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### The Broccoli Test

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Cambridge, Mass.

THE new mandate to buy health insurance has now reached the Supreme Court, which agreed on Monday to judge its constitutionality. The crux of the constitutional complaint against the mandate is that Congress’s ability to regulate commerce has never been understood to give it the power to force Americans to buy insurance, or anything else.

But not only is there a precedent for this, there is also clear support for it in the Constitution. For decades, Americans have been subject to a mandate to buy a health insurance plan — Medicare. Check your paystub, and you will see where your contributions have been deducted, whether or not you wanted Medicare health insurance.

Many opponents dismiss this argument because Medicare (unlike the new mandate) requires the purchase of health insurance as a condition of entering into a voluntary commercial relationship, namely employment, which Congress can regulate under the commerce clause. Thus, they say, the Medicare requirement regulates a commercial activity, whereas the new mandate regulates inactivity. But is that a distinction of substance? After all, we don’t have much choice but to get a job if we want to eat.

Even if you accept this distinction, it means that Congress *can* mandate the purchase of health insurance as long as it conditions that mandate on engagement in some commercial activity. So the challengers would have to admit that a statute saying that “anyone who has ever engaged in

commercial activity must buy health insurance” would be constitutional. This is effectively the same as the mandate, because it is hard to believe that anyone in this nation has never bought or sold anything in his life.

Even if there are a few hardy folks who grow or make everything they need, their activity can still be regulated because it affects commerce. The Supreme Court held in *Wickard v. Filburn*, in 1942, that growing and consuming your own wheat can be regulated under the commerce clause because it reduces demand for wheat and thus affects commerce. Accordingly, a statute saying, “anyone who has engaged in any activity that affects commerce must buy health insurance” would clearly be constitutional, and cover everyone, just like the new mandate. In the end, the opponents’ argument is merely about how the statute is phrased, rather than about its substance.

Opponents of the new mandate complain that if Congress can force us to buy health insurance, it can force us to buy anything. They frequently raise the specter that Congress might require us to buy broccoli in order to make us healthier. However, that fear would remain even if you accepted their constitutional argument, because their argument would allow Congress to force us to buy broccoli as long as it was careful to phrase the law to say that “anyone who has ever engaged in any activity affecting commerce must buy broccoli.”

That certainly sounds like a stupid law. But our Constitution has no provision banning stupid laws. The protection against stupid laws that our Constitution provides is the political process, which allows us to toss out of office elected officials who enact them. This is better than having unelected judges decide such policy questions, because we cannot toss the judges out if we disagree with them.

Nor are all required purchases stupid. It is not stupid to require us to buy air bags for our cars and pensions for our retirements. Nor would it be stupid to require us to buy life and disability insurance to make sure we have provided for our children. Whether the law should is up to our political process, not judicial second-guessing.

But the argument that the commerce clause does not authorize the insurance mandate is beside the point. The mandate is clearly authorized by the “necessary and proper clause,” which the Supreme Court has held gives Congress the power to pass any law that is “rationally related” to the execution of some constitutional power. For example, although the Constitution nowhere gives Congress the power to criminalize interfering with the mail, Congress can do so under the necessary and proper clause because it is rationally related to the constitutional power to establish post offices.

Everyone agrees that the commerce clause authorizes other provisions in the new health care reform act — those that require insurers to insure the sick and restrict premiums. But without the mandate, these other provisions would encourage the healthy to put off buying insurance until they got sick. With only the sick buying insurance, premiums would skyrocket and the market could fall apart entirely. In short, even if the mandate were not directly authorized under the commerce clause, it is authorized under the necessary and proper clause as rationally related to the constitutional exercise of the power to regulate premiums and prohibit rejecting the sick.

There are, of course, limits to what Congress can do under the commerce clause. If it tried to enact a law requiring Americans to *eat* broccoli, that would be likely to violate bodily integrity and the right to liberty. But the health insurance mandate does not require Americans to subject themselves to health care. It requires them only to buy insurance to cover the costs of any health care they get.

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