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Liberty Isn't the Issue in Health Care Case

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The Supreme Court is finally hearing oral argument in the health care case. What a wonderful opportunity to discuss what the case is about.

You read that right. I want to talk about an issue that’s not before the court. It’s worth considering because it’s what everyone thinks the case is about. So let’s address it before getting to the real issue.

Most people think the health care case is about personal liberty— that is, the right of an individual not to be forced by the government to buy health insurance. You know the refrain. If the government can make you buy health insurance, it can make you buy anything: General Motors cars, college savings plans, or, most dreaded of all, broccoli.

Of course, there is no “right not to buy health insurance” clause in the Constitution. But that doesn’t mean the justices couldn’t imply one. After all, they’ve found implied rights before. The court has found a right to marry, a right to control the upbringing of one’s child, and a right to an abortion.

So should they find a right not to buy health insurance?

Perhaps. But why is making us buy health insurance so awful that we think it’s unconstitutional? (Assume that we can afford to buy the insurance; indeed, the act has provisions to deal with people who can’t.) Is it that the government is making us pay for something we don’t want?

Maybe. Yet doesn’t the government use our tax money to pay for things we don’t want all the time? For some, it’s a war in Iraq. For others, it’s a bailout of General Motors.

Indeed, even health care act opponents readily acknowledge that the government could use taxpayer money to fund a government-run health care system (a sort of Medicare for all). So why is it a greater infringement on our rights if the government lets us choose a plan to buy instead of taking our money and buying one for us?

Still, why should we have to buy any health insurance? Why can’t we just go it alone and self-insure?

Maybe we should be able to. But what if the only way our society can drive down the cost of health insurance is if everyone participates? After all, isn’t the point of insurance to spread the risk among as many people as possible?

If the government can draft you into the Army, why shouldn’t it be able to draft you into paying your share of an insurance pool to protect whoever among us gets sick?

Besides, those who try to self-insure frequently can’t afford their medical bills when they do get sick. And guess who picks up the tab for much of this care: taxpayers like you and me, and people who do buy insurance (Congress estimates it increases insurance premiums for families by over $1,000 a year).

Sure, we could just let the uninsured suffer the consequences of their choice by not providing them with any care. But do we really want to be a society that condemns people to die when it could easily cure them? And can we even afford not to treat people who have dangerous communicable diseases like antibiotic-resistant tuberculosis?

Such difficulties might explain why the Supreme Court has not found a right not to buy health insurance. But if the health care case isn’t about this individual liberty right, what is it about? It’s merely about whether the federal government (as opposed to a state government) can make us buy health insurance. You know the drill. The federal government is a government of “limited” and “enumerated” powers. So, for Congress to act, it needs to point to a power given to it by the Constitution.

For regulations, Congress usually points to its power to regulate interstate commerce. But those challenging the health care act say that not buying something is not “commerce,” so Congress can’t reach it.

Congress could say it’s using its taxing power, by telling people to either buy insurance or pay more in taxes (which is what the health care act actually says). But some older Supreme Court cases say that Congress may not use its taxing power to create a “penalty,” even though the distinction between a “tax” and a “penalty” is anything but clear.

Finally, don’t forget that if Congress can’t make us buy health insurance, the states still could. That’s because states don’t need to point to an enumerated power to act. This explains why Massachusetts can require its citizens to buy health insurance.

But rest assured. Even if the government can make you buy broccoli, it can’t make you eat it. That’s because people do have a right not to be told what to do with their bodies. Just think Roe v. Wade.

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