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## Commerce, Death Panels, and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity

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**COMMERCE, DEATH PANELS, AND BROCCOLI:  
OR WHY THE ACTIVITY/INACTIVITY  
DISTINCTION IN THE HEALTH CARE CASE WAS  
REALLY ABOUT THE RIGHT TO BODILY  
INTEGRITY**

**Michael C. Dorf\***

ABSTRACT

In *National Federation of Independent Business v. Sebelius*, five Justices of the United States Supreme Court opined that the Commerce Clause does not authorize Congress to regulate “inactivity.” In giving effect to the intuition that laws compelling activity impose a more serious burden on the individual than do laws forbidding activity, these Justices mistakenly imported a libertarian principle into the Court’s federalism jurisprudence. Indeed, the intuition is not even true in all individual rights cases. Nonetheless, in the aim of understanding the logic behind the position, this Article explains how affirmative mandates that infringe the substantive due process right to bodily integrity can be more intrusive than prohibitions. In so doing, it draws connections between the political charge that the health care law would establish “death panels” and the effective use of the hypothetical fear that upholding the law’s so-called individual mandate would permit the government to require people to eat broccoli.

INTRODUCTION

In *National Federation of Independent Business v. Sebelius*,<sup>1</sup> five Justices of the United States Supreme Court accepted the proposition

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\* Robert S. Stevens Professor of Law, Cornell University Law School. I am grateful to Byron Crowe for outstanding research assistance. The author delivered an oral version of this article as the Spring 2013 Henry J. Miller Distinguished Lecture at Georgia State University College of Law.

1. 132 S. Ct. 2566 (2012).

that the Commerce Clause did not provide Congress with the power to enact the so-called “individual mandate” of the Patient Protection and Affordable Care Act (ACA).<sup>2</sup> Why not? Because, they said, the Commerce Clause does not authorize Congress to regulate “inactivity.”<sup>3</sup> The Court<sup>4</sup> thus endorsed a distinction—between regulable “activity” and non-regulable “inactivity”—that had not previously played an important, or arguably any, role in its Commerce Clause doctrine.

Part I of this Article explains why the activity/inactivity distinction is a mostly harmless but nonetheless unnecessary addition to Commerce Clause jurisprudence.<sup>5</sup> It is mostly harmless because Congress rarely needs to adopt mandates and, even after the ruling in the ACA case, can enact *de facto* mandates via the taxing power. The distinction is unnecessary because the fears of the five conservative Justices who endorsed the activity/inactivity distinction were unfounded. They worried that if Congress could mandate participation in commerce then its powers under the Commerce Clause would be limitless. But, as I shall explain, it is fairly simple to identify laws that Congress would be powerless to pass, even if the ACA had been upheld under the Commerce Clause. The Court could

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2. *Id.* at 2591 (opinion of Roberts, C.J.); *id.* at 2648 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

3. *See id.* at 2586–87 (opinion of Roberts, C.J.); *id.* at 2649 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

4. I refer to the five votes on the Commerce Clause issue as a decision of “the Court” even though one can make a respectable argument that it constitutes *dicta*. After all, Chief Justice Roberts sustained the mandate under the taxing power, and so one might think that nothing he said about the Commerce Clause was necessary to the ruling. *See id.* at 2629 n.12 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Yet Chief Justice Roberts himself disagreed. He stated that his conclusion that the mandate was outside the scope of the Commerce Clause was a necessary step en route to his decision to invoke the principle of constitutional avoidance in applying the Taxing Clause. *See id.* at 2600–01 (opinion of Roberts, C.J.). In any event, it makes little long-term difference whether the Court’s pronouncements on the Commerce Clause in the ACA case were holding or *dicta*. Lower courts will follow the principle either way, see, e.g., *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 402 (4th Cir. 2005) (noting that “repeated *dicta* from the [Supreme] Court . . . guides our exercise of . . . legal judgment in this case”); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (noting that “[t]his [c]ourt should respect considered Supreme Court *dicta*”); *cf.* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2026 (1994) (explaining why many lower courts follow well-considered *dicta* of the Supreme Court), and the ruling itself makes clear that at least as presently constituted, a majority of the Supreme Court will apply the no-regulation-of-inactivity-under-the-Commerce-Clause rule in future cases.

5. *See infra* Part I.

have preserved the notion that the powers of Congress are limited with a rule that allows many but not all mandates, and the shape of that rule could have been readily adapted from the Court's own recent Commerce Clause precedents.

Why, then, did the conservative majority—the four dissenters plus the Chief Justice—vote to forbid mandates under the Commerce Clause? The answer to that question can be found in a phrase first uttered by Justice Kennedy during the oral argument and later repeated by Chief Justice Roberts in the portion of his opinion that rejected the Commerce Clause as authority for the ACA mandate. Justice Kennedy asked Solicitor General Verrilli whether the government ought “not have a heavy burden of justification” when a law “chang[es] the relation of the individual to the government.”<sup>6</sup> Echoing the sentiment, the Chief Justice wrote in his opinion that permitting “Congress the same license to regulate what we do not do” as it enjoys with respect to what we affirmatively do, would “fundamentally chang[e] the relation between the citizen and the Federal Government.”<sup>7</sup>

Note the difference in wording between Justice Kennedy's question and Chief Justice Roberts's statement. Whereas the Chief Justice was careful to limit his point to the relation between the citizen and the *federal* government, Justice Kennedy had referred to a change in the relation between the individual and “the government” in a generic sense. I believe that Justice Kennedy's seemingly less precise usage more accurately captured the core intuition driving the votes of all five conservative Justices who sought to limit government's ability to regulate inactivity. The intuition is that government—at any level—may properly tell people what they cannot do, but not what they must do.

Put less sympathetically, in the ACA case the activity/inactivity distinction was a libertarian principle masquerading as a principle of

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6. Transcript of Oral Argument at 11–12, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf).

7. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2589.

federalism. Or, as an amicus brief on behalf of a group of law professors (including myself) put it:

While offered as a challenge to Congress's commerce power, [the ACA challengers'] claim is really about individual liberty, reflecting an instinct about how far *any* government, state or federal, may go in ordering the affairs of its people. Plaintiffs effectively ask this Court to import a substantive due process limitation into the Commerce Clause.<sup>8</sup>

I continue to think that the five conservative Justices were wrong to import a substantive due process limitation into the Commerce Clause, but after explaining why, I shall take up the further question of whether substantive due process itself ought to be understood as barring affirmative mandates, either conclusively or presumptively.<sup>9</sup>

Part II of this Article addresses that question.<sup>10</sup> I begin by rejecting the notion that there is any general prohibition or even presumption against affirmative government mandates. Nonetheless, the doctrine that has developed around a particular set of substantive due process rights—those that may be understood as implementing the right to bodily integrity—does indeed reflect an intuition that affirmative mandates are more intrusive than negative prohibitions. I explain why this intuition might be regarded as sensible. I also explain how the same intuition connects the political hysteria around the ACA with the legal case that was marshaled against it. Seeing the matter through the lens of bodily integrity connects the false but politically effective charge that the ACA would establish “death panels”<sup>11</sup> with the ACA's constitutional challengers' effective use of the fear that upholding the mandate would permit the government to require

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8. Brief of Law Professors Barry Friedman, Matthew Adler et al., as Amici Curiae in Support of Petitioners and Reversal on the Minimum-Coverage Provision Issue at 4–5, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 160237, at \*4–5.

9. *See infra* Part II.

10. *See infra* Part II.

11. *See* Glenn Kessler, *Sarah Palin, 'Death Panels' and 'Obamacare'*, WASH. POST FACT CHECKER BLOG (June 27, 2012, 4:23 PM), [http://www.washingtonpost.com/blogs/fact-checker/post/sarah-palin-death-panels-and-obamacare/2012/06/27/gJQAysUP7V\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/sarah-palin-death-panels-and-obamacare/2012/06/27/gJQAysUP7V_blog.html).

people to eat broccoli. Both death panels and forced consumption of broccoli raise the specter of a government that directs people's intimate decisions about the use of their bodies. That is a legitimate concern even if it was misplaced in the ACA case and even though it contradicts decades of attacks on modern substantive due process doctrine by conservative Justices.

### I. COMMERCE

Despite the *sturm und drang* that accompanied the ACA litigation, the case may not be especially important as a matter of constitutional doctrine because neither the Commerce Clause ruling nor the taxing power ruling imposes a serious limitation on the actual authority of Congress. To be sure, writing in the *New York Times* just days after the ACA ruling, Professor Pamela Karlan characterized the conservative majority—the four dissenters plus the Chief Justice—as having “laid down a cache of weapons that future courts can use to attack many of the legislative achievements of the New Deal and the Great Society . . . .”<sup>12</sup> I agree with Professor Karlan that the portion of the Court's ruling invalidating the expansion of Medicaid as going beyond the scope of the Spending Clause could indeed threaten important federal legislation. Still, it is worth noting that Justices Breyer and Kagan joined the conservatives to forge a 7-2 majority on that point,<sup>13</sup> and so it remains possible that the ACA's Spending Clause holding will come to mark only an extreme outer limit—the existence of which the Court's leading precedents had long signaled.<sup>14</sup>

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12. Pamela S. Karlan, Opinion, *No Respite for Liberals*, N.Y. TIMES (June 30, 2012), [http://www.nytimes.com/2012/07/01/opinion/sunday/no-respite-for-liberals.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/07/01/opinion/sunday/no-respite-for-liberals.html?pagewanted=all&_r=0).

13. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2576. Justices Breyer and Kagan joined in Part IV of the Chief Justice's opinion striking down the ACA's Medicaid expansion as exceeding Congress's power under the Spending Clause. *Id.*; *id.* at 2666–67 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (“Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional.”).

14. *See* *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (“Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548,

Putting aside the Spending Clause, I am not nearly as pessimistic as Karlan about the likely impact of the Court's rulings on the taxing and commerce powers. Karlan frets that given the unpopularity of tax increases, a Congress that can only regulate through the taxing power "is a Congress with little power at all."<sup>15</sup> Perhaps, but one should recall that on this point the Chief Justice joined his four more liberal colleagues in laying down the rule that Congress may use the taxing power even when it does not invoke the taxing power.<sup>16</sup> And even the four conservative dissenters were prepared to sustain the individual mandate if it had been clearly labeled and more clearly structured as a tax.<sup>17</sup> Karlan's worry, then, comes down to a prediction that Congress will lack the ingenuity to structure future mandates so that they are sufficiently tax-like to satisfy five Justices but not so tax-like as to offend the American people's anti-tax sensibility. That is ultimately a view about politics about which neither Professor Karlan nor I have any special expertise.

In any event, suppose that the ACA ruling really does foreclose future mandates because the Court has now ruled that Congress lacks the power to impose them directly and political forces prevent their imposition through the tax code. So what? For more than twenty-three decades after the ratification of the Constitution, Congress enacted no laws that clearly violated the no-mandate rule announced in the ACA case.<sup>18</sup> It is therefore difficult to believe that the no-mandate rule will seriously hamstring future Congresses in achieving

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590 (1937)).

15. Karlan, *supra* note 12.

16. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594–95 (opinion of Roberts, C.J.).

17. *See id.* at 2647 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (suggesting Congress could constitutionally achieve the ACA's goals by structuring the tax as a tax credit for those "who do purchase [health] insurance"); *see also* Neil H. Buchanan, *It Does Not Matter Whether Congress Calls a Tax a Tax: Explaining the Dissenting Justices' Misconceptions About the Taxing Power in the Affordable Care Act Case*, VERDICT (July 5, 2012), <http://verdict.justia.com/2012/07/05/it-does-not-matter-whether-congress-calls-a-tax-a-tax> (describing how the dissenters implicitly "embrace the idea that Congress can [impose the mandate] in two functionally equivalent ways, but the law at issue will be outside of Congress's power unless it uses the magic words necessary to bring it under the dissenters' preferred vocabulary.>").

18. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.) (noting the "novelty" of the individual mandate when "Congress has never attempted to rely on [the commerce] power to compel individuals not engaged in commerce to purchase an unwanted product").

important national objectives of the sort it has previously achieved using the Commerce Clause. The ACA case was never very important for constitutional law; it was important because of its immediate political and policy ramifications, involving, as it did, a signature legislative accomplishment of a first-term President during a contested re-election campaign<sup>19</sup> with respect to a longstanding policy objective of progressive politicians.<sup>20</sup>

I should be clear that in saying that the Commerce Clause holding of the ACA case was constitutionally unimportant, I do not mean that it was correct. I have long maintained that there is no good reason *why* the Commerce Clause ought to permit Congress only to regulate activity rather than inactivity that has substantial economic effects.<sup>21</sup> Certainly, the reasons offered by the Chief Justice and the four dissenters do not stand up to careful examination.

The Chief Justice pointed to the repeated use of the term “activity” in the prior case law,<sup>22</sup> but that only shows that the prior cases involved activity—which everyone acknowledged.<sup>23</sup> None of the prior cases had accepted or rejected direct regulation of inactivity because no case presented the question.

The Chief Justice also argued that the very words “regulate” and “commerce” connote regulation of pre-existing activity, rather than legal mandates to engage in activity.<sup>24</sup> But that is hardly self-evident. Consider the provisions of federal labor law and federal antitrust law that have been construed to forbid secondary boycotts.<sup>25</sup> A boycott is

19. See Michael C. Dorf, *How Much is Truly at Stake in the Legal Battle Over Obamacare?*, VERDICT (Sept. 26, 2011), <http://verdict.justia.com/2011/09/26/how-much-is-truly-at-stake-in-the-legal-battle-over-obamacare>.

20. See Ronald Dworkin, *Why the Mandate is Constitutional: The Real Argument*, N.Y. REV. BOOKS (May 10, 2012), <http://www.nybooks.com/articles/archives/2012/may/10/why-mandate-constitutional-real-argument/?pagination=false>.

21. See Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part II: Congressional Power*, FINDLAW (Nov. 2, 2009), <http://writ.news.findlaw.com/dorf/20091102.html>.

22. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2587 (“Our precedent . . . uniformly describe the [commerce] power as reaching ‘activity.’”).

23. See *generally, id.* 132 S. Ct. 2566.

24. See *id.* at 2586–89 (“The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.”).

25. See Sherman Antitrust Act, 15 U.S.C. § 1 (2006); 29 U.S.C. § 158(b)(4)(A), (e) (designating secondary boycotts as unfair labor practices); *NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO*, 473 U.S. 61, 78–79 (1985) (holding secondary boycotts prohibited under Sections 8(b)(4)(B) and 8(e) of the

economic inactivity—a refusal to engage in business with the target—in more or less the same way that the non-purchase of health insurance is economic inactivity. Yet prior to the ACA litigation it would not have occurred to anyone to challenge the relevant laws as beyond the scope of the Commerce Power. And prior cases, especially *Wickard v. Filburn*,<sup>26</sup> accepted that Congress could penalize one activity—there, the growing of wheat in excess of a government quota—in order to encourage another activity—the purchase of wheat in the market.<sup>27</sup> Given the traditional view that Congress is the master of the means for achieving legitimate ends,<sup>28</sup> it seems an empty formalism to say that Congress may not do directly what it may do indirectly.

The conservative Justices' main argument was that if the ACA were upheld, then the power of Congress under the Commerce Clause would be unlimited, in violation of the structure of Article I, Section 8, and the Tenth Amendment.<sup>29</sup> But this claim is false in light of the Court's own relatively recent precedents. Even if the ACA had been upheld under the Commerce Clause, Congress would not be omnipotent. For example, Congress would still lack the power to ban the possession of firearms in school zones (per *United States v. Lopez*<sup>30</sup>) or to provide a civil remedy in federal court for gender-motivated violence (per *United States v. Morrison*).<sup>31</sup> Why? Because,

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National Labor Relations Act); *Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n*, 312 U.S. 457, 465 (1941) (holding secondary boycotts *per se* illegal under § 1 of the Sherman Act).

26. 317 U.S. 111 (1942).

27. *Id.* at 128 (holding that Congress's "power to regulate commerce includes the power to regulate . . . prices . . . and practices affecting such prices" and thus Congress was acting within its authority when attempting to "increase the market price of wheat and to that end to limit the volume thereof . . .").

28. See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

29. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas, & Alito, J.J., dissenting) ("What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment . . . and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States.").

30. 514 U.S. 549, 551 (1995).

31. 529 U.S. 598, 601 (2000).

in the Court's argot, firearms possession and gender-motivated violence are not "economic activit[ies]." <sup>32</sup>

That limit also suggests a straightforward limit on affirmative mandates: if some activity is not "economic," then Congress may neither make that activity the predicate for regulation—as in *Lopez* and *Morrison*—nor may Congress compel otherwise-inactive people to engage in it—as per the rule that the Chief Justice and the four conservative dissenters could have laid down in the ACA case. To give two obvious examples, even if the ACA had been upheld under the Commerce Clause, Congress still would be powerless to mandate gun possession near schoolyards or the commission of gender-motivated violence.

Now, it will be immediately objected that these are meaningless limits. After all, Congress would never try to *mandate* gender-motivated violence and any law doing so would violate the equal protection component of the Fifth Amendment's Due Process Clause. <sup>33</sup> That may be a fair objection with respect to the *Morrison*-based hypothetical example but the *Lopez*-based hypothetical example is harder to dismiss. A number of local governments around the country have enacted laws mandating gun ownership or possession in particular locales, such as the home. <sup>34</sup> Given the strength of the gun-rights lobby, <sup>35</sup> it is at least possible to imagine Congress enacting a similar law for the nation as a whole. Doing so *might* infringe the Second Amendment, but then again it might not.

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32. *Id.* at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); *Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect . . . interstate commerce.").

33. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638–39 (1975) (invalidating a gender-based distinction in the Social Security Act as violating the Due Process Clause of the Fifth Amendment).

34. *See* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 *STAN. L. REV.* 1, 37–38 (2012).

35. *See, e.g.*, Laura I. Langbein & Mark A. Lotwis, *The Political Efficacy of Lobbying and Money: Gun Control in the U. S. House, 1986*, 15 *LEGIS. STUD. Q.* 413, 433 (1990) (concluding, after an empirical analysis, that the NRA and Handgun Control, Inc. (a pro-gun control group) were effective at influencing legislative decision-making); Peter H. Stone, *History Repeat? NRA Has Blocked New Gun Laws After Tragedies Like Tucson*, *CENTER FOR PUB. INTEGRITY* (Jan. 11, 2011, 1:44 PM, updated Apr. 19, 2011, 3:44 PM), <http://www.publicintegrity.org/2011/01/11/2211/history-repeat> (noting the "legendary" influence of the NRA in Washington, stemming from "the grassroots clout of its 4 million members and the tens of millions it has spent over the last two decades on campaign contributions and lobbying").

Professor Joseph Blocher has argued that the Second Amendment right to keep and bear arms as construed in *District of Columbia v. Heller*<sup>36</sup> and *McDonald v. City of Chicago, Illinois*<sup>37</sup> is best read to entail a right *not* to keep and bear arms, but as Professor Blocher himself acknowledges, the question is difficult and open.<sup>38</sup> Let us suppose that the Second Amendment would not be offended by a federal law requiring that competent law-abiding adult citizens (duly defined in the law) keep working firearms in their homes. Would such a law nonetheless be unconstitutional as beyond the power of Congress under the Commerce Clause?

Before I answer that question, I need to set aside a complicating wrinkle. Might a federal law obligating law-abiding adult citizens to keep firearms in the home be sustained under the power of Congress “[t]o provide for organizing, arming, and disciplining, the Militia”<sup>39</sup>? As Justice Ginsburg noted in the ACA case, as early as 1792 Congress enacted legislation mandating citizens “to purchase firearms and gear in anticipation of service in the Militia.”<sup>40</sup> But my hypothetical federal mandate would apply to those too old or too feeble to serve in the militia, and so, at least as applied to them, it might be said to be beyond the scope of the Militia Clause. Even if not, we can ask whether the hypothetical gun mandate would also fall within the scope of the Commerce Clause, on the assumption that Congress, acting pursuant to the Commerce Clause, may mandate economic activity but not non-economic activity.

Given *Lopez*, the answer is pretty clearly no. If gun possession in a school zone is not economic activity, then neither is gun possession in the home. To be sure, under the *Lopez*-based test I am proposing, the government could use the Commerce power to mandate the *purchase* of guns, but it can already effectively accomplish that result

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36. 554 U.S. 570 (2008).

37. 130 S. Ct. 3020 (2010).

38. See Blocher, *supra* note 34, at 5–7 (admitting that “there are serious objections to” the thesis that the Second Amendment entails a right not to keep and bear arms).

39. U.S. CONST. art. I, § 8, cl. 16.

40. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2627 n.10 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing the Uniform Militia Act of 1792, 1 Stat. 271).

under the taxing power: by withholding tax deductions or tax credits from those who do not purchase guns. For truly economic activity, only formalism could warrant distinguishing the taxing power from the Commerce power.

What other activities would Congress be powerless to mandate under the rule that I am suggesting was implicit in the Court's prior Commerce Clause cases? The answer should be found in those cases. In *Gonzales v. Raich*,<sup>41</sup> the Court invoked a dictionary to define "economic" activity as "the production, distribution, and consumption of commodities,"<sup>42</sup> but this definition appears to be under-inclusive because it omits services. Presumably that oversight simply reflects the fact that *Raich* involved a commodity—marijuana—rather than a service.<sup>43</sup> In a subsequent case involving services, we can expect the Court to hold that they too count as economic activity, at least when traded for money or other value.

The more troubling aspect of *Raich* is its inclusion of "consumption of commodities" within the definition of economic activities.<sup>44</sup> Suppose I eat a raspberry that I pick from a bush that grows wild on my property. Have I really engaged in economic activity that may serve as the predicate for federal regulation under the Commerce Clause? It is easy to see why the *Raich* Court *wanted* to include consumption in its definition: by defining the relevant activity in *Raich* as the consumption of marijuana, the Court was able to analogize the case closely to *Filburn*, where the law aimed to limit the consumption of home-grown wheat by people like Filburn.<sup>45</sup>

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41. 545 U.S. 1 (2005).

42. *Id.* at 25 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

43. *See id.* at 18.

44. *See id.* at 25–26.

45. At least that is how the facts have been understood by the Supreme Court. *See, e.g., Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2587 (opinion of Roberts, C.J.) (describing farmer Filburn as "growing wheat for consumption on his own farm"); *Raich*, 545 U.S. at 18 ("Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."). In fact, Filburn's "homegrown" wheat was almost certainly part of a larger economic enterprise. To eat the wheat that Filburn grew beyond his quota "the Filburn family would have had to consume nearly forty-four one-pound loaves of bread *each day* for a year." Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation, and Commerce*, in CONSTITUTIONAL LAW STORIES 69, 102 (Michael C. Dorf ed., 2d ed. 2009). "In Filburn's time, farmers fed twenty times more wheat to livestock than they ground into flour for home use." *Id.*

Nonetheless, the inclusion of consumption of commodities in the definition of economic activity is difficult to reconcile with the exclusion of possession of a commodity (a gun) in *Lopez*. Suppose that instead of just possessing his gun, Lopez had been eating it—either in the literal sense or as a euphemism for using it to commit suicide. In what sense would that be an “economic” activity of any sort?

If consumption of a commodity may serve as the predicate for federal regulation under the Commerce Clause, that should be because there is a national market for the commodity and demand to consume it drives that market, not because the consumption itself is economic activity. The very Controlled Substances Act at issue in *Raich* appeared to reflect Congressional recognition of that fact. The Act does not outlaw “consumption” of controlled substances but their manufacture, distribution, dispensation, or possession with intent to distribute or dispense.<sup>46</sup>

Accordingly, in the ACA case the Court could have said that while the *purchase* of a commodity like broccoli is of course economic activity that Congress may either forbid or require, its *consumption* is not. Such a ruling would have allowed the Court to uphold the mandate to purchase health insurance under the Commerce Clause without opening the floodgates for consumption mandates.

So why did the conservative majority reject this path? Setting aside legal realist and political explanations, part of the answer may be that five Justices took the language of *Raich* too seriously. Thinking that purchasing and consumption were constitutionally indistinguishable under the Commerce Clause, they saw no way to sustain the health insurance purchase mandate without also implying the validity of consumption mandates. Admittedly, this explanation only partly explains the conservatives’ view in the ACA case because they also appear to have been concerned about purchase mandates in their own right. However, given the functional equivalence of tax incentives and purchase mandates, *that* concern was a mostly empty formalism.

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46. See 21 U.S.C. § 841(a)(1) (2006).

Accordingly, the only real functional concern at play in the five conservatives' opinions was—or should have been—a concern about consumption mandates. But that still leaves us with a puzzle. If (four of the five of) the Court's conservatives already thought that Congress has the power to *forbid* consumption of commodities,<sup>47</sup> why were they troubled by the notion that Congress might *compel* such consumption? Why, in other words, is it worse to be forced to eat broccoli than to be forbidden from eating broccoli? The answer—if there is one—is more likely to be found in libertarian principles than in federalism principles.

## II. MANDATES AND CONSTITUTIONAL LIBERTY

Are there grounds for thinking that legal mandates impose greater infringements on liberty than do prohibitions? If we ask the question categorically, the answer must be no. It is easy to imagine affirmative mandates that impose no burden at all because they merely require people to do what they would choose to do anyway—a mandate that people must breathe air, for example—or impose only a trivial burden—such as an obligation to pay a one-penny head tax. At the same time, prohibitions can be extraordinarily burdensome—as with laws forbidding religious rituals, intimate relationships or the use of what could be life-saving medicine. Only the imagination limits the range of pairwise comparisons in which most rational people would clearly prefer to be subject to the mandate rather than the prohibition.

Nonetheless, other things being equal, we can expect mandates to be more intrusive than prohibitions. Let us compare a mandate to  $\phi$ <sup>48</sup> and a mirroring prohibition on  $\phi$ -ing. Again, we can imagine many circumstances in which the prohibition is worse. If  $\phi$ -ing is breathing, then anyone who is not suicidal will prefer the mandate to the

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47. Justice Thomas is an exception. He would roll back much of modern Commerce Clause jurisprudence. See *United States v. Lopez*, 514 U.S. 549, 599–602 (1995) (Thomas, J., concurring) (arguing the Court's interpretation of the Commerce Power starting in the 1930s was a “wrong turn” and a “dramatic departure . . . from a century and a half of precedent”); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (raising the same concern).

48. I follow the custom in the philosophical literature of using the Greek letter  $\phi$ , pronounced “phi,” as the variable that denotes some activity.

prohibition. But in the more likely scenario, the mandate will be more intrusive.

Why? Perhaps the mandate leaves less liberty in some rough quantitative sense. Imagine two polities: Mandatia and Prohibita. The legislature of each polity has enacted exactly one law. In Mandatia, everybody must  $\phi$ . In Prohibita, no one may  $\phi$ . If we imagine that  $\phi$ -ing is a somewhat time-consuming activity, then the people of Prohibita are freer than the people of Mandatia. In Prohibita, it is true, their liberty is constrained by the law that bans  $\phi$ -ing, but so long as they do not  $\phi$ , the people of Prohibita may do pretty much whatever they like. By contrast, the people of Mandatia are effectively forbidden from doing anything other than  $\phi$ -ing during the time it takes to  $\phi$ . Also, if  $\phi$ -ing is expensive, then when Mandatia commands people to  $\phi$ , it makes it impossible for them to use the funds necessary to  $\phi$  for any other purpose.

Nonetheless, the cost in time or money is not the main reason mandates might be considered more intrusive than prohibitions, *ceteris paribus*. Some mandates are especially objectionable even though one can comply with them quickly and at low cost. Laws that coerce speech comprise an important such category. One can comply with an obligation to recite the Pledge of Allegiance or to carry the message “Live Free or Die” on one’s license plate<sup>49</sup> without much commitment of time or money. And yet the Supreme Court cases invalidating such mandates<sup>50</sup> tap into a core libertarian intuition. The key Pledge case was decided during the Second World War, but it was not simply the timing that made Justice Robert Jackson’s invocation of totalitarianism<sup>51</sup> appropriate. As the Court later explained in the less freighted license plate case, the state may not co-opt its citizens to its own ends; it may not “force[] an

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49. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating criminal prohibition on covering New Hampshire state motto on license plates); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating mandatory pledge for children in public schools).

50. *Wooley*, 430 U.S. at 717; *Barnette*, 319 U.S. at 642.

51. *Barnette*, 319 U.S. at 641 (“Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.”).

individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”<sup>52</sup>

That *instrumentalization* distinguishes mandates from prohibitions. The *Barnette* and *Wooley* Courts implied that the government, in seeking to use its citizens for the government’s ends, had—as Justice Kennedy and Chief Justice Roberts would later complain in the ACA case<sup>53</sup>—changed the relationship between the individual and government. Mandates make citizens tools of the government rather than *vice versa*. They thus contravene a prohibition that Immanuel Kant and his followers have deemed essential to morality.<sup>54</sup>

The Kantian prohibition on using our fellow human beings as means to our own ends may find expression in other legal distinctions between activity and inactivity. Consider, for example, the common law’s traditional (and largely still extant) rejection of any duty to rescue strangers. Private morality may oblige us to come to the aid of our fellow citizens, at least when we can do so at relatively little risk to ourselves, but the law generally does not<sup>55</sup>—even as it imposes all manner of negative duties.<sup>56</sup>

Thus, the compelled speech cases and the common law’s rejection of a general duty to rescue render comprehensible the claim by Justice Kennedy and Chief Justice Roberts that such mandates change the relation between the government and the individual. But

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52. *Wooley*, 430 U.S. at 715 (“Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”). For an excellent analysis of just what was wrong with the laws in *Barnette* and *Wooley*, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1314–18 (2d ed. 1988).

53. See Transcript of Oral Argument, *supra* note 6, at 31.

54. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 36–37 (Mary Gregor ed., Cambridge Univ. Press 1998) (1785).

55. See *Williams v. State*, 664 P.2d 137, 139 (Cal. 1983) (“As a rule, one has no duty to come to the aid of another.”); *Rhodes v. Ill. Cent. Gulf R.R.*, 665 N.E.2d 1260, 1270 (Ill. 1996) (“Our common law generally imposes no duty to rescue an injured stranger upon one who did not cause the injury in the first instance.”); see also, e.g., Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1459 (2008).

56. It may be tempting to see the constitutional distinction between positive and negative rights as carrying out the same principle. See, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 202 (1989) (finding no due process violation where government officials recorded, but failed to intervene to prevent, severe child abuse). However, that limitation on the doctrine of state action appears to implement a distinct policy of separation of powers: Allocation of resources and law enforcement are generally left to legislative judgment. See *id.*

these examples do not make the claim plausible—at least not as a general matter—because our law recognizes a variety of affirmative obligations that cannot be reconciled with a general Kantian right against being treated as a means.

In the ACA litigation, the government put forward various examples of federal mandates.<sup>57</sup> Chief Justice Roberts and the four dissenters argued that none of the examples demonstrated that the Commerce power extends to mandates,<sup>58</sup> but even if they were right on that point, such examples do undercut any claim that the Constitution generally forbids the government from instrumentalizing citizens. Jury duty, selective service, vaccination requirements, and of course, the obligation to pay taxes, all treat citizens (or in the last case, their money) as a means to some collective end. They rest on the proposition that people, or their labor, belong to us all, rather than to them alone. And all of these obligations are constitutionally valid.<sup>59</sup>

Even the right against compelled speech—which Justice Jackson extolled in anti-totalitarian terms—is at most the complement of the right against prohibitions on speech. Indeed, in the commercial

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57. See Reply Brief for Petitioners (Minimum Coverage Provision) at 15–16, U.S. Dep’t of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 748426, at \*16 (citing cases involving federal statutes on child support, sex-offender registration and racial discrimination); Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment at 12 n.7, Florida v. U.S. Dep’t of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-00091-RV/EMT), 2010 WL 4876894 (giving examples of jury service, census compliance, and acquiring armaments for the militia); Reply in Support of Defendants’ Motion for Summary Judgment, Florida v. U.S. Dept. of Health and Human Serv., 716 F. Supp. 2d 1120 (No. 3:10-cv-00091-RV/EMT), 2010 WL 5184233 (giving example of requiring commercial land owners to provide accessibility for people with disabilities).

58. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 n.3 (2012) (“The examples of other congressional mandates . . . are not to the contrary. Each of those mandates—to report for jury duty, to register for the draft, to purchase firearms in anticipation of militia service, to exchange gold currency for paper currency, and to file a tax return—are based on constitutional provisions other than the Commerce Clause.” (citation omitted)); see also *id.* at 2587 (“As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching ‘activity.’ It is nearly impossible to avoid the word when quoting them.”).

59. See U.S. CONST. art. III, § 2, cl. 3 (mandating jury trials for criminal prosecutions); *Arver v. United States*, 245 U.S. 366, 390 (1918) (upholding the Selective Service Act); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916) (upholding federal income tax); *Butler v. Perry*, 240 U.S. 328, 333 (1916) (“[The 13th Amendment] was not intended to interdict enforcement of those duties which individuals owe to the state, such as service[] . . . on the jury.”); *Jacobson v. Massachusetts*, 197 U.S. 11, 38–39 (1905) (upholding state law that allowed boards of health to mandate vaccinations).

context, the case law permits the government to compel speech in circumstances in which it could not forbid speech.<sup>60</sup> Thus, notwithstanding the Kantian resistance any of us might feel towards instrumentalization, there does not appear to be any general constitutional principle that treats mandates as more intrusive on individual liberty than prohibitions.

But if there is no such general principle, there is nonetheless one area of case law that does distinguish between mandates and prohibitions: the doctrine governing the right of bodily integrity. We see this distinction most clearly in cases involving death and dying.

In *Cruzan v. Director, Missouri Department of Health*, the Supreme Court upheld a Missouri law that forbade the disconnection of a feeding tube or other medical intervention from a comatose patient, absent clear and convincing evidence that disconnection complied with the wishes the patient had expressed when competent.<sup>61</sup> Although the case thus rejected a right-to-die claim, in doing so the lead opinion assumed *arguendo* that a competent adult has a constitutional right to refuse even life-saving medical treatment, including food and water.<sup>62</sup> Justice O'Connor, who cast a fifth and crucial vote for the majority opinion, stated in a concurrence that she thought such a right in a competent person was established, not merely assumed.<sup>63</sup>

And with good reason: the common law treated nonconsensual medical treatment as battery<sup>64</sup> (absent an emergency in which consent could be presumed).<sup>65</sup> Of course, modern doctrine does not

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60. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (holding that compelled disclosures for commercial speech are subject to a less intrusive form of scrutiny than flat prohibitions).

61. 497 U.S. 261, 286–87 (1990).

62. *Id.* at 279.

63. *Id.* at 287 (O'Connor, J., concurring).

64. *See id.* at 269 (majority opinion); RESTATEMENT (SECOND) OF TORTS § 13 cmt. c (1965) (“[A] surgeon who performs an operation upon a patient who has refused to submit to it is not relieved from liability by the fact that he . . . believes that the operation is necessary to save the patient’s life. Indeed, the fact that . . . the patient would have died had the operation not been performed and that the operation has effected a complete cure is not enough to relieve the physician from liability.”).

65. RESTATEMENT (SECOND) OF TORTS § 892D (1979) (“Conduct that injures another does not make the actor liable to the other, even though the other has not consented to it if (a) an emergency makes it necessary or apparently necessary, in order to prevent harm to the other, to act before there is opportunity to obtain consent from the other or one empowered to consent for him, and (b) the actor has

constitutionalize all or even most of tort law, but it does appear to draw a line around the body. The Supreme Court has cited cases like *Winston v. Lee*<sup>66</sup>—involving nonconsensual surgery to obtain evidence—and *Rochin v. California*<sup>67</sup>—involving nonconsensual pumping of a suspect’s stomach for the same purpose—as cornerstones of the constitutional right to bodily integrity.<sup>68</sup> The government may not compel citizens to do with their bodies as the government chooses—at least absent a very strong justification.

But while mandates involving the body abridge the constitutional right to bodily integrity, prohibitions generally do not. Compare the Court’s assumed constitutional right to avoid medical treatment with the Court’s rejection of a right against prohibitions on particular medical interventions. Even while no doubt aware of the constitutional overtones, the Court rejected any statutory right to take the experimental drug Laetrile<sup>69</sup> or to use medical marijuana.<sup>70</sup> Also, in marked contrast with the right against compelled life-saving treatment assumed in *Cruzan*, the Court in *Washington v. Glucksberg*<sup>71</sup> unanimously rejected a right to resist prohibitions on physician-assisted suicide. The majority opinion relied extensively on the distinction between a patient who refuses a medical intervention—that is, one who refuses to submit to a mandate to accept medical treatment—and a patient who wishes to violate the prohibition on acting to commit suicide.<sup>72</sup> We can thus understand the distinction between the assumed right to let nature take its course and the non-right to hasten death as implementing a libertarian

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no reason to believe that the other, if he had the opportunity to consent, would decline.”); *see, e.g., Perna v. Pirozzi*, 457 A.2d 431, 461 (N.J. 1983) (“Absent an emergency, patients have the right to determine . . . whether surgery is to be performed on them . . .”).

66. 470 U.S. 753, 758 (1985).

67. 342 U.S. 165, 173 (1952).

68. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992).

69. *See United States v. Rutherford*, 442 U.S. 544 (1979).

70. *See United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001).

71. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

72. *Id.* at 725 (“The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.”).

principle holding that, at least with respect to bodily integrity, mandates are worse than prohibitions.

Was the Court in *Glucksberg* warranted in treating the act/omission distinction as a proxy for the strength of the liberty claim?<sup>73</sup> If so, it *might* be for the Kantian reasons I referred to above. All four of the dissenters in *Cruzan* argued that the Court gave insufficient procedural protection for the right to refuse medical treatment, arguing that the state had elevated its conception of the value of Nancy Cruzan's life above her own.<sup>74</sup> The state, in this view, instrumentalized Cruzan in violation of the categorical imperative, disregarding her own ends in favor of the ends that the state chose. To be sure, five Justices upheld the procedural scheme at issue in *Cruzan*,<sup>75</sup> but in doing so they did not reject the core Kantian insight the dissenters propounded: the majority's assumption that a competent person would have the right to refuse medical treatment even if death results is itself best understood as a product of the Kantian principle.

The centrality of the activity/inactivity distinction to cases involving the right to bodily integrity explains the rhetorical power of two claims that were made about the ACA: that it authorized "death panels" and that upholding the Act would mean that a law mandating broccoli purchases would likewise be valid. The original "death panels" charge took aim at a provision<sup>76</sup> in a House version of the then-pending legislation that would have authorized Medicare

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73. I co-authored an amicus brief on the losing side of *Glucksberg*, arguing, *inter alia*, that both physician-assisted suicide and the right to refuse medical treatment assumed in *Cruzan* are acts rather than omissions. Brief Amicus Curiae of State Legislation in Support of Respondents, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 709339. But the Court rejected that framing of the question.

74. See *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261, 313 (1990) (Brennan, J., dissenting) ("The only state interest asserted here is a general interest in the preservation of life. But the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment."); *id.* at 344–45 (Stevens, J., dissenting) ("Missouri asserts that its policy is related to a state interest in the protection of life. . . . Missouri insists, without regard to Nancy Cruzan's own interests, upon equating her life with the biological persistence of her bodily functions.")

75. *Id.* at 280.

76. America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. § 1233 (2009). However, H.R. 3200 was never enacted, and the ACA, as enacted and signed, contained no such provision.

reimbursement for end-of-life planning discussions between doctors and patients.<sup>77</sup> Although nothing in the bill would have required patients to forgo medical treatment to which they were otherwise entitled or even to schedule appointments to make end-of-life plans, some conservative politicians and pundits nevertheless asserted that Congress and the Obama Administration were opening the door to rationing of care.<sup>78</sup> The charge persisted even after the Medicare provision was dropped. Former Alaska Governor and 2008 Republican Vice Presidential candidate Sarah Palin, who had spearheaded the initial death panels charge, shifted gears in 2012, arguing that a different provision of the ACA—the one creating the Independent Payment Advisory Board—would act as the “death panel” that would ration care.<sup>79</sup> Neither the original death panel charge nor its revised version ever had much grounding in reality,<sup>80</sup> but it had substantial emotional (and thus political) force because it tapped into a version of the Kantian worry.

A government that rations health care—or even one that asks its citizens to think about the costs and benefits of end-of-life care—tacitly asserts that life under some conditions has more worth than life under other conditions. The fear that the government does not simply defer to people’s prior judgments about the value of their lives is the same fear that the *Cruzan* dissenters raised.<sup>81</sup> No matter how far-fetched in light of the actual content of the ACA, the fear of death panels may have been the same fear that drove the Court’s concern about instrumentalization in the bodily integrity cases in general and the right-to-die cases in particular. Nonetheless, the fear of death panels was not a fear that government would mandate activity, and thus it did not translate directly into the constitutional argument that the government may not regulate inactivity. To make

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77. Jim Rutenberg & Jackie Calmes, *False ‘Death Panel’ Rumor Has Some Familiar Roots*, N.Y. TIMES (Aug. 13, 2009), <http://www.nytimes.com/2009/08/14/health/policy/14panel.html>.

78. Constance Uribe, Commentary, *The Coming Obamacare Rationing Government to Determine Value of Individual Lives*, WASH. TIMES, Nov. 8, 2012, at B04, available at 2012 WLNR 23837814.

79. Jason Millman, *Sarah Palin Revives ‘Death Panel’ Message*, POLITICO (June 26, 2012, 12:52 PM), <http://www.politico.com/news/stories/0612/77838.html>.

80. See Kessler, *supra* note 11.

81. See *Cruzan v. Dir., Mo. Dep’t. of Health*, 497 U.S. 261, 313 (1990) (Brennan, J., dissenting).

that move, the ACA's opponents needed a different example. Broccoli fit the bill perfectly.

Under extant constitutional doctrine, a law forbidding the consumption of broccoli would be subject to rational basis scrutiny, in the same way that laws forbidding the consumption of marijuana are subject only to rational basis scrutiny<sup>82</sup>—even though such prohibitions clearly implicate bodily integrity: they regulate what people may put in their bodies. Nonetheless, the mandate/prohibition distinction is crucial here. A law that *required* the ingestion of broccoli would infringe the substantive due process right to bodily integrity. The right to bodily integrity is chiefly a right to keep the government from forcing us to use our bodies in ways that we do not want to use them, rather than a right to do particular things with our bodies. Accordingly, a successful substantive due process challenge could very likely be mounted against a law compelling the consumption of broccoli.

The hypothetical broccoli mandate was nonetheless inapt, however, because the ACA did not in fact infringe bodily integrity. A mandate to consume broccoli is analogous to a mandate to accept medical treatment: both infringe bodily integrity. But the ACA contains no mandate to submit to medical treatment. It only mandates the payment of money for (insurance to cover) medical treatment, which persons subject to the mandate remain free to refuse. Thus, as others have pointed out,<sup>83</sup> a tighter analogy would have been a mandate to purchase broccoli. However, the ACA's opponents likely wanted to avoid that analogy because it pushes strongly in favor of

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82. See *State v. Murphy*, 570 P.2d 1070, 1074 (Ariz. 1977) (in banc) (“[T]here is a substantial body of expert and sincere opinion on both sides of the question. That being the case, we cannot say that the legislature had no rational or reasonable basis for proscribing the use of marijuana.”); *Ill. NORML, Inc. v. Scott*, 383 N.E.2d 1330, 1335 (Ill. App. Ct. 1978) (applying rational basis scrutiny and upholding law prohibiting private possession and use of marijuana); John C. Williams, Annotation, *Constitutionality of State Legislation Imposing Criminal Penalties for Personal Possession or Use of Marijuana*, 96 A.L.R.3d 225, § 5(a) (1979) (surveying cases where state laws prohibiting possession or use were challenged).

83. See, e.g., Einer Elhauge, Op-Ed., *The Broccoli Test*, N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/opinion/health-insurance-and-the-broccoli-test.html>; Daniel Shaviro, *The Supreme Court's Healthcare Decision*, WESTVIEW NEWS (Aug. 2012), <http://westviewnews.org/2012/08/the-supreme-courts-healthcare-decision/>.

upholding the ACA, at least under the taxing power. After all, government routinely uses its taxing power to take money from citizens to fund purchases of food and other items that many of those citizens will never use.<sup>84</sup>

### CONCLUSION

Apt or not, the broccoli analogy had emotional resonance with the Court's conservatives in the ACA case because it called to mind a real constitutional concern—the worry that mandates could violate the substantive due process right to bodily integrity. That is more than a little bit ironic, given that the Court's two staunchest conservatives—Justices Scalia and Thomas—have expressed doubt about the legitimacy of all substantive due process rights.<sup>85</sup>

The irony goes deeper still, for in construing the enumerated powers to protect bodily integrity, the Court's conservative wing relied on a right that finds very strong expression in the abortion jurisprudence<sup>86</sup> that Justices Scalia and Thomas hold in special

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84. Agricultural subsidies are a leading example. Each year, the federal government uses taxpayer money to deliver \$3.6 billion in subsidies that contribute to the production of grains fed to farmed animals. R. DENNIS OLSON, INST. FOR AGRIC. & TRADE POLICY, *BELOW-COST FEED CROPS: AN INDIRECT SUBSIDY FOR INDUSTRIAL ANIMAL FACTORIES I* (2006), available at [http://www.nffc.net/Learn/Reports/BelowCost6\\_06.pdf](http://www.nffc.net/Learn/Reports/BelowCost6_06.pdf). As a vegan, I will eat none of the resulting products, but that fact does not entitle me to complain about the use of my pro rata share of the tax money for their purchase.

85. See *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (“If I thought that ‘substantive due process’ were a constitutional right rather than an oxymoron, I would think it [was] violated by bait-and-switch taxation.”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, Lecture at Princeton University (Mar. 8 & 9, 1995), in *THE TANNER LECTURES ON HUMAN VALUES* (1994–1995), available at <http://tannerlectures.utah.edu/lectures/documents/scalia97.pdf>. For Justice Thomas's view, see *McDonald v. City of Chicago*, Illinois, 130 S. Ct. 3020, 3058–59 (2010) (Thomas, J., concurring) (“I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment ‘fully applicable to the States.’ . . . But I cannot agree that it is enforceable against the States through a clause that speaks only to ‘process.’ Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”).

86. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (“*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.”).

disregard.<sup>87</sup> Indeed, one can understand the objection to abortion prohibitions as fundamentally an objection to mandated activity. Abortion prohibitions formally forbid an act—abortion. But in substance they mandate an act—the use of a woman’s body to gestate a human life. If it is an intolerable infringement on liberty for the government to require anyone to ingest a single piece of broccoli, surely it is no *less* an infringement for the government to mandate that a woman give over her uterus to another being for nine months.<sup>88</sup> Thus, following the libertarian logic of the broccoli example to its natural conclusion, it is not surprising that the lawyers who advanced it in the hope of swaying five conservative Justices were content to disguise their liberty claim as a federalism claim.

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87. See *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., joined by Scalia, J., concurring) (“I write separately to reiterate my view that the Court’s abortion jurisprudence . . . has no basis in the Constitution.”); *Casey*, 505 U.S. at 980 (Scalia, J., joined by, *inter alios*, Thomas, J., concurring in the judgment in part and dissenting in part) (“That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a ‘liberty’ in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not.”).

88. In saying that forced pregnancy is at least as burdensome on liberty as forced broccoli consumption, I mean to be making an utterly uncontroversial claim. One could grant the point but still think that abortion restrictions are justified in light of the government’s interest in fetal life.

