

Elena Kagan balances your diet

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Elena Kagan, in her hearing on Tuesday, seemed to accept the federal government’s power to force you to eat three servings of fruits and vegetables every day. She opined that it would be a “dumb law” but refused to say it was unconstitutional.

Supporters of limited government have long been concerned about skewed interpretations of the Constitution that justify government intervention into whole swathes of life far beyond the Framers’ contemplation. But hearing a Supreme Court nominee say that Congress could regulate one of the most private decisions a human being makes—what to eat—is about as bad as any nightmare scenario a tin-foil-hat conspiracy theorist can conjure.

And Senator Tom Coburn (R-Okla.) was not wearing any kind of hat when he asked his fruits-and-vegetables question.

For several months now, serious scholars have been arguing that if the government can force people to buy health insurance, there is nothing the government can’t force you to do. “Cash for clunkers” not reviving the auto industry? Make everyone buy a Chevy. Housing industry still not sufficiently stimulated? Mandate that people can only live in houses built in the last decade.

It’s not any kind of logical leap to ask whether, in the name of combating our obesity epidemic and lowering national health care spending, the government can regulate gastronomic intake—or require people to join a gym (assuming the health club company has successfully lobbied for its franchises to be on the “approved” list).

As is often the case when the government claims ever-increasing powers, the Commerce Clause is the culprit here. This constitutional provisions grants Congress the power to “regulate Commerce . . . among the several States.”

Seems simple enough, with the noble goal of preventing interstate trade wars and making the United States one national economy instead of the hodge-podge of colonies in place under the Articles of Confederation.

In the 1942 case of *Wickard v. Filburn*, however, the Supreme Court ruled that the government could fine a farmer for growing and consuming too much wheat instead of taking it to market—because his actions, when aggregated with those of other farmers, affect national wheat prices. Since then, only twice has the Court struck down legislation as exceeding Congress’s commerce power: 1995’s *U.S. v. Lopez*, involving gun-free school zones (not part of a “larger regulation of economic activity”) and 2000’s *U.S. v. Morrison*, about the Violence Against Women Act (too “attenuated” an economic effect).

Those cases were outliers but four liberal justices opposed even their meager limits on federal power.

And they still left us with the prevailing standard—or “settled law,” as Kagan puts it—of Congress being able to regulate “channels” and “instrumentalities” of interstate commerce, as well as those activities that “substantially affect” interstate commerce. That’s a loophole you can drive a produce truck through.

Indeed, Kagan was briefly pained to respond to Coburn’s question before reciting the holdings of *Lopez* and *Morrison*, that the federal government could not regulate non-economic activities or areas traditionally left to the states. Coburn followed up by asking whether, if it were shown that eating more vegetables reduced health care costs, would it fit into the “settled law” of what Congress can regulate. Kagan’s indirect answer—that nonsensical laws could still be constitutional—implied that it would.

Unfortunately, Kagan is tapping into a legitimate point: when you socialize health care costs, taxpayers have an interest in keeping those costs down, including by mandating behavior that should rightly be considered private. Some conservatives might like to require that all unwed mothers be injected with Depo-Provera or be put on other long-term birth control methods so taxpayers aren’t saddled with the cost of raising their children. Many on the left would not agree with that particular policy, but they rely on the same arguments about cost-control when they justify government mandates and subsidies like those proposed by Michelle Obama in her Let’s Move! campaign.

Both sides seek to justify state interference with personal freedom by appealing to the “I’m paying for it” logic. Neither side—nor unfortunately Elena Kagan—seems to understand that the key to a free society is to limit the extent to which one person’s choices mean a claim on another’s pocketbook.

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