



Obamacare premise is just wrong

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Next week, the Supreme Court takes up the Obamacare litigation, the heart of which is the issue of whether the federal government can constitutionally force people to buy health insurance.

No longer is anyone calling this case "frivolous" or "easy," as most commentators once did. After all, when the Supreme Court grants six hours of oral argument over three days - something not seen since *Brown v. Board of Education* and *Roe v. Wade* - that's a pretty good sign that the case is important and difficult.

Of course, for most of our history, the question of whether Congress could, by using its constitutional power to regulate interstate commerce, require people to buy something would have been laughably easy. Obviously it can't: sitting around doing nothing, or even deciding not to buy something, is neither commerce - traditionally defined as trade or exchange, so not even agriculture or manufacturing counts - nor anything interstate.

Indeed, it wasn't until the New Deal that the Supreme Court allowed Congress to regulate wholly local economic activity. Using the power to make laws that are "necessary and proper" to the enforcement of broader regulations, the court said, the federal government could regulate certain types of local economic activity (wheat-farming, in one particular case) that had, in the national aggregate, a "substantial effect" on interstate commerce.

That "substantial effects" test continues to mark the outer bounds of Congress' regulatory authority under modern constitutional law. Thus, in the most recent case challenging that power, Congress could stop two women from growing and consuming medicinal marijuana - in compliance with applicable state laws - because their economic activity substantially affected the (illegal) interstate market in marijuana.

But Obamacare's individual mandate goes further than either the wheat or weed cases. More than regulating or prohibiting some sort of economic activity, the federal government for the first time is mandating that individuals engage in the very commerce that then becomes subject to congressional regulation.

Recall that even during the Great Depression, Congress didn't force people to become farmers or buy wheat (or war bonds, or anything else). And in the civil rights era, hotels and restaurants had to start serving black people, but nobody had to become (or remain) a hotelier or restaurateur.

The government's lawyers contend that "health care is unique" because virtually all of us will need it at some point, but its significant and unforeseen cost can be passed on to taxpayers - when the insolvent uninsured show up at the ER.

Setting aside the important distinction between health care and health insurance, this argument simply lacks the legal force its proponents want it to have. That is, while true as a matter of public policy - one reason why health care has become such an intractable political issue - the government's point is irrelevant to the constitutional debate.

There are plenty of commodities that we all consume: food, shelter, clothing, mortuary services. Many others may lead to large and unexpected costs: a car totaled in an accident, a house destroyed by fire or flood. And the only reason why the impecunious uninsured can slough the costs of their emergency care onto the taxpayer is because the Emergency Medical Treatment and Active Labor Act requires hospitals to provide care regardless of legal status or ability to pay.

I support EMTALA - I wouldn't want to live in a society that lets people die in the streets - but it cannot justify the individual mandate.

Think about it: if all Congress had to do to get more power was to pass a law creating an economic or other policy problem, then there would be no constitutional limit on federal authority. Instead, Congress could rub Aladdin's lamp to wish for more wishes whenever a majority of its members thought it wise to do so.

And so if we can all be subject to economic mandates merely because everyone is "already in the market," then the Constitution's limits on federal power are meaningless. We're all in the market for transportation, so why not a mandate to buy an American car the next time the automobile industry is in crisis? Diet and exercise have a greater effect on taxpayer spending on health care than rates of ownership of health-insurance policies, so why not a broccoli or gym-membership mandate?

The government has failed to articulate a meaningful, judicially administrable limit to its power - or even to give examples of what lies beyond it - so it must lose.

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