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Congress' Power Is Properly Vested

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Congress' power is properly vested

As President Obama tries to jump start health care reform this week, it is worth revisiting an issue that has been looming in the background: Where does Congress get the power to require individuals to obtain health insurance?

Most of us learned in grade school that the federal government is a government of limited, enumerated powers. The framers, we were told, were fearful of a large, overbearing central government. So they provided that Congress could only act pursuant to one of the powers given to it in the Constitution. Any powers not delegated to Congress were reserved by the 10th Amendment to the states and the people.

This sounds simple. But it's not. If you read the Constitution's list of Congressional powers, you quickly realize that it is remarkably short. Many powers are tied to supporting the military. Some are narrowly defined, such as the power to establish the post office or to enact copyright and patent laws. The three broadest powers are the power to tax, spend, and regulate interstate commerce.

What you won't find are powers for much of what Congress actually does. There is no power to enact environmental, minimum wage, or controlled substances laws. Even though Washington is crowded with massive federal agencies, there is no power to create these agencies. And, as many commentators have recently pointed out, there is no power to force individuals to buy health insurance.

So how does Congress do it? How does it do so many things that are seemingly beyond its Constitutional authority?

The answer lies in the Supreme Court's broad interpretations of Congressional power.

Chief Justice John Marshall set the tone back in 1819 when he held that Congress had the power to create a national bank even though the Constitution nowhere mentions this power. Marshall said that the Constitution's list of express powers reflects only the "great outlines" of Congressional power. The framers instead intended that these powers to be supplemented by a vast array of implied powers to ensure that Congress had "ample means" to discharge its responsibilities. Thus, Congress' powers to tax and spend could readily imply a



power to create a national bank to help exercise these powers.

For most of the 20th century, the Supreme Court followed Marshall's lead to extreme lengths. In fact, the Court interpreted Congress' powers so broadly as to effectively place no limits on what Congress could do.

Most of this occurred in cases concerning Congress's power to regulate interstate commerce.

The Court said that this power allows Congress to regulate not only commerce between the states, but also any intrastate activities that "substantially affect" interstate commerce. Yet virtually everything — crime, health care, education, the environment — affects the national economy.

The Court construed Congress' commerce power so broadly that for nearly 60 years (from 1937 to 1996) the Court never struck down a single law as beyond Congress' power. And while the Court's conservative majority has more recently placed some limits on Congress' commerce power, the power is still expansive.

You might be aghast at the Supreme Court's failure to enforce Constitutional limits on federal power. But would you really want nine unelected justices deciding what Congress could do? Isn't it better to leave this decision to members of Congress who are accountable to the people through elections?

After all, if Americans don't like a large federal government, they can elect politicians who promise to shrink the government. Indeed, isn't that precisely what they did when they voted for Ronald Reagan? And wasn't a fear of federal overreaching part of the reason why Massachusetts voters elected a Republican to fill Ted Kennedy's Senate seat?

So the next time a pundit says Congress does not have the power to create mandatory health insurance, consider this: Who should decide whether Congress has this power? Should it be nine unelected judges?

Or should it be Congressional representatives who are accountable to the people in re-elections?

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