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# Health insurance is not 'commerce'

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Although the federal district courts have split on whether people can be forced to purchase government-designed health insurance, they have assumed that Congress may constitutionally regulate health insurance in general. But that assumption is wrong: In fact, the congressional power to regulate "Commerce…among the several States" does not include authority to regulate health insurance. Under the Constitution, health insurance is a matter of state, not federal, jurisdiction.

In assuming the contrary, the lower courts have relied on a single erroneous U.S. Supreme Court decision, *U.S. v. South-Eastern Underwriters Association*. Since the case is standing precedent, lower courts must follow it. However, when the cases challenging the recent health care legislation reach the Supreme Court, the justices should begin by overruling that case.

As used in the Constitution, "commerce" refers only to a particular subset of economic activity — primarily the buying and selling of goods by merchants. We know this from several studies of how the founding generation used the term. In two studies, for example, Georgetown University Law Center professor Randy Barnett surveyed thousands of contemporaneous uses and found this to be the dominant meaning.

Barnett's findings have been corroborated by two studies by Rob Natelson. The first disclosed how advocates of the Constitution, in their efforts to promote ratification, represented that governance of most economic activity would remain exclusively in the states. The second examined appearances of "commerce" in founding-era legal sources. After surveying hundreds of appearances of the word in court cases, legal treatises, law dictionaries, case digests and political pamphlets, the study revealed that "commerce" encompassed only the buying and selling of goods among merchants, together with certain tightly related activities: transportation, international brokerage, consignment, commercial paper and cargo insurance.

The founding-era understanding that "commerce" excluded most forms of insurance was honored by the Supreme Court for more than 150 years after the Constitution was adopted. In a string of cases, the Court affirmed that "commerce" did not include insurance. In the most famous of these, *Paul v. Virginia* (1869), a unanimous Court wrote that insurance contracts "are not articles of commerce in any proper meaning of the word."

It was not until 1944, in *South-Eastern Underwriters*, that the Court reversed itself. After acknowledging that constitutional language should be construed according to the "common parlance of the times in which the Constitution was written," Justice Hugo Black's opinion claimed that 18th century "dictionaries, encyclopedias, and other books" showed that the founders actually understood "commerce" to include insurance. Yet Black failed to cite a single dictionary, encyclopedia or book to support this extraordinary statement.

Instead, Black referenced a post-ratification report by Alexander Hamilton, a polemical tract published in 1937 and an 1824 Supreme Court case. Yet the Hamilton report simply referred to cargo insurance. The 1937 book offered only slender and contradictory evidence to support its novel theory that the founders understood "commerce" to include all economic activity. The 1824 Supreme Court case, *Gibbons v. Ogden,* not only failed to mention insurance at all, but included a long list of matters (including "health laws of every description") that were outside the commerce power.

The weakness of *South-Eastern Underwriters* suggests it is a prime candidate for overruling. The modern Court's standards for overruling a precedent were detailed in *Casey v. Planned Parenthood* (1992). Among the reasons for overruling are: if the facts on which it was based have changed or come to be seen differently; if there has been little reliance on the precedent; and if it is a "remnant of an abandoned doctrine."

In *South-Eastern Underwriters,* the key "facts" were never facts at all. Nor has the case been much relied on: It was so unpopular that Congress promptly adopted the McCarran-Ferguson Act, which declared that insurance

regulation would remain a state concern — which remained generally true until the 2010 health care legislation. And although the Supreme Court has upheld many economic regulations as "necessary and proper" to regulation of commerce, *South-Eastern Underwriters* is alone in holding that insurance itself is commerce.

*South-Eastern Underwriters* must be understood as a product of an unusual and unfortunate period in the Court's history — a time when the Court often acquiesced to the worst excesses of federal power. Only a few months later, the Court approved the incarceration of tens of thousands of innocent Japanese-Americans. The caseshould be overruled, and the regulation of health insurance returned to the states, where the Constitution places it.

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