



Perspective

The Irrelevance of the Broccoli Argument against the Insurance Mandate

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The parties who have brought legal challenges to the Affordable Care Act's (ACA's) individual mandate to obtain health insurance claim that the Constitution's Commerce Clause authorizes the reg-

ulation of only commercial activity, not inactivity, and thus gives Congress no power to force individuals to buy a product. They argue that if the Supreme Court were to hold otherwise, then Congress could force us all to buy anything, from General Motors cars to broccoli. This claim is a red herring, however, because Congress could force precisely the same purchases even if the Supreme Court were to accept their arguments.

Accepting the challengers' line between activity and inactivity would do nothing to curb Congress's feared power to force purchases, because Congress could

easily sidestep that line by rephrasing the law to provide that if we have ever engaged in commercial activity, then we must buy insurance, broccoli, or anything else — just as Congress can and does mandate nondiscrimination by private firms, for instance, simply because those firms engage in commerce. Such a law would regulate activity, but because everyone buys things, it would have the same effect as a simple mandate. One might try to make this line more meaningful by adding a requirement that the obligation be germane to the commercial activity, but such requirements have proven fuzzy in

the past — and, in this case, could easily be satisfied in a way that still creates a mandate by providing that anyone who has ever received health care from a paid provider must buy health insurance.

Nor are the challengers correct that Congress can regulate only commercial activity. The Supreme Court has held since 1942 that Congress has Commerce Clause power to limit our ability to grow wheat that we consume ourselves and do not sell, reasoning that it suffices that this noncommercial activity encourages a commercial inactivity that in turn affects commerce — because those who grow their own wheat are not buying wheat from others, which reduces commerce in wheat.¹ If Congress can regulate a noncommercial activity that causes commercial inactivity that in turn

affects commerce in this relatively minor way, then surely it can directly regulate a commercial inactivity that affects commerce in as major a way as the mandate would.

Some argue that the wheat case is outdated. However, the Supreme Court explicitly reaffirmed it in 2005, in a case holding that Congress had Commerce Clause power to ban the medicinal use of home-grown marijuana.² The decision in that case held that Congress lacked Commerce Clause power only when the regulation was not “economic” in nature. The health insurance mandate is clearly economic — indeed, much more clearly so than the sustained marijuana ban.

Others argue that the Constitution’s framers could not possibly have envisioned a congressional power to force purchases. However, in 1790, the first Congress, which was packed with framers, required all ship owners to provide medical insurance for seamen; in 1798, Congress also required seamen to buy hospital insurance for themselves. In 1792, Congress enacted a law mandating that all able-bodied citizens obtain a firearm. This history negates any claim that forcing the purchase of insurance or other products is unprecedented or contrary to any possible intention of the framers.

Indeed, we already live under a mandate to buy health insurance, because we have to pay contributions to the Medicare trust fund. Some argue that Medicare contributions are a tax, not a forced purchase. But an obligation to pay money has the same effect whether we call it a tax or not. Indeed, the new mandate actually provides that one has to either buy health insurance or pay a

tax. The penalty is similar in nature to, but usually much smaller in monetary value than, the higher taxes we have to pay if we don’t get a home mortgage and therefore cannot deduct any mortgage interest from our taxes.

The objectors respond that the new insurance mandate was not called a “tax.” But why should mere phrasing trump substance? Both Medicare and the new mandate entail obligations to pay money for health insurance. That is what matters, not the labels chosen to describe this reality. Because the objectors’ tax–nontax distinction turns only on phrasing, like their activity–inactivity distinction, it similarly fails to prevent the feared power to force purchases. Even without Commerce Clause authority, Congress could achieve precisely the same result with its taxing power by requiring us to pay a “tax” whose revenue will go to buy health insurance — or broccoli — for ourselves.

Some argue that Medicare differs from the mandate because Medicare forces us to buy health insurance from the government, rather than from private insurers. But any concern about Congress forcing us to buy broccoli would hardly seem lessened if it further limited our options by requiring us to buy that broccoli from government stores. Moreover, Medicare actually allows beneficiaries to get their benefits through private insurers. So this argument collapses to the claim that the government could force us to buy health insurance only if it also gives us the option of selecting government insurance. It’s hard to see how this claim addresses any concern about limiting Congress’s power to force purchases. Furthermore, this claim seems

oddly inconsistent with conservatives’ opposition to adding a public option to the mandate (which would be constitutionally required if this claim prevailed) and with recent conservative proposals to fully privatize Medicare (which would be constitutionally precluded).

None of this means there are no limits to Congress’s power. It simply means that Congress can enact economic regulations that merely require us to pay money without exceeding its powers under the Commerce Clause. Congress remains subject to many other limits, including those imposed by the political process and all the other substantive constitutional provisions, such as free speech, equal protection, and personal liberty. For example, our right to liberty has been held to prevent violations of bodily integrity and would probably preclude any law requiring us to eat broccoli — but such issues are not raised by the mandate, which requires paying for health insurance but does not require us to undergo health care.

However one interprets the Commerce Clause, it clearly does not apply to the states and thus cannot impede state legislatures from requiring purchases. And although all 50 state legislatures have always had this power, none of them has ever forced us to buy broccoli or anything similar. This fact seems ample proof that the political process prevents such ridiculous laws from passing. Although the individual mandate’s challengers may have a point in deploring the “nanny state,” the solution is not to replace our democracy with “nanny judges” who tell us which laws we can pass.

Even if one did not want to recognize a Commerce Clause au-

thority to force purchases, the mandate would remain constitutional under the Necessary and Proper Clause, because it is reasonably related to the ACA's provisions that prohibit discrimination against the sick, which are certainly permissible under the Commerce Clause. The reason is that without a mandate those provisions would encourage the healthy to put off buying insurance until they are sick, which could cause the health insurance market to collapse.

Some critics simply complain that the mandate is bad policy. I have to agree; indeed, like presidential candidate Barack Obama, I opposed the mandate. There are two ways to keep healthy people in the insurance pool: mandates and subsidies. Subsidies would have been not only more politically palatable, but also less regressive because they would rely on our normal tax system. Moreover, our current health care system is so inefficient that I would not have mandated the purchase

of insurance without stronger reforms to increase its efficiency. I also hate broccoli. But there is a difference between the policies one disfavors and what the Constitution prohibits.

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1. *Wickard v. Filburn*, 317 U.S. 111 (1942).
2. *Gonzales v. Raich*, 545 U.S. 1 (2005).

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