Perfectly Legal to Mandate the Purchase of Insurance

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Those hoping the Supreme Court will overturn President Obama's health-care act always have the same refrain: If Congress can make people buy health insurance, it can make them buy anything. Broccoli? General Motors cars? College-savings plans? This argument is great for setting off alarm bells. (What could be more frightening than having to buy broccoli?) But as a basis for making constitutional law, it is fundamentally unsound.

The simple truth is that there is no constitutional right not to buy health insurance. Indeed, Massachusetts has required its residents to buy health insurance for years.

Whether people like it or not, the government makes them pay for things they don't want all the time. For some, it's for a war in Iraq. For others, it's a bailout of General Motors. Even those who challenge the health-care act readily acknowledge that the government could use taxpayer money to fund a government health-care plan (which it already does on a more limited scale with Medicare). That the health-care act requires people to buy insurance on their own, instead of taxing them and buying it for them, is inconsequential. If anything, the act merely enhances people's freedom to choose the product they prefer.

Not surprisingly, then, the case before the Supreme Court is not about individual rights. Instead, it's about federalism, the relative balance of power between the federal and state governments.

You know the drill from grade school. Congress can act only pursuant to a power enumerated in the Constitution. Any powers not given to Congress are reserved to the states by the 10th Amendment.

The critical question before the Supreme Court — and the one that has split the lower courts — is whether Congress' power to "regulate commerce among the several states" allows it to make the purchase of health insurance mandatory.

Those who say it doesn't contend that Congress only has the power to regulate "commerce," and that not buying something is not commerce. Instead of being a commercial activity, it's merely inactivity.

Those who say that Congress can make people buy health insurance point out that if millions of people forego insurance, it burdens the economy when they inevitably get sick and undermines the insurance goal of spreading risk among as many people as possible.

These are the opposing arguments. But the truth is that neither gets to the heart of the matter. Instead, the real question is why the fate of the most important health-care law in a generation should turn on whether five justices think that not buying health insurance is an "activity" or "inactivity." Shouldn't policy in a democracy be made by the citizens and their elected representatives and not nine unelected judges?

Don't get me wrong. There are times when the Supreme Court should intervene to overturn laws enacted by elected representatives. This is particularly true when the political process is incapable of protecting constitutional values. Thus, the court needs to intervene to protect minority groups from discrimination, dissenting voices from suppression, or criminal defendants from being sentenced without due process.

But there is no need to intervene when the federal government allegedly exceeds an enumerated power and trenches upon states' rights. That's because federal overreaching affects all Americans, not just a select minority. If the majority of Americans don't like it, they are perfectly capable of using the political process to send representatives to Washington with a mandate to shrink the federal government. Indeed, that's exactly what voters did in 2010.

When the political process can adequately protect constitutional values, it's better to let "We the People" and our representatives set national policy and not a tiny cadre of unelected judges. That's why Justice Louis Brandeis said of the Supreme Court: "The most important thing we do is not doing."

So let's hope the Supreme Court defers to Congress and leaves the health-care act alone. If Americans don't like it, or think that health coverage should be regulated by the states and not the federal government, they can instruct their representatives to repeal the law or replace them with representatives who will.

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

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