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From the SelectedWorks of Alan E Garfield

July 3, 2012

Health Care Back Where It Belongs, Before the Voters

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Available at: https://works.bepress.com/alan_garfield/69/

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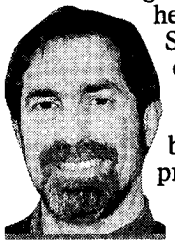

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The individual mandate lives. Let's see if we can figure out why.

For starters, cleanse your mind of the notion that the health care case was about the right not to buy health insurance. Sure, that's what everyone talked about. But that wasn't the issue before the Supreme Court.

Indeed, there is no right not to buy health insurance. That's why Massachusetts can and does require its residents to buy insurance (just don't remind Mitt Romney about that).

But if Massachusetts can make its residents buy health insurance, why can't the federal government? Why was this even a question for the Supreme Court?

The answer has to do with "federalism" – the division of power between the national government and state governments. The Constitution provides that the federal government is one of only limited and enumerated powers. Any powers not given to the federal government are reserved to the states.

Under this system, states like Massachusetts are free to do whatever they think is appropriate to advance the public welfare. But Congress can act only pursuant to a power listed in the Constitution.

The key question in the health care case was whether the Constitution authorized Congress to require people to buy health insurance (the "individual mandate"). The Obama administration said it did, pointing to two separate powers in the Constitution.

The first was Congress' power to regulate interstate commerce, an expansive power that Congress usually relies on when regulating. Longstanding Supreme Court jurisprudence says Congress can use this power to regulate virtually any economic activity.

Since buying health insurance is economic activity, many thought Congress could surely use its commerce power to enact the individual mandate. But a majority of the Supreme Court disagreed (specifically, the five conservative justices).

Having lost the commerce power argument, the administration then pointed to Congress' power to levy taxes. This made sense because under the Affordable Care Act the only consequence of not buying health insurance is that one pays more in taxes.

This is where Chief Justice John Roberts parted company with his fellow conservatives and joined the four liberal justices to uphold the individual mandate. He said that the taxing power is separate from the commerce power and that Congress was fully within its rights to tax people who failed to purchase insurance (at least as long as the tax was not unduly punitive).

Roberts' incensed conservative colleagues complained that this allowed Congress to end-run the limitations on its commerce power. After all, taxing people if they don't buy health insurance is little different from making them buy it.

Personally, I think it's crazy that the fate of the most important health care reform in decades depended upon the vote of one justice. After all, this is a democracy. Policy should usually be made by the people's elected representatives, not nine unelected judges.

Our nation desperately needs health reform. Health care costs are spiraling out of control, and millions of people have no health insurance. Something had to be done. And in the sausage-making process we call legislating, the best that Congress could do was the Affordable Care Act with the individual mandate.

If Americans don't like the individual mandate, they can tell their representatives to repeal it. But Chief Justice Roberts, and the liberal justices who joined him, were right to leave this decision to the people rather than making the decision for them. So the health care ball is back in our court.

But keep in mind that, if the individual mandate is repealed, Congress will almost certainly repeal the provision forbidding insurance companies from discriminating against people with preexisting conditions. Otherwise, people could wait until they got sick before purchasing insurance. Since insurance companies can't make money insuring only sick people, they'd have to either leave the market or astronomically raise premiums.

So if you want to get rid of the individual mandate, go for it. If afterward you lose your job along with its health insurance coverage, don't fret. Just follow this simple advice: don't get sick.

Alan Garfield is a professor at Widener University School of Law.