DORF ON LAW

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My Debate with Cato's Ilya Shapiro on the Affordable Care Act--and My New Limiting Principle

By Mike Dorf

Last week I debated the Cato Institute's Ilya Shapiro on a range of issues arising out of the Supreme Court's ruling on the Affordable Care Act. If you want to waste an hour of your life, you can watch it below. (For email readers, here's a link. Please note that in both the embedded version and the version at the link, the questions during the Q&A are inaudible, but the answers are audible and should provide enough context so that you can figure out what the questions were about.)

As you will see, the debate was quite wide-ranging. Here I want to take the opportunity to expand on one point I raised in my initial remarks. The relevant discussion begins at the 15:50 point of the video. I said in the debate that the challenge for the government in the ACA case was to give an example of a mandate the government could not impose under an appropriate limiting principle that would nonetheless sustain the minimum coverage provision. I then referred to a paper I am writing. What follows is an excerpt of the current draft of that paper (minus footnotes) that should help to clarify the limiting principle I have in mind. I will present the fuller version of the paper as the Henry J. Miller Lecture at Georgia State University College of Law in the spring. The Lecture is tentatively titled "Commerce, Death Panels and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity."

The dissent's 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. But this claim is false, in light of the Court's own relatively recent precedents. Had the ACA been upheld under the Commerce Clause, Congress still 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*) or to provide a civil remedy in federal court for gender-motivated violence (per *United States v. Morrison*). Why? Because, in the Court's argot, firearms possession and gender-motivated violence are not "economic activities."

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 laid down, but not its application, by the Chief Justice and the four dissenters 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 that a law doing so would violate the equal protection component of the Fifth Amendment's Due Process Clause.

That may be a fair objection with respect to the *Morrison*-based example but the *Lopez*-based 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. Given the strength of the gun-rights lobby, 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. Professor Joseph Blocher has argued that the Second Amendment right to keep and bear arms as construed in *District of Columbia v. Heller* and *City of Chicago v. McDonald* 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. 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"? 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." 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.

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*, the Court invoked a dictionary to define "economic" activity as "the production, distribution, and consumption of commodities," but this definition appears to be under-inclusive because it omits services. Presumably that oversight simply reflects the fact that *Raich* involved goods—marijuana—rather than services. 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. 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 link the case closely to *Filburn*, where the law aimed to limit the consumption of home-grown wheat by people like Filburn. 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 a recognition by Congress 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.

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 they 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.

http://www.youtube.com/watch?feature=player_embedded&v=v_I_5-mqX5s