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## The Supreme Court Upholds The Individual Mandate: But Who Are We Talking About?

July 5th, 2012

by **Alice Noble** and **Mary Ann Chirba**

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While the Affordable Care Act's individual mandate survived constitutional scrutiny in [NFIB v. Sebelius](#), a Republican president and/or changes in the House or Senate this fall could lead to its demise. As campaigns shift into high gear, the law's opponents will undoubtedly draw on the strident and jointly authored dissent of Justices Scalia, Kennedy, Thomas, and Alito. Despite the value of robust debate, relying on the dissent may be problematic due to its misperceptions about the ACA and the realities of health care. Thus, while we considered [what we were waiting for](#) in the weeks before the decision, the Court's ruling raises a new question: "Who Are We Talking About?"

In an [earlier Health Affairs Blog post](#), we unpacked some of the misperceptions about health care insurance and access that surfaced during oral arguments. As former litigators and teachers of advocacy skills, we realize that jurists are deliberately provocative during oral arguments in order to test competing arguments and deepen their own understanding of the case. Notwithstanding our reservations about certain lines of questioning, we remained hopeful that the Court's private deliberations would yield a carefully reasoned and well supported written decision.

At 193 pages, the justices took care to explain their reasoning, particularly with regard to the ACA's mandate that all individuals obtain minimum coverage. We simply wish they had exercised as much care in discussing *who* lacks such coverage and *why*. Nowhere are these concerns more acute than when reading the dissenters' opinion, especially when contrasted with Justice Ginsburg's decision. To be blunt: she gets it, they don't.

In rejecting the ACA's individual mandate as unconstitutional overreaching under the Commerce Clause, Chief Justice Roberts along with the four dissenters chastise Congress for attempting to penalize the "inactivity" of "the young people." Implicitly, "the young people" seem to be a homogenous group of healthy and gainfully employed 20- and 30-somethings who simply choose not to buy health insurance because they prefer to spend their incomes differently. Bringing their dollars and low actuarial risk into the health insurance market is a gain for the older and sicker people who already have insurance. In contrast, "the young people" are being forced by Congress to use their modest earnings, to purchase health insurance that they don't need and don't want.

Moreover, the dissenting justices assert that young individuals who forgo insurance today may purchase coverage at the same cost in later years. Together, Justices Roberts, Scalia, Kennedy, Thomas, and Alito envision a mythical creature: the young, healthy, and put-upon uninsured who live

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in a magical kingdom where the cost of coverage is low and remains so forever, regardless of age and other factors.

Unfortunately, in the real world where most of us live, the uninsured are a far more complex group, and the ACA recognizes this even if five justices won't. Accordingly, to determine *who we should be talking about* in terms of the object and impact of the individual mandate, we must distinguish myth from reality. Our quest begins with a brief consideration of the opinions themselves, reviews applicable ACA provisions, and evaluates empirical evidence concerning who the uninsured are and why they lack coverage.

### **What The Justices Tell Us About The Young Uninsured**

The following quotes (with emphasis added) capture the divergent views of the three written opinions that tackle the individual mandate: (1) Justice Roberts, (2) Justice Ginsburg (joined by Justices Sotomayor, Breyer and Kagan), and (3) the joint dissent of Justices Scalia, Kennedy, Thomas, and Alito.

#### ***On the impact of the individual mandate***

Chief Justice Roberts:

The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money.... If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature. (Roberts, C.J., Slip Op. at 25)

Justice Scalia, et al.:

This creates a new incentive for young and healthy individuals without pre-existing conditions. ... Many of them may decide that purchasing health insurance is not an economically sound decision—especially since the guaranteed issue provision will enable them to purchase it at the same cost in later years and even if they have developed a pre-existing condition. (Scalia, J. et al., Slip Op. at 6)

Justice Ginsburg:

Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. []. Those who have insurance bear the cost of this guarantee. []. By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy. (Ginsburg, J., Slip Op. at 22)

#### ***On who the uninsured are***

Chief Justice Roberts:

It is precisely because these individuals, as an actuarial class, incur relatively low healthcare costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect. (Roberts, C.J., Slip Op. at 25)

- [GoozNews](#)
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- [The Medical Professionalism Blog](#)
- [U.S. Health Policy Gateway](#)
- [Wall Street Journal Health Blog](#)
- [Wing of Zock](#)
- [Wright On Health](#)

Justice Scalia, et al.

Indeed, the main objection many have to the Mandate is that they have no intention of purchasing most or even any of such goods or services and thus no need to buy insurance for those purchases. The Government responds that the health-care market involves “essentially universal participation.”[] The principal difficulty with this response is that it is, in the only relevant sense, not true. It is true enough that everyone consumes “health care,” if the term is taken to include the purchase of a bottle of aspirin. But the health care “market” that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate do not purchase. They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance. (Scalia, J. et al., Slip Op. at 11)

Justice Ginsburg:

Echoing THE CHIEF JUSTICE, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who “have no intention of purchasing [medical care]” and are too far “removed from the [health-care] market.” [] This criticism ignores the reality that a healthy young person may be a day away from needing health care. [] A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so. (Ginsburg, J., Slip Op. at 19)

### **What The ACA Says About The Young Uninsured**

Chief Justice Roberts and the four dissenters repeatedly insist that the ACA’s individual mandate forces the young and healthy to purchase possibly unaffordable coverage in order to subsidize coverage for older and sicker individuals. However, the ACA provides for low- or possibly no-cost options for all young people under age 30 and thereby limits their participation in the individual market.

- Following the ACA’s enactment, [3.1 million young adults have gained coverage](#) through their parent’s employment-based plan. Currently 75 percent of individuals age 19 to 25 have coverage.
- Section 1302(e) of the ACA allows individuals under 30 years of age to purchase catastrophic-coverage-only policies that are not subject to the modified community rating rules.
- Section 1201(4) permits age to affect the cost of coverage.

Due to the ACA’s clear limitations on the cost and opportunity for young adults to subsidize coverage for older Americans, the mythically young uninsured are not as central to the underwriting process as the Chief Justice and Justice Scalia et al. suggest. The assertion that young people can buy the same coverage at the same cost in the future— despite their age and other factors — makes this a double fantasy. Age can affect cost, and other forces will drive up costs over time. The reality check of the law’s own terms makes clear that the young uninsured are not mere conscripts in a drive to cover others; they too stand to gain under the ACA.

### **What The Data Show About The Young Uninsured**

A quick survey of empirical literature reveals that Justice Ginsburg, as opposed to Justices Roberts and the four dissenting justices, has a firmer grasp on who these “young people” are and why they may not presently “intend” to be “active” in the health insurance market. For instance:

- According to the [U.S. Census Bureau’s Current Population Survey of 2010](#), 10 percent of “young people” age 17 and under have no coverage at all. The figure rises to 17 percent for Hispanics.
- [Kaiser’s 2011 Health Tracking Poll](#) indicates that the large majority of non-elderly uninsured very much want insurance; they simply can’t afford it. Of the uninsured, 16 percent are unemployed,

looking for work and cannot find a job. Another 18 percent work in jobs that offer no health benefits or salaries that are too low to make coverage affordable. This will change with the cheaper policies made available by the ACA.

- [These same people report](#) “widespread problems getting and paying for needed care”. At least a portion of their “inactivity” in the health insurance and health care markets can be explained by the fact that 67 percent of the uninsured report doing without needed health care because of cost, versus 21 percent of the insured. The uninsured are also more likely than the insured to report doing without prescription medication (54 percent versus 20 percent); cutting pills in half or skipping doses (37 percent versus 12 percent); declining recommended medical tests or treatments (51 percent versus 16 percent); going without dental care (64 percent versus 24 percent); having problems paying medical bills (56 percent versus 19 percent); and having problems getting mental health care (33 percent versus 7 percent).
- Injury is the leading cause of death (51 percent) among those who are 1-44 years of age, making it more common than all non-communicable and infectious diseases combined. That the young uninsured are five times more likely to face barriers to mental health services is especially troubling since suicide and homicide are the leading causes of death in 15 – 34 year olds.

In addition, Justice Ginsburg’s opinion was bolstered by data, such as the following:

- According to the [National Center for Health Statistics report](#), over 60 percent of the uninsured visit a hospital or doctor’s office each year.
- The [National Health Interview Survey](#) shows that nearly 90 percent of the uninsured will visit a hospital or doctor’s office within five years.

From these two data points, Justice Ginsburg concludes:

An insured’s consumption of health care is thus quite proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year. ... Equally evident, Congress has no way of separating those uninsured individuals who will need emergency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come. No one knows when an emergency will occur, yet emergencies involving the uninsured arise daily. (Opinion of J. Ginsburg at 19).

The Ginsburg opinion again looks to the [National Health Interview Survey](#) in explaining that a lack of health insurance is most commonly due to:

- High cost
- Lost employment
- Employer unwillingness to offer coverage
- Insurer unwillingness to cover those with preexisting medical conditions
- Loss of Medicaid coverage

Contrary to the dissenters’ perception that the uninsured intentionally defer purchasing coverage to a later time when money is more plentiful and need may be greater, this same survey received too few responses under “did not want or need coverage” to warrant a distinct category.

### **Putting It All Together: When Myth Meets Reality For The Young Uninsured**

The Supreme Court could have resolved the difficult issues before it in any number of ways and, indeed, the decisions of Justice Roberts, Justice Ginsburg, the joint dissenters, and Justice Thomas’ short dissent on the scope of the Commerce Clause did just that. Whether the Court did the right things for the right reasons, and whether Congress will stick with the ACA will be hotly debated. Such discussions, however, should rest on a solid understanding of *why* health insurance is so important, *who* lacks coverage and *why* they don’t have it.

As flawed as it may be, the ACA tries to make significant inroads to redressing serious problems that affect all of us as a society and as individuals. For the four dissenters, these concerns pale against

the need to stand guard against congressional overreaching. As members of the Supreme Court, they certainly should stand sentry over the Constitution. However, in the guise of protecting the young uninsured and, indeed, the nation at large, they warn that:

If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, "the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane." The Federalist No. 33, p. 202 (C. Rossiter ed. 1961).

In the real world, the hideous monsters roam as unforeseen injuries and life-threatening diseases that also "spare neither sex nor age, nor high nor low...." By mischaracterizing the young uninsured and misstating their objectives and intentions, five justices missed the boat. Justice Ginsburg consistently kept sight of who we should be talking about—and why. We can only hope that her nuanced and evidence-based approach to the real world of health care and the uninsured will be recognized as a gold standard in health law jurisprudence.

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## 1 Response to "The Supreme Court Upholds The Individual Mandate: But Who Are We Talking About?"

**alan** Says:

July 13th, 2012 at 11:43 pm

In this world there are Haves and Have-nots. Those that have very little wish they had more such as access to health care. The people who already have Insurance are paranoid that it will be taken from them. Its the "I have mine" mentality.

I have been in health care for 16 years. Luckily in my field, chiropractic medicine, I dont have to deal with patients that have life and death issues like cancer for example which is very expensive. But, very often I have patients that have chronic pain complaints that can be expensive to fix. In many cases, even the patients that have insurance, the coverage is so bad, they may as well not have anything at all. So they come in with insurance that has a \$5000 deductible and I am forced to lower my rates because the patient is not financially able to pay my fees. I dont know what the outcome will be with the new affordable care act, but I do know one thing: Something has to change. Dr. H

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