Leave Health Care Law's Validity Up to Voters

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Ready for a challenge? Let's see if we can pierce the confusing talk about the health care law's constitutionality and figure it out.

First, you need to know that no lower court has said that making an individual buy health insurance violates that person's civil liberties. Commentators often imply that the courts said this. They didn't. Indeed, nothing prevented Massachusetts from requiring its citizens to purchase health insurance.

Rather than saying that the law violated a person's liberty, the courts instead said that Congress lacked the power to enact it. In lawyer lingo, this is an issue of "federalism"—that is, a matter of the appropriate roles of the national and state governments.

Readers know the drill. The federal government is a government of limited powers so that Congress can act only pursuant to a power enumerated in the Constitution. Under the 10th Amendment, any powers not given to Congress are reserved to the states.

The issue that has split the lower courts is whether there is an enumerated power that allows Congress to make health insurance mandatory. The central question is whether Congress' commerce power in Article I, Section 8—"to regulate commerce among the several states"—permits this.

You can stare at these words "commerce among the several states" all you want. They won't tell you whether Congress can make health insurance mandatory. Indeed, credible arguments can be made for answering that question either way.

If you think Congress can't make people buy insurance, hammer home the notion that not buying something is the opposite of "commerce." Congress can regulate an activity affecting interstate commerce. But surely it can't regulate inactivity.

If you think Congress can make people buy health insurance, point out that health care is one-fifth of the U.S. economy; that uninsured people still get sick and burden society with their health care costs; and that people without insurance undermine the goal of spreading risk among as many people as possible. Thus, the decision of millions of people to forgo health insurance has a powerful economic impact on interstate commerce. Congress should certainly be permitted to regulate it.

These are the battle lines. The lower courts invalidating mandatory health insurance accepted the first argument. Those that upheld it accepted the second.

In truth, however, neither argument should be relevant. Instead, courts should defer to Congress' judgment about the extent of its powers and leave it to the political process to rein in Congress if it overreaches.

To understand why, just remember that citizens in a democracy ordinarily make policy, not nine unelected judges. That's why the Constitution begins with "We the People," not "We the Supreme Court Justices."

Because citizens are sovereign, judges should reluctantly invalidate laws enacted by the people's representatives. Justice Louis Brandeis even said of the Supreme Court: "The most important thing we do is not doing."

Of course, the Court sometimes needs to invalidate laws. This is especially true when the democratic process is unlikely to protect constitutional values.

A pure democratic process, for example, is unlikely to protect minority interests, unpopular voices, or people accused of crimes. The Supreme Court, therefore, must be prepared to trump the political process if it tramples minority rights, suppresses ideas or deprives a fair class of a fair process.

But some constitutional values don't need the Court's protection. This is especially true for the type of federalism issue presented in the health care cases.

The reason is simple. If the federal government becomes overbearing, all Americans are affected, not just a select minority. And if the majority feels that the national government is regulating an area reserved for states, it can use the political process to elect representatives who will curtail the federal power.

So which makes more sense? To have the fate of the national healthcare law depend upon whether five justices (a bare majority) think that not buying health insurance is an activity or inactivity? Or to have the justices defer to Congress and let the political process respond if citizens believe Congress has overreached?

Doesn't the last election answer those questions? Didn't the voters demonstrate that, if they disapprove of the healthcare law, they are perfectly capable of sending representatives to Washington to repeal it? While these voters didn't get enough Senate seats to repeal the law and President Obama still has his veto power, in two years they could remove both of those obstacles.

That, at least, would be democracy at work. It is not, in Justice Antonin Scalia's words, having "nine superannuated judges who have been there too long" impose their will on society.

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