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Elena's nanny state

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Suppose that the federal government, in its infinite wisdom, decided that it would deal with the obesity crisis and improve the health and welfare of the American people -- by mandating that every American eat three helpings of vegetables and three helpings of fruit every day. Anyone caught failing to eat the required food would be subject to a fine or tax. Would such a law be constitutional?

Sen. Tom Coburn (R-Okla.) put that question to Supreme Court nominee Elena Kagan this week. Kagan, the US solicitor general, couldn't answer. In fact, she implied that under the court's "expansive" view of the Constitution's Commerce Clause, a fruit and vegetable mandate *might* be just fine.

Now, some may think that such a hypothetical question is silly, other than giving us a glimpse of Kagan's virtually unlimited view of government power. Congress would never pass such a "dumb" law, to use Kagan's term -- would it?

But Congress has just taken a very similar step, mandating that every American purchase a government-designed package of health-insurance benefits. The issue is now before the courts -- there's a hearing today.

And supporters of the mandate justify it under exactly the broad interpretation of the Commerce Clause that Kagan cited. In fact, the health-care bill itself says that the mandate is constitutional because "the individual responsibility requirement . . . is commercial and economic in nature, and substantially affects interstate commerce."

The Founders must be spinning in their graves.

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States." It was intended to prevent states from erecting trade barriers among themselves, as was common practice under the Articles of Confederation (our governing national document before ratification of the Constitution), and to allow the federal government to deal with such issues as river navigation.

However, in the 1932 case of *Wickard v. Filburn*, the high court interpreted the clause so as to give Congress the authority to reach wholly intrastate-economic activity that "substantially affects" interstate commerce.

In that case, the federal government, in order to help farmers by keeping wheat prices high, had imposed limits on how much wheat farmers could grow.

One farmer, Roscoe Filburn, was growing wheat not for sale but to feed to his own chickens. He argued that since he wasn't selling wheat -- let alone selling it across state lines -- he wasn't subject to the restrictions.

The court, setting the foundation for the modern regulatory state, held that because Filburn's farming reduced the amount of wheat he would buy for chicken feed from others, and because wheat was traded nationally, growing his own wheat was affecting interstate commerce, and therefore could be regulated.

But the individual mandate contained in the health-care reform bill goes beyond regulating even intrastate activity to regulate *non*activity. That is: Everything you do or don't do could be seen as affecting interstate commerce -- so, in this interpretation, everything you do or don't do could be regulated by Congress.

Thus, Congress would be free to order you to take or not take a job, to sell or not sell your house, to buy or not buy a car -- or to eat more fruits and vegetables.

This individual-insurance mandate is unprecedented in US governance. As the Congressional Budget Office noted, "a mandate requiring all individuals to purchase health insurance would be an unprecedented federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States."

However, as Sen. Coburn's question and Kagan's response make clear, if the courts uphold the mandate's constitutionality, the last limits on federal-government power will be gone.

It was easy to see the debate over health-care reform as being about the best way to deliver and pay for health care. But it was always about much more than that. If nothing else, we owe a debt of gratitude to Solicitor General Kagan for making absolutely clear what is really at stake: freedom.

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