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## How Broccoli Landed on Supreme Court Menu

By JAMES B. STEWART

What does broccoli have to do with **health insurance**?

Until recently, nothing. But now, perhaps a lot.

Broccoli, of all things, came up in the **Supreme Court** during arguments over the constitutionality of the Obama administration's health care legislation. If Congress can require Americans to buy health insurance, **Justice Antonin Scalia asked**, could it force people to buy just about anything — including a green vegetable that many find distasteful?

“Everybody has to buy food sooner or later,” he said. “Therefore, you can make people buy broccoli.”

Since then broccoli has captured the public imagination and become the defining symbol for what may be the most important Supreme Court ruling in decades, one that is expected any day and could narrow the established limits of federal power and even overturn the legal underpinnings of the New Deal.

If the court strikes down the **health care law** — which many constitutional experts on both the right and left long doubted it would do — many lawyers say they believe one reason may be the role of broccoli in shaping the debate.

It turns out that broccoli did not spring from the mind of Justice Scalia. The vegetable trail leads backward through conservative media and pundits. Before reaching the Supreme Court, vegetables were cited by a federal judge in Florida with a libertarian streak; in an Internet video financed by libertarian and ultraconservative backers; at a Congressional hearing by a Republican senator; and an op-ed column by David B. Rivkin Jr., a libertarian lawyer whose family emigrated from the former Soviet Union when he was 10.

Even those who reject the broccoli argument appreciate its simplicity. Whatever the Supreme Court rules, Mr. Rivkin and his libertarian allies have turned the decision into a cliffhanger that few thought possible.

“I have some grudging admiration for them,” said Akhil Amar, a professor of law and political science at Yale and author of a book on the Constitution. “All the more so because it’s such a bad argument. They have been politically brilliant. They needed a simplistic metaphor, and in broccoli they got it.”

The seeds of the broccoli debate date back to the early 1990s, when President Bill Clinton first proposed a universal health care plan. It included a requirement that all businesses provide health insurance to their employees. “How can the government do that?” Mr. Rivkin wondered, explaining, “It’s just the way I am.”

Mr. Rivkin attended Georgetown University while working three jobs, including cleaning animal cages at a lab. He later worked in the White House counsel’s office under President George H. W. Bush and now, at 55, is a partner in the Washington office of the law firm Baker Hostetler.

“I’m driven by two things,” he said. “Enormous appreciation bordering on burning love for the American system. It gives people with drive and motivation and hard work an opportunity to be all you can be. And a healthy suspicion of governmental power, having come from an environment where you had an all-powerful totalitarian government.”

With his law partner Lee A. Casey, Mr. Rivkin took aim at Congress’s power under the commerce clause of the Constitution. It had become the source of ever-expanding legislative power since Chief Justice John Marshall **wrote in 1824** that Congressional power to regulate commerce “may be exercised to its utmost extent.”

In a September 1993 commentary in *The Wall Street Journal*, Mr. Rivkin and Mr. Casey argued that the Clinton proposal was unconstitutional. Requiring Americans to buy insurance went a step beyond a famous 1942 case, **Wickard v. Filburn**, which has long been a thorn in the side of those who opposed the New Deal. In it, the Supreme Court ruled that Congress had the power to prevent a farmer from growing wheat for his own consumption on the theory that any wheat affected the total supply, and thus fell within interstate commerce.

The health care law, the two lawyers maintained, did not ban an existing activity like growing wheat, but forced people who were doing nothing to act in a certain way. If Congress could regulate inactivity, they argued, there might be no limit to what it could force people to do. “If Congress thinks Americans are too fat,” the article said, “can it not decree that Americans shall lose weight?”

“Would the Bill of Rights intervene?” it continued. “Maybe, and maybe not. There is no specific right to eat when and how you like.”

The Clinton administration's health care effort collapsed. But Mr. Rivkin's unorthodox theory lived on, nurtured by "a small but discernible, libertarian segment of academia," he said. One advocate, Ilya Shapiro of the Cato Institute, said "we were treated with condescension bordering on rudeness" by the legal establishment.

Mr. Rivkin recalled, "We were met with howls of derision."

### **An Analogy Returns**

By 2009, with the Obama administration pushing its health care initiative, one that included a requirement that Americans buy health insurance, Mr. Rivkin and Mr. Casey returned to the Wall Street Journal and Washington Post op-ed pages. Mr. Rivkin also took his argument to Senator Orrin G. Hatch, Republican of Utah.

Senator Hatch had earlier supported an individual insurance mandate as an alternative to a more sweeping plan championed by Hillary Clinton. But after listening to Mr. Rivkin, the senator embraced the argument. "If we have the power to simply order Americans to buy certain products, why did we need a **Cash for Clunkers** program or the upcoming program providing rebates for purchasing energy-saving appliances?" Senator Hatch asked during hearings in October 2009. "We could simply require Americans to buy certain cars, dishwashers or refrigerators."

His remarks struck a chord with Terence P. Jeffrey, the editor in chief of CNS News, an Internet publication formerly known as the Conservative News Service. Both his parents are doctors, and he has a particular interest in health care.

After reading the transcript of Senator Hatch's comments and the Supreme Court's opinion in the wheat case, Mr. Jeffrey shared the senator's concerns. But he figured most Americans would not understand an abstract debate over the limits of the commerce clause. Searching for an easy-to-grasp analogy, he hit upon something "that would go more to health care, something that people would universally recognize was good for you," he said. Broccoli. "I know George Bush didn't like broccoli. It seemed an obvious thing that everyone thinks is good for you."

"Can President Barack Obama and Congress enact legislation that orders Americans to buy broccoli?" Mr. Jeffrey wrote in his **Oct. 21, 2009, CNS column**.

"This is not a question about nutrition. It is not a question about whether broccoli is good for you," the column continued. "It is a question about the constitutional limits on the power of the federal government. It is a question about freedom."

The column appears to be the first public mention of broccoli in the context of the commerce clause. If so, Mr. Jeffrey said, “that’s pretty cool.”

President Obama’s health care law passed on March 21, 2010. That summer, after the president nominated his solicitor general, Elena Kagan, to the Supreme Court, the subject of vegetables resurfaced in confirmation hearings. Senator Tom Coburn, Republican of Oklahoma, who is also a medical doctor, asked, “If I wanted to sponsor a bill and it said, ‘Americans, you have to eat three vegetables and three fruits every day,’ and I got it through Congress and it’s now the law of the land, got to do it, does that violate the commerce clause?”

“Sounds like a dumb law,” Ms. Kagan replied.

The exchange caught the attention of Austin Bragg, 33, a producer for Reason TV. He proposed a video to his editor, Nick Gillespie. Reason TV and its magazine and Internet outlets are subsidiaries of the **Reason Foundation**, a libertarian research organization whose largest donors are the **David H. Koch Charitable Foundation** (\$1,522,212) and the **Sarah Scaife Foundation** (\$2,016,000), according to its most recent disclosures. Both finance conservative and libertarian causes.

“Part of the idea for Reason is we’re ideological and we’re trying to articulate and popularize our worldview and have some influence,” Mr. Gillespie said.

### **Creating a Villain**

**The video**, “Wheat, Weed and Obamacare: How the Commerce Clause Made Congress All-Powerful,” was shown on YouTube and the Reason Web site in August 2010. “Legal titans John Eastman and Erwin Chemerinsky slug it out to determine whether or not Congress has been abusing the commerce clause,” Reason’s Web site proclaimed. Professor Eastman, a conservative, teaches at Chapman University in Orange, Calif., and clerked for Justice Clarence Thomas of the Supreme Court. He is also chairman of the National Organization for Marriage, which opposes gay marriage. Professor Chemerinsky, a liberal, is dean of the law school at the University of California, Irvine.

In the Reason video, Professor Chemerinsky got the worst of it. The clip shows Senator Coburn asking Ms. Kagan about eating vegetables and fruits, and cuts to Professor Chemerinsky. He appears to struggle with the question of limits to Congressional power, saying at one point, “Congress can force economic transactions,” and at another, “power can be used in silly ways and the Constitution isn’t our protector.” Professor Eastman comes off better, as he questions whether Americans want “an unlimited, amorphous government that can make us do whatever it wants?”

For Mr. Gillespie, the video had the desired effect. “Based on that video, Chemerinsky is the best screen villain since Hannibal Lecter,” Mr. Gillespie said. “But he got his chance to make his case.”

Professor Chemerinsky said he has never seen the video and doesn’t recall being interviewed, though Mr. Gillespie said he was filmed in his office. At this point, different strands of the broccoli legal argument came together. It happened in a suit filed by the state of Florida and 12 other states challenging the constitutionality of the health care law.

Arguing the case against the law last December was Mr. Rivkin of Baker Hostetler. He and his colleague Mr. Casey had been hired by Florida’s attorney general, who had read the two men’s Wall Street Journal op-ed articles.

Judge Roger Vinson, appointed to Federal District Court in 1983 by President Ronald Reagan, heard the case, and introduced the subject of broccoli. “If they decided that everybody needs to eat broccoli because broccoli is healthy, they can mandate that everybody has to buy a certain quantity of broccoli each week?” he asked.

“That is absolutely true, Your Honor,” Mr. Rivkin replied. “The analogy you’re talking about is entirely apropos.”

(Judge Vinson did not respond to the question of where he came up with broccoli. But Mr. Rivkin said he thought he had mentioned it to the judge. Vegetables also surfaced during oral arguments in October in a Virginia case challenging the health care law, when the judge asked if the government could force people “to buy an automobile, to join a gym, to eat asparagus.”)

Judge Vinson also indicated that he had seen the Reason video citing vegetables. He said, “You know, my friend Dean Chemerinsky says the government can, under the commerce clause, in his view, order Americans to buy G.M. cars.”

Ian Gershengorn, a lawyer from the Justice Department, replied: “But what this case is about is the purchase of a very particular product, and it is not shoes, it is not cars, it is not broccoli.”

That argument summed up the prevailing view among legal scholars, but broccoli figured prominently in Judge Vinson’s ruling that the law was unconstitutional, as did the Reason video.

“Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system,” wrote Judge Vinson, who even provided a link to the “Wheat, Weed and Obamacare” video.

## **Seized by the Media**

After the opinion, broccoli quickly became the defining symbol for the debate. Fox News led its report on Judge Vinson's opinion with a broccoli reference. Professor Eastman was deluged with media requests, and hits to the Reason video rose. Rush Limbaugh **took up the issue**. "Let's cut to the chase here," he said to a guest. "You're telling me that you want the Supreme Court to decide that the government can tell you that you have to buy health insurance and broccoli?"

Broccoli surfaced at the federal appeals court level last September. During oral arguments in another case challenging the health care act, Laurence H. Silberman, a Reagan appointee and senior judge of the United States Court of Appeals for the District of Columbia Circuit, asked if it would be unconstitutional to require people to buy broccoli. (He nonetheless wrote the opinion that the act is constitutional.)

The Supreme Court **agreed last November to hear Florida's case**. Broccoli and the notion that limiting the commerce clause protects personal freedom appeared in many of the 136 briefs filed with the court. It featured prominently in a long Wall Street Journal editorial that ran before the oral argument.

Justice Scalia's broccoli question suggests that the argument struck a chord with him. It also seems to have resonated with Justice Anthony M. Kennedy, widely viewed as the swing vote.

"The government is saying that the federal government has a duty to tell the individual citizen that it must act, and that is different from what we have in previous cases," Justice Kennedy said, echoing Mr. Rivkin's argument.

Legal scholars say it is hazardous to predict how the court will decide based on oral arguments.

Whatever the outcome, that such a small group of libertarian lawyers could harness the power of media in the digital age and have such an impact "has left the legal establishment reeling," Mr. Shapiro of Cato said.