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# CAN CONGRESS MAKE YOU BUY BROCCOLI?<sup>1</sup> AND WHY IT REALLY DOESN'T MATTER

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Critics of the individual mandate to purchase health care insurance make a simple but seemingly compelling argument. If the federal government can require people to buy insurance because that would be good for their health, then the government can require people to buy all sorts of things that are good for their health, like broccoli or membership in an exercise club.<sup>2</sup>

To avoid the prospect of the ultimate nanny state, U.S. district court judges in Florida<sup>3</sup> and Virginia<sup>4</sup> concluded that while the federal government may regulate economic *activity*, it may not regulate economic *inactivity*. Thus, once you decide to purchase health care insurance, the government can regulate the terms of your insurance policy. However, you cannot be forced to purchase the policy in the first place. To breach the activity-inactivity line, wrote Judge Roger Vinson, would invite all kinds of well-intended, but liberty-destroying, laws.<sup>5</sup>

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1. Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Can Congress Make You Buy Broccoli? And Why That's a Hard Question*, 363 NEW ENG. J. MED. 201 (2011).
2. Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded in Law—And Pose Serious Challenges*, 29 HEALTH AFFAIRS 1229, 1232 (2010).
3. Florida v. U.S. Dept. HHS, 2011 WL 285683 (N.D. Fla., Jan. 31, 2011).
4. Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).
5. U.S. Dept. HHS, 2011 WL 285683..

This argument, then, does not rely on problems with the insurance mandate itself. Rather, it rests on the implications for future laws if courts uphold the mandate. We would start to slide down a slippery slope of officious government, and we would no longer have the federal government of limited powers that the founding fathers envisioned.

But the critics and judges have it backwards. If there's a slippery slope, we would have reached bottom already. Even without blessing the regulation of inactivity, the Supreme Court opened the door decades ago for the federal government to make people buy insurance, broccoli or other things that are good for their health. That this is the first time Congress has done so is actually reassuring.

There are many problems with the "broccoli argument" and its reliance on a distinction between activity and inactivity. For example, the Supreme Court already has imposed meaningful limits on the power of Congress to mandate behavior; further limits are not needed. Moreover, the activity-inactivity distinction is illusory so cannot serve a useful purpose. In any event, it is not realistic to suppose that Congress would ever impose a broccoli mandate. The public would not stand for such a law. All of these responses challenge the premises of the broccoli argument, and I will discuss them at greater length. More importantly, I will show how the broccoli argument is misguided even when taken on its own terms.

#### **THERE IS NO NEED TO IMPOSE NEW LIMITS ON THE COMMERCE CLAUSE POWER**

Proponents of the activity-inactivity distinction recommend it as a way for courts to place some limits on the Commerce Clause power of Congress.<sup>6</sup> Over more than half a century, from the New Deal onward, courts allowed increasingly expansive uses by Congress of the Commerce Clause power—it was invoked to enact laws that restrict abortions<sup>7</sup> or protect endangered species<sup>8</sup> and civil rights.<sup>9</sup> In the words of Judge Alex Kozinski, the Commerce Clause had become for Congress the "Hey, you-can-do-whatever-you-feel-like Clause."<sup>10</sup>

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6. Jason Mazzone, *Can Congress Force You to Be Healthy?*, N.Y. TIMES, Dec. 17, 2010, at A39.

7. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

8. *Nat'l Assoc. of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

9. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

10. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1 (1995).

But in 1995, the Supreme Court reined the Commerce Clause power in when it observed that while Congress may regulate *economic* activity, Congress may not regulate *non-economic* activity.<sup>11</sup> Invoking its distinction between economic and non-economic activity, the Court struck down a law banning possession of a gun on or near the grounds of a school<sup>12</sup> and another law prohibiting violent crimes that are committed because of a person's gender.<sup>13</sup> While laws against both kinds of conduct are important, wrote the Court, they should be enacted by state legislatures rather than by Congress. The federal government would be extending its power too far if it assumed responsibility for matters of local concern like K-12 education and community crime.<sup>14</sup> On the other hand, the federal government acts within its authority when it regulates economic activities that affect the national economy.<sup>15</sup> By distinguishing between economic and non-economic activity, the Court already has imposed meaningful limits on the Commerce Clause power.

#### THE ACTIVITY-INACTIVITY DISTINCTION IS ILLUSORY

Even if the Supreme Court needs to curtail the Commerce Clause power further, trying to distinguish between economic activity and economic inactivity will not do the trick. As three federal trial court judges have concluded, one can easily characterize the individual mandate to purchase health care as a regulation of the economic *decision* whether to purchase a health insurance policy or instead to cover one's health care costs through self-insurance.<sup>16</sup> Indeed, it is the same economic decision that large companies regularly make when they choose between purchasing insurance or relying on self-insurance to provide health care benefits for their employees. Everyone seeks health care at some point, so it is not accurate to say that a person can remain "inactive" with respect to the health care system.

Even conceding that people who do not buy health care insurance are inactive, it does not follow that Congress lacks the power to enact an

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11. Timothy S. Jost, *Can Congress Regulate "Inactivity" (and Make Americans Buy Health Insurance)?*, 364 NEW ENG. J. MED. e17 (2011).

12. *United States v. Lopez*, 514 U.S. 549 (1995).

13. *United States v. Morrison*, 529 U.S. 598 (2000).

14. *Lopez*, 514 U.S. at 564–566.

15. And of course, the health care law's regulation of health care insurance entails direct regulation of the national economy.

16. *Mead v. Holder*, 2011 WL 611139 (D.D.C., Feb. 22, 2011); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010); *Liberty University v. Geithner*, 753 F. Supp. 611 (W.D. Va. 2010).

individual mandate to purchase health care coverage. There is nothing in the language or history of the Commerce Clause that limits its reach to the regulation of activity.<sup>17</sup> To be sure, lawmakers often distinguish between activity and inactivity when they decide whether to regulate a person's behavior. Generally, society is much more willing to hold people accountable for their activity than their inactivity. Thus, while it is against the law to cause someone to drown by pushing the person into deep water, it is not against the law to stand idly by and let someone drown who already has fallen into the water. However, the activity-inactivity distinction merely *correlates* with the distinction between unacceptable and acceptable behavior. It does not *define* the line between the unacceptable and the acceptable. At times, inactivity is just as problematic as activity. As Justice Antonin Scalia has written, "It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing."<sup>18</sup>

#### CONGRESS CAN REQUIRE PEOPLE TO BUY BROCCOLI BY REGULATING ECONOMIC ACTIVITY

There is an even more fundamental problem with the activity-inactivity distinction. Prohibiting the regulation of economic inactivity would make no difference regarding the extent of the Commerce Clause power. For any economic decision that Congress could reach by regulating economic *inactivity*, Congress also could reach that decision by regulating economic *activity*. Establishing an activity-inactivity distinction would not protect the public from unwise legal mandates. The broccoli horse is already out of the barn.

How can the federal government require you to purchase broccoli by regulating only economic activity? Congress could pass a law that requires you to order broccoli with your Big Mac<sup>®</sup>, cheese fries or other restaurant

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17. Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. Section IIB (forthcoming June 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1747189](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1747189).

18. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 296 (1990) (Scalia, J., concurring). There also are times when inactivity is more problematic than activity. For example, withholding a ventilator from a dying patient can be worse than withdrawing a ventilator from a dying patient. In the case of a withdrawal, the patient is taken off the ventilator only after being given an opportunity to beat the odds and do better than expected with treatment. When a ventilator is withheld, the patient never receives the chance for an unexpected recovery. DAVID ORENTLICHER, *MATTERS OF LIFE AND DEATH: MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW* 30 (2001).

food. The law also would mandate the purchase of broccoli when you shop at the grocery store. Anytime you bought some food, you would have to buy broccoli (unless you could show you bought broccoli earlier that day or week).

A mandate to buy broccoli with other food would not be first time that the federal government required the purchase of a particular product when people bought a related product. The U.S. Department of Transportation requires you to buy seat belts, air bags and a catalytic converter when you purchase a car.<sup>19</sup> The Consumer Product Safety Commission requires you to buy guardrails for the upper bunk when you purchase a bunk bed.<sup>20</sup> The U.S. Department of Housing and Urban Development requires you to buy smoke alarms when you purchase a mobile home.<sup>21</sup> In all of these cases, the federal government requires you to buy something you might not want to buy by connecting it with the purchase of something you do want to buy.

What about people who do not buy any food but grow their own at home? Isn't this the kind of economic inactivity that Judge Vinson and other mandate critics claim may not be regulated by the federal government? In an important 1942 decision, the Supreme Court held otherwise. In *Wickard v. Filburn*, the Court decided that growing your own wheat for home consumption counts as economic activity.<sup>22</sup> Accordingly, Congress could require people to cultivate broccoli when they grow their own food (as part of a broad mandate for farmers to grow broccoli). Congress could even reach the indigent who eat at soup kitchens or rely on food pantries. The charitable kitchens and pantries are considered economic actors, and the law could require them to serve broccoli with their meals or add it to their provisions. Everyone would be bound by the obligation to include broccoli in their diet.<sup>23</sup>

Because people will become subject to the insurance mandate in 2014 by virtue of living in the U.S., critics have said that the mandate is a

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19. 49 C.F.R. § 571.208 (2010); 40 C.F.R. § 86.000-28 (2011) (setting emissions standards for automobiles that manufacturers have chosen to meet with catalytic converters).

20. 16 C.F.R. § 1513.3(a) (2011).

21. 24 C.F.R. § 3280.208 (2010).

22. *Wickard v. Filburn*, 317 U.S. 111 (1942).

23. Congress could pass other laws to make sure that people actually eat their broccoli. The federal government could require hamburgers, hot dogs, French fries and soft drinks to be fortified with broccoli. Congress could mandate broccoli fortification for Lucky Charms®, Hershey's® Bars and Twinkies®, just as it now requires vitamin fortification for infant formula. 21 C.F.R. § 107.100.

requirement of breathing.<sup>24</sup> My hypothetical—but constitutionally valid—broccoli law would be a requirement of eating.

We can generate a mandate to join an exercise club in the same way as the broccoli mandate. Congress could require that the purchase or home-farming of food be accompanied by the purchase of an exercise club membership to ensure that people do not become obese from the food they eat.<sup>25</sup>

My broccoli and exercise club laws are clearly unrealistic. However, they are no less realistic than the hypothetical statutes of the insurance mandate critics. The critics posit laws that simply make everyone buy broccoli or join an exercise club. Indeed, it is not difficult to imagine absurd laws that pass constitutional muster. As Justice Scalia has observed, the Constitution does not prohibit us “from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day.”<sup>26</sup>

If the Constitution does not stop the federal government from imposing laws like a broccoli mandate, what protects us from a Congress run amok? In general, we must rely on our democratic political process to protect us from unreasonable statutes. As Chief Justice John Marshall wrote nearly two hundred years ago, our principal safeguard against overly burdensome rules is our influence on Congress on Election Day.<sup>27</sup> This may well have been the lesson of the Republican gains in November 2010. And of course, Congress never has tried to pass a broccoli or exercise club mandate.

If it is possible to require desired behavior by regulating economic activity, why didn't Congress connect the individual mandate to economic activity? Why didn't Congress impose the individual mandate on people who purchase medical care? The fact that the health care mandate is not tied to economic activity simply demonstrates the distinctive nature of insurance. We cannot let people wait until they need medical care before they buy health care insurance any more than we can let people wait until their houses are ablaze before they buy homeowners insurance.

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24. To be sure, the individual mandate does not apply to everyone. Undocumented immigrants, poor persons and others are exempt from the requirement to carry health care coverage.

25. Presumably, an exercise club mandate would include exemptions or subsidies for the poor—much like the individual health care mandate.

26. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

27. *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824).

In other words, the individual mandate does not suggest a new willingness by Congress to regulate inactivity. Rather, it reflects a unique situation that requires the regulation of inactivity. There is no slippery slope here to be avoided.

Critics of the individual mandate have raised the specter of other problematic mandates from a federal power to regulate inactivity. The government might not stop at health-promoting requirements. Judge Vinson worried that if Congress can require everyone to purchase insurance for the good of our health care system, then Congress could require everyone to purchase a domestic automobile for the good of our economy.<sup>28</sup>

This type of hypothetical statute should not cause concern either. Congress might require everyone to buy an American car, but it is difficult to see why Congress would do so. Congress could provide ample support for domestic manufacturers by requiring people to buy from a U.S. company when they purchase a car—when they are voluntarily engaged in economic activity.<sup>29</sup>

But what if Congress wanted to make everyone buy a domestic car anyway? It still could do so by regulating economic activity. It could make ownership of an American car a requirement of purchasing any vehicle, whether a car, truck, motorcycle, bicycle, skateboard or wheelchair. It could make ownership of an American car a requirement of buying a ticket for a plane, train, boat, bus or subway, or of using a taxi or limousine. And for those people who never use a vehicle of any kind, Congress could make ownership of an American car a requirement of buying shoes or paying to have them repaired.

Critics of the individual mandate are correct to argue that the federal government should not require us to eat our broccoli or exercise daily. However, they are incorrect to say that the Supreme Court must therefore strike the health care law down. Permitting Congress to regulate inactivity will not place us at any greater risk of federal mandates for the purchase of broccoli, domestic cars or other “virtuous” products.

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28. See *Florida v. U.S. Dept. HHS*, 2011 WL 285683 (N.D. Fla., Jan. 31, 2011). See also Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 605 (2010).

29. General Motors needs to sell 2 million vehicles a year to break even, and that number represents only about one-sixth of total domestic sales. Nick Bunkley, *Resurgent G.M. Posts 2010 Profit of \$4.7 Billion*, N.Y. TIMES, Feb. 25, 2011, at B1. While a domestic car mandate would not violate the Constitution, it might violate international trade agreements.