I never really considered whether the government has the power to require citizens to eat broccoli, but that question seems very much at the center of the legal jousting concerning the implementation of the Patient Protection and Affordable Care Act (ACA).

This type of inquiry, while no doubt odd, is not without recent precedent, recalling Oklahoma Sen. Tom Coburn's question to now-Justice Elena Kagan, about the legality of a hypothetical government directive to consume fruits and vegetables. Of course, maybe that's what we all need in 2011, more broccoli (assuming it's not laced with pesticides) to get us out of this health-care mess.

The immediate legal and political crunch over broccoli can be attributed to the question asked by Judge Roger Vinson in a hearing conducted in the Northern District of Florida in a 20-state challenge concerning the constitutionality of ACA.

The federal litigation in Florida is one of a dozen or so similar suits progressing around the country. Although two other federal courts have rejected constitutional challenges leveled against health reform, Judge Henry Hudson of the Eastern District of Virginia ruled that the Congress in enacting ACA exceeded its commerce clause power in requiring individuals to purchase health insurance.

The Hudson ruling centered on ACA's minimal essential coverage provision, holding that the requirement compels an individual to involuntarily engage in a commercial transaction, beyond the scope of the commerce clause or the associated necessary and proper clause.

The defendant secretary of Health and Human Services argues that the individual mandate is an essential form of economic regulation that builds on 35 years of interstate health insurance reform. While the Virginia district court struck down the minimal essential coverage provision, it neither enjoined the enforcement of ACA as a whole nor ruled on the severability of the legislative scheme.

The constitutionality of ACA under the commerce clause will eventually be decided by the U.S. Supreme Court. The related jurisprudence of Article 1, Section 8 is cloaked in the ongoing and complex saga of how the court characterizes federal power, and is now being jogged by a rather novel consideration of the legality of regulating inactivity, namely the choice not to purchase health insurance.

While it may disturb some, the court decisions rendered, to date, appear to reflect the liberal and conservative ideologies of the deciding judges, beyond a neutral reading of commerce clause jurisprudence.

The legal issues surrounding the ACA commerce clause challenge may actually be more discernable than other variables wearing at the fabric of this legislation. The political maneuverings around health reform beyond the overt Democrat versus Republican sparring are murky. The soon-to-be-empowered Republican 112th Congress has ACA repeal as a top priority, but has yet to articulate a clear plan about the future direction of health care.
Public polls concerning general support for ACA remain split, and individual elements in the bill, such as the ban on pre-existing conditions or the expansion of employer health benefits to dependents up to age 26, are very popular. Many red states have accepted ACA funding and are moving ahead with health insurance exchange implementation.

Democrats do need to take the constitutional challenges to ACA seriously, and may want to make changes to the legislation before the matter winds its way to the Supreme Court. The president in his exchange with South Carolina Gov.-elect Nikki Haley outlined three nonnegotiable parts of the health reform: the ban on preexisting conditions, pooling for individuals and small businesses and the creation of health exchanges.

While extrapolation from the president's remarks may be conjecture, it does seem reasonable to speculate that the administration may be willing to compromise on aspects of health reform if necessary and agree to a "fix" that could possibly resurrect the discarded public option.

No doubt the biggest concern surrounding ACA implementation and its broad impacts on the health system are matters of cost. The Congressional Budget Office (CBO) projections of March 2010 that estimate health reform reducing the deficit by $143 billion over 10 years may prove to be correct, but the immediate fiscal challenges of dealing with health reform in a recession economy are considerable. Of particular concern is Medicaid, as state governments, like Illinois, on the brink of default, will be hard-pressed to meet the ACA expansion requirements by 2014, even with increased federal assistance and programmatic reforms.

In the meantime, the regulatory machine at the Centers for Medicare and Medicaid, set in motion by ACA, is moving forward on a very aggressive implementation timetable, with 20 new measures kicking in as of 2011 and many more to come through 2014.

As we begin 2011, uncertainties over the legal, political and economic fate of ACA are confounding and unpredictable, no doubt a metaphor for the rest of life in the second decade of the century. So perhaps for the present, the best course of action is to put the holiday diets behind us, mandatory or not, and just have an extra helping of broccoli that should make us all healthier, hopefully.

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