Forbes

11/18/2011

Obamacare Judges Must Answer The "Broccoli Question"

By: Daniel Fisher

Whether you're for Obamacare or against it, you must have pondered the broccoli question. Namely: If Congress can order you to buy health insurance, why can't it order you to buy (and eat!) broccoli?

The answer isn't as simple as it seems. If the Supreme Court finds the insurance mandate in the healthcare reform act is constitutional, it is endorsing a very expansive view of Congress' power to regulate interstate commerce under Article I of the Constitution. The Obama administration argues Congress is well within its rights to regulate an interstate industry that delivers a product virtually every American will use at some point in his or her life. To go without health insurance, the administration says, is to impose costs on other Americans. Millions of uninsured impose billions of dollars in costs on Americans nationwide.

But that same argument works for broccoli, the eating of which is believed to protect against colon cancer. Reducing the rate of colon cancer would reduce healthcare costs and thus have a direct economic impact on the interstate healthcare market.

Healthcare-law proponents have "had trouble articulating anything that makes the health-insurance market special," said David Kopel, a conservative constitutional law expert with the Cato Institute. "You can think of lots of products everybody consumes. Clothing. Food."

In fact, health insurance is one of the few products that by law can't be purchased on an interstate basis (the states zealously protect their power to regulate the insurance industry). So on that basis, Kopel said, healthcare might be one of the *least* interstate markets Congress can regulate, Kopel said.

So how can the government's lawyers argue for the insurance mandate without including the broccoli mandate? Michael Dorf of Cornell University Law School offers a few tips.

The key cases are *U.S. vs. Lopez* and *U.S. vs. Morrison*, two modern decisions that set limits on Congress's Commerce Clause powers. In *Lopez*, the court struck down a law prohibiting guns near schools as being too disconnected from any reasonable concept of interstate commerce. And in *Morrison*, the court did the same. Congress tried to tie both laws to the aggregate effects of criminal acts on the economy, but in Morrison the majority held that was constitutional overreach.

> Petitioners' reasoning …will not limit Congress to regulating violence but may …be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.

In *Morrison*, Justice Steven Breyer penned a dissent making the very point Obamacare critics make. It's impossible to formulate a rule, he wrote, that allows Congress to, say, outlaw growing marijuana for your own consumption but not violence against women. "Virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State," Breyer wrote. Instead of being a defect, the idea of almost unlimited Commerce Clause powers is a fact of the modern world.

> Since judges cannot change the world, the "defect" means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance.

But Breyer lost that fight. The majority "wanted a limiting principle" on Congress, Dorf said, and came up with one by deciding that federal laws can regulate a lot of seemingly uneconomic activity but must have a firm economic basis at their core. Even the Civil Rights Act of 1964 was passed under Commerce Clause powers because it targeted employers, schools and businesses, all arguably economic actors. In a practical sense, Dorf says, the law must be directed at the person engaging in economic behavior — the motel owner preventing black travelers from checking in, or the commercial farmer growing wheat to feed his animals in violation of federal crop price-support regulations.

Some people have a hard time seeing the difference between preventing innkeepers from discriminating and locking up people for carrying guns near schools, Dorf said, but it exists.

"The difference is there are more analytical steps to get to economic activity in the gun-free schools act than in the 1964 Civil Rights Act," he said. "In the 1964 act Congress directly regulated businesses."

So the justices could rule that requiring people to buy insurance fulfills an interstate regulatory scheme, while forcing them to eat broccoli is too distant from any rational economic goal, he said.That helps get around the uncomfortable precedent of *Wickard v. Filburn*, where Congress ordered the farmer to stop growing wheat for his own consumption. That law, too, targeted a commercial farmer engaged in business.

What about forcing people who earn more than $200,000 a year to buy Cadillacs to help reinvigorate the national economy? That one's easy, Dorf said. Congress could do that under its taxing powers. Simply enact a surtax equivalent to the cost of a Cadillac and then issue vouchers to everyone who paid it, good for one Cadillac. Might be ridiculous, might lead to a rout in the next election, but legal under the Constitution.

"That's part of the oddity of this litigation — lurking in background is the question of whether the mandate is valid as a tax," he said. "Nobody doubts if Congress had been cleverer they could have made it clearly valid by calling it a tax."

The intensity of the argument and the fact the government hasn't come up with a clear limiting principle still bothers critics like Kopel and Ilya Somin, a Libertarian-leaning professor at George Mason University School of Law and frequent contributor to the Volokh Conspiracy.

"The federal government and their lawyers have been trying to solve this problem for many months now and they haven't come up with a good answer," he said. "That suggests there isn't a good answer."