professor of economics, I can say without hesitation that the Supreme Court failed its oral exam. For the sake of patients and physicians, I hope they do better on the final.

The first mistake the Supreme Court made was to try to make a distinction between taxes and mandates. Consider 2 ways of achieving universal health insurance coverage: telling people they must buy insurance or instituting a \$10 million annual tax on people who choose not to be covered. Does anyone doubt that the substantive effect of these 2 policies would be the same? Yet most of the justices were at pains to distinguish between them. All agreed that the second of these is constitutional; a number of the lawyers suggested that the first was not.

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But they got it wrong: Economics 101 teaches us that anything one can do with a mandate can be done with a tax as well. Indeed, the argument the lawyers were making is equivalent to saying that single-payer health care is perfectly fine (because it is financed by a tax) but universal private coverage is not (because it's a mandate to buy private insurance). If that is the only way to guarantee universal insurance coverage, the ranks of the single-payer community will swell.

This fuzzy distinction led to serious problems. The government is “hands-off” about requiring people to buy broccoli, it was asserted, so what right does the government have to compel people to buy health insurance? In fact, the government is hands-off about neither health insurance nor broccoli. We subsidize agriculture, as we subsidize medical research. We regulate supermarkets, as we regulate hospitals—and so on. Government involvement in different industries is demarcated in shades of gray, not black and white.

Once it was decided that health care had to be special to merit a mandate, the court then spent an enormous amount of time figuring out if it is indeed special. Here, they obviously missed the relevant lecture in Economics 101. Every economics textbook will tell you why government intervention in health care is particularly warranted: The decision of some people not to buy coverage ripples throughout the economy; these ripple effects (technically, they are called externalities) need to be addressed, and the ACA does that. Insurers dump people or charge them more when they become sick? Tell them they can't do that. People rely on the largesse of strangers when they get sick? Have them pay in advance so that doesn't happen. Use subsidies so that everyone can afford coverage, and if you really want to be sure that people are covered, mandate that they buy insurance.

This is not an area of great economic disagreement. Every economics textbook agrees with this set of solutions, as was pointed out in several briefs to the Court (including one [I participated in](#)).

Without knowing these facts, you cannot pass introductory economics—but apparently you can be a US Supreme Court justice. Thus, Justice Scalia asserted that the problem was of Congress's making because it wanted to mess around with rates for the healthy and the sick (wrong: Congress was *responding* to a sick market, not *creating* a sick market). Justice Alito couldn't see the difference between health insurance and burial insurance (lack of burial insurance doesn't impose costs on others the way lack of health insurance does, and insurance markets for burial insurance work just fine). And Justice Roberts asserted that deciding not to purchase health insurance but relying on strangers instead is somehow less of a decision than deciding to purchase health insurance in the first place (got it?).

Follow this logic, and the destination is clear: we are not a society, but a collection of individuals. Don't tell insurers to pool the healthy and sick; that is too dicey. Don't worry about uncompensated care; it's our constitutionally given right to pass on our costs to others.

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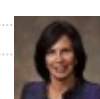
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The unspoken law in the Supreme Court hearing was the Emergency Medical Treatment and Labor Act (EMTALA). That act, which passed with little debate and was signed by President Reagan, mandates that hospitals that accept Medicare stabilize patients who come to their emergency rooms with emergency conditions, even if the patient cannot pay for the care he or she needs. EMTALA was built on previous state laws and centuries of experience with physicians acting as moral actors, not just market participants out to make a buck.

The dissonance between this law and the spirit of the Supreme Court hearing is jarring. If we don't think it's a social obligation to create a health care system, what is the rationale for making providers bear the burden of the uninsured after they get sick?

Actually, the mandate discussion did strike a chord—it reminded me of the recent legislative debates about abortion and contraception. A few weeks ago, the governor of Virginia announced his medical view about whether a transvaginal ultrasound was an appropriate procedure to require of a woman considering an abortion. Around the same time, the Senate voted on whether employers should be able to selectively decide that women do not have the right to contraception on equal terms with other medical services. Now, we have the Supreme Court discussing the finer points of economics. This much we have learned: politicians are terrible physicians and awful economists.

People with powerful positions in government sometimes wonder why they are held in such low esteem. Perhaps it would be better if they left the doctoring to doctors and economics to economists. Having untrained people messing in areas where knowledge is essential is not a formula for doing good.

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**About the author:** David Cutler, PhD, is the Otto Eckstein Professor of Applied Economics in the Department of Economics and Kennedy School of Government at Harvard University and a member of the Institute of Medicine. He served on the Council of Economic Advisers and the National Economic Council during the Clinton Administration and was senior health care advisor to Barack Obama's presidential campaign.

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