

Eric Thomas Weber

Liberty, health care reform fit

By Eric Thomas Weber

Contributing columnist

OXFORD — "It's about liberty," said Virginia Attorney General Ken Cuccinelli, explaining his opposition to the health care mandate. He continued, "Even the president and Congress must act within the boundaries set by the Constitution." Of course, on both counts Cuccinelli is right.

Federal judges have ruled in conflicting ways recently on the health insurance mandate, which will require all Americans either to buy health insurance or to pay a tax penalty. Federal Judge Henry Hudson of Virginia argued that the government did not make its case successfully in demonstrating the limits of the commerce clause in the Constitution. The worry is that without a clear limit on congressional power, the people could suffer endless encroachment on individual liberty. So, if the government will be successful in defending its federal mandate, it needs to clarify a limiting principle for interfering in people's lives.



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There is a rich and complex tradition of thought about liberty that defies oversimplification. What is fascinating about the debate on health care is that the federal mandate is justified by the idea that not having health care is said to affect others. How can one person's inactivity harm others? We have answers to this question in a number of areas. If Tom is drowning and Jack chooses not to throw him an available life preserver, Jack can be charged with negligence. Jack's inactivity is seen as a choice for which we hold him responsible.

More directly, the argument is that individuals who do not have health insurance show up at emergency rooms all the time. Hospitals with emergency rooms cannot turn them away. Imagine a doctor who confronts a choking child. If he were to start looking for the child's wallet and insurance card, we would be astonished. The same problem for hospitals translates to hugely expensive emergency room costs. People with insurance, therefore, are charged more money so that hospitals can stay in business. That means that people who have insurance pay indirectly for all the people who do not have insurance. So, the inactivity of choosing not to purchase health insurance can clearly raise costs for others.



Charles Dharapak/The Associated Press

Opponents of the health care reform bill base some of their opposition on provisions that require all citizens to purchase health insurance.

One could argue, of course, that some people may not choose to go to emergency rooms when they are sick and have opted out of health insurance. Two issues arise here. The first is that many instances of taking people to emergency rooms do not allow for choice. If Alice is hurt in a car accident and is unconscious, we treat her. We do not wait until she wakes up to then ask whether she wants emergency service. Second, the mandate for health insurance does not actually require you to purchase health insurance. This is perhaps the most startling point. You can opt out if you are willing to pay a tax penalty.

Tax penalties are a form of coercion, of course, but people choose them all the time, such as in seeking extensions for paying income taxes later than is required. Think about other forms of government coercion, furthermore, like the military draft we had just a generation ago. An option to accept a tax penalty instead of serving would have represented a significant expansion of freedom for those who opposed war.

The problem remains that unless we know the limits to the government's justifiable encroachments on individual liberty, we should all be worried. In that sense, it is important to agree with Cuccinelli that the point here concerns liberty. Liberty can be our guide in deciding about the proper limits of government interference. Among the

most important writers on the subject of liberty was John Stuart Mill. He argued that the only time government is justified in limiting an individual's liberty is when that person limits the liberty of others or harms others without their consent. So, boxing is OK as long as the boxers agree to the match. But, it is not all right when Lisa punches Sam without Sam's consent to fight.

A number of libertarian thinkers have refined Mill's formulation. Joel Feinberg, for instance, explained that the idea of harming others is not so simple. It does not always involve direct injuries. We hide pornography behind magazine counters because Brad's freedom to purchase his magazines indirectly affects Maxine's desire to raise her children free from exposure to such adult matters. Also, think about why tax evasion is a crime. Al Capone's tax crimes did not directly hurt others, but affected citizens indirectly. The people had to take on more responsibility for public needs than if Capone had paid his fair share. This is an indirect form of harm, but one that is important and troubling. We make it illegal for a good reason.

In the case of the Affordable Care Act, the mandate is intended to address indirect harms. The claim is that to lack insurance coverage leaves the rest of us on the hook for taking care of you when you get into an

accident or show up at an emergency room, something that happens regularly. So, the justification one could give from the libertarian point of view is that it is permissible to limit an individual's liberty regarding health insurance when that person's exercise of liberty harms others. In the end, then, the issue is indeed one of liberty, but that does not mean we should abandon the health care mandate. It means instead that the debate is really about whether or not individuals who choose to opt out of health insurance negatively affect others.

So, when cases about the federal mandate reach the U.S. Supreme Court, one way to explain the limit to the government's justifiable encroachments upon liberty could be this libertarianism principle, known as the harm principle. We can say that Congress ought to limit its interference in people's lives when there is no great social cost to individuals in the form of non-consensual direct or indirect harms. Where people are not harming others without their consent, let them be.

I have only argued here on the basis of what libertarians call negative freedom, freedom that has to do with avoiding imposition or encroachments on people's liberty. There is a complex set of values built on the idea of positive liberty, which we see represented in American public schools and universities, for example. The motivation behind support for positive liberty is the idea that individuals ought to have a chance to pursue happiness and meaning in life. That form of argument could be offered about health care, but I have focused instead here on the less controversial approach to make a point.

In countless cases, individuals who lack health insurance are taken to emergency rooms or go to them on their own. The indirect harm done is clear. Thus, it seems that the health care mandate can be supported even with the less controversial libertarian harm principle based on negative freedom.

Cuccinelli is right about one thing: the issue of the federal mandate is indeed about liberty.

Eric Thomas Weber, Ph.D., is assistant professor of Public Policy Leadership at the University of Mississippi. Here he is expressing only his own point of view. His second book, *Morality, Leadership, and Public Policy*, will be published in June and his third book, *Democracy and Leadership*, will be released in 2012.