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March 30, 2012: A Fundamental Rights Case Masquerading as a Commerce Clause Case

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3/30/2012—The late Chief Justice Rehnquist explained the limits of the Commerce Clause on the power of Congress to regulate. When the matter is genuinely economic, the presumption should be that Congress can regulate. When Congress is doing something else, close connections to commerce in a traditional sense are more necessary. Under this approach, Obamacare is obviously constitutional.The concerns apparently animating Justice Kennedy about changing the relationship of citizen and government demonstrate that the issue is not the Commerce Clause or even federal power. For wouldn't the same issue be present if Massachusetts required each person to buy healthcare insurance? And wouldn't the same conservative, pro-market arguments be made? But of course, Massachusetts does require such a purchase now.As a fundamental right, this interference by government is justified by a simple reality. We all have health insurance already. Even the uninsured know that if they are in a traffic accident, the ambulance will come out and they will get emergency room treatment. They will not be left to bleed to death. That is what health insurance is, at least in great part. And it is why health insurance is not being forced to buy broccoli. The prospect of the Court striking down Obamacare depresses me. It means the Supreme Court will now be the reason Americans don't have universal healthcare, rather alone in the world. That is not the Court's job. It is not the Court's job to decide the fundamental social/economic system of the country. This decision will be made on the basis of an economic philosophy much of the country disagrees with—as Justice Holmes said once before in criticizing conservative justices. What is the point of teaching constitutional decisions as if they were law? I always said it was just politics and now it obviously is.