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Abstract

This is an edited transcript of a debate sponsored by the Commonwealth Club of California and the Institute of Governmental Studies, University of California, Berkeley. The speakers were Laurence H. Tribe, the Carl M. Loeb Professor and Professor of Constitutional Law at Harvard Law School, and Roger Pilon, Vice President for Legal Affairs and Director of the Center of Constitutional Studies at the Cato Institute. The debate was moderated by Jesse Choper, Earl Warren Professor of Law at the University of California, Berkeley Law School.

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Is the Patient Protection and Affordable Care Act Constitutional?

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JESSE CHOPER: Good evening, and welcome to tonight's special meeting of the Commonwealth Club of California and the Institute of Governmental Studies at the University of California at Berkeley. I am Jesse Choper. I'm a professor at the University of California at Berkeley Law School and the moderator this evening.

Tonight we will have a discussion about the constitutionality of the Obama Administration's healthcare reforms, also known as the Patient Protection and Affordable Care Act, hereinafter referred to as the Act. It's a federal statute that was passed by Congress and signed into law by President Obama on March 23 of last year. The law, along with a companion Healthcare and Education Reconciliation Act of 2010, is the principal healthcare reform legislative action of the 111th Congress.

The Act reforms certain aspects of private health insurance and public health insurance programs, including increasing insurance coverage of preexisting conditions and expanding access to insurance for over 30 million Americans. Under the law, national healthcare expenditures are projected to rise from 17.6% of GDP last year, that's 2010, to 19.8% in 2020. A lawsuit brought by 26 states, as well as the National Federation of Independent Business and several individuals, urges that the law's requirement to buy insurance, the so-called individual mandate, is unconstitutional.

This past August, the United States Court of Appeals for the 11th Circuit agreed with those behind the suit and found the statute unconstitutional, and now the Justice Department has urged the Supreme Court to rule on the case, and the Court is expected to do so by the end of June next year. Tonight, two highly respected legal scholars will debate the constitutionality of these healthcare reforms and give you a view of the important arguments being weighed by the Supreme Court.

Arguing in favor of the constitutionality of these healthcare reforms is Laurence H. Tribe, the Carl M. Loeb Professor and Professor of Constitutional Law at Harvard Law School. Professor Tribe has taught at Harvard since 1968. He holds the title University Professor, which he has held since 2004. It's Harvard highest academic honor, awarded to fewer than 70 professors in all of the university's his-

tory. Professor Tribe entered Harvard at 16. He graduated *summa cum laude* in mathematics and *magna cum laude* in law. He then clerked for justices at both the California and the United States Supreme Court, received tenure at the age of 30, and has helped write the constitutions of South Africa, the Czech Republic, and the Marshall Islands. As a much sought after appellate advocate, he has prevailed in three-fifths of the many appellate cases he has argued, including 35 in the Supreme Court. Tribe was appointed in 2010 by President Obama and Attorney General Holder to serve as the first Senior Counselor for Access to Justice, and currently serves as a member of the President's Commission on White House Fellowships.

Arguing against the constitutionality of the Act is Dr. Roger Pilon, Vice President for Legal Affairs and Director of the Center of Constitutional Studies at the Cato Institute. The Cato Institute is a public policy research organization dedicated to the principles of limited government, individual liberty, and free markets. Its Center for Constitutional Studies has become an important force in the national debate over constitutional interpretation and judicial philosophy. Pilon is the publisher of the *Cato Supreme Court Review* and an adjunct professor of government at Georgetown University through the Fund for American Studies. Prior to joining Cato, Pilon held five senior posts in the Reagan Administration, including at the state and justice departments, and was a national fellow at Stanford's Hoover Institution. In 1989, the Bicentennial Commission presented him with its Benjamin Franklin Award for Excellence in Writing on the U.S. Constitution, and in 2001 Columbia University School of General Studies awarded him its Alumni Medal of Distinction. Pilon lectures and debates at universities and law schools across the country and testifies often before the Congress. He holds a Ph.D. from the University of Chicago and a J.D. from George Washington University Law School.

We will begin with each of our speakers making a brief presentation outlining their arguments and then take questions from the audience.

We begin with Professor Laurence Tribe.

LAURENCE TRIBE: Good evening. The market for healthcare is a \$2.5 trillion interstate industry that consumes 17% of America's GDP and covers an array of providers, consumers, supply chains, and financing schemes, operating freely across state borders. Any state that tries on its own to cope with the problems of the uninsured, whether by providing more generous medical benefits than others, or by imposing tighter restrictions on health insurance practices than its neighbors, would turn itself into a magnet for the needy and dependent and prompt insurers to move to other states.

That race to the bottom is the main reason that action at the national level was thought to be required. And the national costs imposed by the uninsured are enormous. In 2008, they consumed \$116 billion in healthcare, leaving third parties,

including taxpayers, to pay \$30 billion on their behalf and leaving providers in the lurch for \$43 billion in medical expenses that were ultimately passed on to the rest of us, raising the average family's insurance premium by \$1,000, making health insurance unaffordable for many more families. So people who choose to gamble, often incorrectly, that they will not need healthcare beyond what they can pay for when they get that care are making financial decisions—quintessentially economic decisions directly involving commerce—that end up costing the entire nation tens of billions of dollars and endangering the viability of the nation's healthcare system.

Congress has the power, enumerated in Article I, to regulate interstate commerce and to impose taxes for the general welfare. It's been settled for nearly 75 years that this includes the power to mandate that all income earners pay taxes toward Social Security and Medicare, whether they want to make such payments or not, even if they firmly believe they'll never need or want to use the benefits. The primary issue raised by the Affordable Care Act is whether Congress's powers, for some reason, stop short of increasing the income tax liability of those who refuse to purchase health insurance to cover the years before age 65 and thereby end up raising everybody else's premiums, making healthcare less accessible to many and imposing a significant tax burden on the rest of us.

That's exactly how the individual mandate works. It tells people who can afford to buy health insurance and are not otherwise covered that they must either buy it or pay a tax penalty that will help offset the added costs that such people's economic choices impose upon others. Yale's Professor Akhil Amar asked a simple question, to which I'd be curious to know Dr. Pilon's answer: "If Congress may tax me, and surely it can, and if Congress can then use the tax money to buy health insurance for me, and, again, it can surely do so, then why can it not do both at once by mandating that I buy my own health insurance policy? That gives me more choice, not less."

Now the one Circuit Court that struck down that mandate, the 11th Circuit, conceded, as it had to concede, that when the uninsured consume healthcare, Congress may regulate their activity at the point of consumption. But it drew the line there and said that, under the Commerce Clause, a requirement to obtain insurance could not be imposed any earlier. But as many experts have said, and as common sense dictates, no health insurance market could possibly survive if people could buy their insurance on the way to the emergency room, something that they could do without any penalty under a system that, like the Affordable Care Act, deliberately prevents insurers from discriminating against patients on the basis of their preexisting conditions.

Insurance, of course, works by spreading costs in advance of the event, when we cannot know who will need to take advantage of it. Besides, as even the highly conservative Judge Jeffrey Sutton, appointed to the Sixth Circuit by President George W. Bush, had to acknowledge, "[r]equiring insurance today and requiring it

at a future point of sale amount to policy differences in degree, not kind, not the sort of . . . differences that are removed from the political branches by” the Constitution.

Quite simply, then, the individual mandate is an entirely constitutional exercise of Congress’s Commerce Power to encourage as many people as possible to get coverage in advance, and of Congress’s further power under the Necessary and Proper Clause to take all steps “necessary and proper” to carry out its enumerated power to regulate interstate commerce.

The CBO estimates that, without the mandate, an extra 18 million uninsured people would shift an added \$27.7 billion in uncompensated care costs to the rest of society. Given that brute reality, opponents of the mandate have trouble denying that it is “necessary,” but they claim it is not “proper” because it exercises a kind of federal “police power” by conscripting people into the stream of commerce when they are simply “inactive” and have chosen to remain “strangers” to that stream.

That, I must say, is an optical illusion caused by focusing too narrowly on the moments at which healthy individuals don’t happen to be consuming healthcare services. “That freeze frame still, captured like a photograph in a single moment in time,” to quote Judge Marcus of the 11th Circuit, overlooks the basic fact that virtually all of us swim in that stream at some point or other, most of us quite often, and that none of us can arrange *never* to have to swim in it, except perhaps those with religious objections to all medical care, and the Act grants them an exemption.

As for the rest of us, we can decide never to participate in the stream of commerce for annual checkups, or for gym memberships, or for particularly healthy foods, and the Affordable Care Act leaves all of us alone as we make those individual decisions. In fact, the Act does not intrude on anyone’s bodily integrity, nor does it compel anyone to accept unwanted treatment—something that long-settled substantive due process principles protecting personal liberty rightly refuse to permit either Congress or the states to do.

But virtually none of us can decide to remain permanently outside the broad stream of commerce for healthcare, and all the Affordable Care Act does is regularize the economic arrangements by which our inevitable participation in that stream is to be funded, using the Internal Revenue Code to collect an income tax surcharge if we insist on making economic choices that burden our families and others, driving up taxes and insurance premiums, as though we were islands unto ourselves. Well, we’re not, and the Constitution does not require Congress to pretend that we are.

It’s worth noting that the Act uses purely civil, not criminal, enforcement devices to collect the tax surcharge or penalty that it imposes on people who do not purchase the required insurance. The surcharge is calculated as a percentage of household income. It’s subject to a floor and to a cap. It isn’t imposed on anyone who isn’t required to file an income tax return for a given year. And it isn’t nearly

steep enough to be punitive. In fact, it was deliberately set low enough so that quite a few people would end up choosing to pay the tax, rather than to purchase the insurance.

One result is that the mandate is projected by the CBO to generate at least \$4 billion per year in tax revenues for the General Treasury by 2019. That's revenue that, in turn, can help cover some of the budget burdens attributable to the uninsured.

Another result is that the Taxing Power provides an additional and independent pillar to support the mandate as a device to simultaneously raise revenue for the general welfare and encourage conduct that Congress has ample power to encourage. Those who deny that Congress can invoke the Taxing Power along with the Commerce Power here have quite a burden to meet, given that the term "tax" appears some 40 times in the minimum coverage provision, so that those who say that nobody called it a tax just haven't read the legislative history—or the legislation itself. Core parts of the minimum coverage provision were placed in the Internal Revenue Code. The only enforcement mechanisms for the mandate involve the civil collection procedures of the Tax Code. Numerous congressional leaders, including Representatives Miller, Slaughter, and Waxman, and Senators Leahy, Baucus, and Hatch, specifically described the mandate as a "tax," even if there were a constitutional requirement that we use the magic "T" word, which of course there isn't.

The Supreme Court, in the great 1819 case of *McCullough v. Maryland*, upheld federal power to create a national bank by referencing Congress's combined powers to regulate commerce, lay and collect taxes, borrow money, and raise armies and navies. There's no "one clause per law" requirement in the Constitution, and this mandate rests securely on three clauses or pillars, the Commerce Clause, the Taxing Clause, and the Necessary and Proper Clause.

Finally, some states claim that the Act invades their sovereignty by forcing them to broaden their federally funded Medicaid programs to cover more poor people, with the federal government covering only 90% of the resulting addition in expense. But if those states don't want to cover those poor people, no one is compelling them to accept federal funds under Medicaid, which Congress expressly reserved the right to modify in the program's organic statute. This is not a case of using federal funds to pressure states into taking unrelated actions, like establishing new food or housing programs to help their poor.

In the famous case of *South Dakota v. Dole*, the Supreme Court held that Congress may properly threaten to take 5% of federal highway funds away from states that fail to raise the drinking age to 21, but it suggested in dictum that threatening to take 100% of such funds from states unwilling to raise the drinking age might have been impermissibly coercive. And so some argue threatening to take away Medicaid is impermissibly coercive, but it certainly would have been acceptable

for Congress to condition 100% of highway funds on states using the funds to build free public highways, even if they had to spend some of their own money on that effort, rather than, say, building private toll roads limited to the rich.

States have absolutely no sovereign right to redesign federal programs to their own liking. So neither the individual health insurance purchase mandate nor the state Medicaid mandate exceeds Congress's constitutional authority. If the question were a close one, and I honestly do not believe it's close, the Supreme Court's clear duty in a representative democracy would be to defer to the hard won results of four decades of effort in the democratic process rather than to substitute its policy judgment for that of the people's elected representatives in the two political branches.

And let me emphasize that fundamental point. To be sure, when a law invades personal liberty, as it would if people were forced to accept medical care that they don't want, or when a law commands the states to take action making them virtual departments of the federal government, the boundaries of limited government will have been breached. But when a law grapples with a profound national problem that is beyond the capacity of any individual state to solve because of the race to the bottom, and when it does so in an entirely rational way on the basis of elaborate congressional findings of the tens of billions of dollars of harm that are done when people choose to gamble and do not insure, then it seems to me the burden is overwhelming on someone who would argue that the Supreme Court of the United States should invalidate that law. I do not believe that that burden can be met here. Thank you.

CHOPER: And now, Dr. Pilon.

ROGER PILON: Well, it's a great pleasure for me to be here at the Commonwealth Club, about which I've heard so much over the years. And it's especially fitting, I think, that we should be holding this debate about the constitutionality of what I shall call ObamaCare in the city of San Francisco. After all, it was the lady who represents this city in Congress who responded famously to the question, "Is ObamaCare constitutional?" by asking, "Are you serious?" And she repeated it for emphasis. Like so many Americans, especially those on the Left, she was simply incredulous that anybody could question that Congress lacked the authority to pass a bill that she thought was as worthy as this one—in other words, that there might be limits on what Congress could do.

Now as you see, I've already put this question in a political context, because at bottom it's a question about the very meaning of our political Constitution. And it *is* a serious question, Madame Speaker. When 28 states, to date, bring suit to overturn a law, which most did immediately after its passage; when the National Federation of Independent Business and individuals join that suit; when there are some 30

other suits now in play against this bill; when half of the 12 federal judges who've thus far ruled on the merits have found the individual mandate, the law's Achilles' Heel, to be unconstitutional, that's serious. Think about it. When was the last time 28 states brought suit to overturn a statute coming from Congress? I can think of nothing like this in the past.

Clearly, though, ObamaCare isn't just any statute. It essentially federalizes one-sixth of the national economy, touching the most intimate aspects of life, from cradle to grave. It was a massive 2,700-page bill cobbled together by Democratic staffers and special interests that no member in Congress read before voting on it. The history of the cobbling was itself quite a spectacle. You'll remember the "Cornhusker Kickback," the "Louisiana Purchase," the "Florida Flim-Flam." You'll remember too the stormy town hall meetings in the summer of 2009, which led to the massive increase in the membership of the Tea Party; the off-year elections in 2009, and the election of Scott Brown to the seat of the sainted Senator Ted Kennedy in Massachusetts; and, finally, the huge swing in the 2010 elections, federal, state, and local. Now I realize you didn't get the memo out here in California, but back there in fly-over country they did get it, and there were massive changes in legislatures all across this country, with ObamaCare as one of the main issues behind that shift.

No one, of course, knows everything that's in this statute. It's constantly evolving, as we saw from the recent demise of the "Class Act." The Congressional Research Service tells us the number of entities ObamaCare will create is "unknowable." The Pacific Research Institute right here in San Francisco estimates that it will create 159 new boards and commissions. It contains 21 new or higher taxes. But of course the biggest question at the moment—the focus of the suits by the 28 states—is whether Congress can compel an individual, on pain of paying a penalty, to buy a government-approved health insurance policy from a private insurance company, the individual mandate. That's what's generated most of the popular opposition. In fact, an August AP–National Constitution Center poll showed that an astounding 82% of respondents opposed the mandate: 82%!

But our question today is not whether the mandate is popular or unpopular, but rather whether it's constitutional. And I'm here to argue that it is not—and further, that it's unconstitutional *even under something called modern constitutional law*, not to be confused with the Constitution. And right there, to frame the issue, is where I want to begin, with that distinction between the Constitution and modern constitutional law. They're not the same.

In fact, in his *New York Times* piece a few months back, Larry alluded to that distinction when he wrote: "*Since the New Deal*, the court has consistently held that Congress has broad constitutional power to regulate interstate commerce." "*Since the New Deal*." The implication of Larry's statement, of course, is that *before* the New Deal, Congress had no such power.

So what happened during the New Deal? Did we amend the Constitution, like we did after the Civil War when we made fundamental changes in federalism? Of course not. The New Deal's "constitutional revolution" changed not one word in the document. What we had, rather, was what Yale's Bruce Ackerman has famously called a "constitutional moment." Because the so-called Old Court had found several of Franklin Roosevelt's schemes to be unconstitutional, Roosevelt threatened, after the landslide election of 1936, to pack the Court with six new members. The plan failed politically, but the Court got the message. With the famous "switch in time that saved nine" it began rewriting the Constitution without benefit of a constitutional amendment.

I'll show how it did that in just a moment, but first I want to sharpen this distinction between modern constitutional law and the Constitution. To do that you have to go back to the beginning, as the courts that have decided this case against the government have done. And I'll start not with the Constitution but with the Declaration, which makes it clear that the philosophy of the founding generation was one of individual liberty secured by limited constitutional government. You see that in the Constitution itself, starting right from the Preamble, which shows that *we* created the government and *we* empowered it; the government didn't give us our rights, we already had those rights. Then you look at the document itself and you see how it was that Madison went about limiting the government's power, first by dividing power between the federal and state governments, leaving most power with the states, then by separating power between the three branches, each defined functionally, then by providing for a bicameral legislature, a unitary executive, an independent judiciary, periodic elections to fill the offices, and, most important of all, through *the doctrine of enumerated powers*—the idea that Congress has only those powers that we've given it.

I can state that doctrine no more simply than this: if you want to limit power, don't give it in the first place. You see the doctrine in the very first sentence of the Constitution: "All legislative Powers *herein granted* shall be vested in a Congress." By implication, not all powers were "herein granted." Look at Article 1, Section 8, and you'll see the main powers that were given to Congress. There are only 18 such powers. And then the Tenth Amendment, the last documentary evidence from the founding period, makes it clear, once again, that Congress has only those powers that were given to it, the balance remaining with the states or the people, while the Ninth Amendment says that we have rights both enumerated and unenumerated.

All of this is spelled out in great detail in the *Federalist Papers*. Indeed, in *Federalist 45*, which the courts have quoted repeatedly in this case, Madison stated plainly that the powers of the new federal government would be "few and defined." I dare say that the powers that Larry was talking about are anything but "few and defined." And we lived under that limited government, more or less, for 150 years.

It wasn't perfect, to be sure; most important, the Civil War amendments were necessary to correct the cardinal sin of slavery. But by and large it was a limited federal government.

The great watershed came during the Progressive Era, of course, with the Progressives, the social engineers, the elites coming from the schools of the Northeast—Harvard, Yale, Columbia, Princeton—who thought they knew how to run our lives better than we did. To paraphrase the Dupont ad from several years ago, it was to be “better living through bigger government.”

The Progressives succeeded to some extent at the state level during the early decades of the 20th century, but things came to a head during the New Deal, culminating in Roosevelt's infamous Court-packing scheme. After that, the Court decided several cases that essentially turned the Constitution on its head. Regarding the Commerce Clause, our principal concern here, it was written mainly to check states from interfering in a free national market, as they'd been doing under the Articles of Confederation.

In fact, in the first great Commerce Clause case, *Gibbons v. Ogden* in 1824, Chief Justice Marshall defined the power as limited to regulating interstate “commerce”—not manufacturing, not agriculture, and not commerce *within* states. That view held right up through the *E. C. Knight* decision in 1895. But after the Court's decisions in *Jones & Laughlin* in 1937, *Darby* in 1941, and *Wickard* in 1942, Congress emerged with a power to regulate anything that “affected” interstate commerce, which of course is virtually everything. The Framers would be turning in their graves if they knew that.

And so what we've had since then is this essentially unlimited government under the Commerce Clause—at least until 1995, when the Court, in the *Lopez* decision, said enough is enough. Chief Justice Rehnquist began his opinion there with these now-famous words: “We start with first principles. The Constitution creates a Federal Government of enumerated powers”—and the commerce power, he ruled, does not extend to noneconomic events.

And that's just the issue here. Far beyond dictating how a product may be produced, distributed, exchanged, or consumed—the expansive modern view of the commerce power—the ObamaCare mandate actually *compels* that a transaction occur, the purchase of health insurance. Essentially, the mandate is regulatory bootstrapping: Congress can force someone to engage in commerce so it can then regulate the activity under its commerce power.

Indeed, this claim is so unique that Congress's own lawyers at the Congressional Research Service and the Congressional Budget Office called it “novel” and “unprecedented.” Judge Roger Vincent, who ruled against the government in the case brought by 26 of the 28 contesting states, said that the litmus test is economic *activity*. A mental decision not to buy insurance is not an economic act. As Judge

Henry Hudson put it in the case brought separately by Virginia, “the subject matter must be economic in nature and affect interstate commerce, and . . . *must involve activity.*” Thought processes are not subject to regulation.

The 11th Circuit, for its part, looked beyond the activity/nonactivity distinction, focusing more on the broader principles. It took the basic question before it to be whether Congress, under the power to regulate interstate commerce, can mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they’re born until the time they die. And the court answered no *because there was no limiting principle*. Not only had the government been unable in its oral arguments to articulate one, but the lack of any such limiting principle would (a) upset the federal/state balances that the Constitution establishes, and (b) amount to saying that Congress had a general police power when courts from the beginning of the nation to today have repeatedly said that there is no such power.

Let me conclude with this, however. We heard about cost shifting as the great problem that Congress is addressing in this statute. In 2008, the uninsured paid on average 46% of their healthcare costs. Third parties paid another 26% of those costs. That’s 72%. What portion of our total healthcare expenditures do you think we’re talking about when we talk about cost shifting? I’ll give you the figure—1.7%. *For 1.7% of our health care expenditures we are federalizing the entire healthcare system.* That’s the typical approach of folks afflicted with the post-New Deal way of thinking. So the issue before us is much bigger than ObamaCare. This is about how we govern ourselves and whether we govern ourselves any longer as individuals or only through the good graces and largesse of Washington.

Thank you.

CHOPER: It’s now time for our question period. I want to ask a similar question for each of them. For Professor Tribe, if the Court were to uphold the healthcare mandate could Congress require people to buy American cars, or, for that matter, buy broccoli, since, for healthcare purposes, both are in the stream of commerce?

On the other side, Dr. Pilon, if the court strikes this down could Congress require that a farmer buy wheat for home consumption or feeding his cattle instead of producing it himself? That’s a case that the Supreme Court upheld. Let me ask you both that.

TRIBE: Let me begin with broccoli. I deliberately addressed that when I spoke. I said that people have the right not to enter particular streams of commerce. They have a right not to enter in the stream of commerce for healthy food or in the stream of commerce for personal trainers.

One stream of commerce we can't stay out of is the stream of commerce for medical care, as we all end up using medical care. The idea that no act exists to be regulated, and it's all in the mind, I only wish it were all in the mind. The fact is we all need medical care. Sometimes you get hit by a truck and you end up unconscious in an emergency room. The one kind of commerce that we are inescapably engaged in is the commerce for medical care. And how we pay for it is not simply a thought process, it's a finance mechanism, so it's an absolutely clear core instance of commercial activity. You don't even need the New Deal to see that.

But I do think that the idea of repealing the New Deal, which you must have heard as the subtext of Roger Pilon's remarks, is a little scary. It would be an implication of the kind of decision he wants that the Social Security Act is unconstitutional, not only a Ponzi scheme, but unconstitutional. It would be an implication of his position that just about everything since 1937 is unconstitutional, but not only that, probably a lot of stuff before 1937, because this is not some newfangled constitutional doctrine. The power to regulate commerce is enumerated in the Constitution. You can't make people necessarily buy a particular product, but if people are in the market for medical care you can arrange how it's to be paid for.

Now I didn't hear Roger respond to the 11th Circuit's concession that people could be made to get the insurance at the time they consume it. So what does he want to do, make them buy insurance when they're in the ambulance on the way to the emergency room? It seems to me that we would end up unraveling a huge part of government if we went his way. And it seems to me that I could agree with just about everything he said. Of course we have a doctrine of enumerated powers. The civics lesson that you heard today is what I teach my students in constitutional law. I don't believe in unlimited government. That's why I tried in detail to show you that this was commerce.

There's another question that I'm curious to get Roger's answer to, and that was the question that Yale's Akhil Amar asked, that is, may Congress tax us? I suppose it can. With the money that it gets with that tax, can it not buy an insurance policy? I think so. Can it then give us the insurance policy? I don't see what would be unconstitutional about that. So why does it have to go through all those elaborate steps? Why can't it simply say you better insure yourself the way we have to buy insurance when we get an automobile? You can't force me to buy a car, but you can force me to insure when I'm driving, because I impose costs on third parties. It's quite simple.

Now, I don't want to be confused with those who say that you can't be serious if you think this is unconstitutional. It's very serious. Roger is serious, all those judges who have found it unconstitutional are serious, but you can be serious and wrong.

CHOPER: Dr. Pilon, is it possible that you have something to say?

PILON: First of all, the question you put to me, Jesse, was whether Congress, if the Court strikes ObamaCare, could compel a farmer to buy wheat for his consumption rather than grow it himself. I assume you're talking about the *Wickard* decision, and of course the answer is no, *under the Constitution*. But then *Wickard*, I think, was wrongly decided, as you might expect me to say, and so the answer might be yes, under modern constitutional law, if the ObamaCare Court were to rule narrowly.

With respect to overturning the New Deal, obviously I'm in favor of overturning the New Deal, but slowly, because of course we got into this mess slowly and we can't get out of it overnight—there are now too many people who depend on Social Security, on Medicare, on Medicaid, and so forth. As we say, it's terribly easy to get into socialism. You just take what is privately owned and turn it over to the public, everything from land to labor. It's terribly difficult, as the Eastern European countries found, to get out of socialism, because you no longer have titles in individual hands. The titles are all in the hands of the government, and so what you've got to do is slowly work your way out.

Larry has written that you couldn't allow people to opt-out of Social Security. Well people *have* opted out of Social Security. Galveston County and other counties in Texas did so, and they're doing very well—about six times better than the rest of us are doing under Social Security. So you're welcome to Social Security if you want it, but it's a very, very poor investment, and those of you who are young in the audience will discover that it's not even going to be available for you if current demographic conditions continue.

In any event, Larry remarked that this “civics lesson” that I graced you with this evening is something that he teaches his students. Well I didn't notice that when I spoke to his students. It was a matter of first impression to them, and so if he did convey it to them, they must have forgotten it very quickly.

CHOPER: Many of these questions raise essentially the same issue, and that is, if there are limits on what Congress can do under the Commerce Clause that the states could do, that is to say, they're within the power of the state but not within the power of Congress, what is the limiting principle that divides what Congress can regulate under the Commerce Clause, from what it can't?

PILON: The limiting principle is the doctrine of enumerated powers. The underlying question that you asked, Jesse, is of course the one that the Court has been wrestling with for a long time. By and large, for 150 years they had it right. Then all of a sudden the justices, who had been threatened with having six more members thrust among them, saw powers in that document that no one had seen for 150

years. It's like they woke up and said, "Oh my God, how did we ever not discover those powers—what were we thinking for 150 years?"

Well, we know what was going on there. It was a sleight-of-hand in constitutional interpretation. But don't take my word for it. Here's Roosevelt writing to the chairman of the House Ways and Means Committee in 1935: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." Here's Rexford Tugwell, one of the principal architects of the New Deal, reflecting on his work some 30 years later down at Santa Barbara's Center for the Study of Democratic Institutions: "To the extent that these new social virtues [i.e., New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them."

Think about that. They knew exactly what they were doing. They were turning the Constitution on its head. And today we have generations of Americans who think that the purpose of government is to solve our problems. The Founders never thought of government that way. They thought of government as an institution to secure our rights and do the few other things that we'd authorized it to do, leaving us otherwise free to plan and live our own lives.

CHOPER: Larry, do you want to say a word about that?

TRIBE: I wouldn't know quite where to begin. The Supreme Court has said ever since the 1990s that some earlier courts went too far in almost obliterating limits on the Commerce Power, and that's why in the Lopez case that Roger mentioned the court said that there are some things that are purely local, like whether or not you have a gun within 1,000 feet of a school. That's not an economic activity, even though, of course, like all other activities it ultimately has economic effects. That's the line the court has drawn. You can regulate only economic activities that in the aggregate affect interstate commerce. And I quite painstakingly tried to show that the activity of financing your healthcare is a quintessentially economic activity, and I've still not heard any answer to that. The word is commerce, Roger, and the power to regulate it is enumerated in at least my copy of the Constitution. That's really all I have to say about that.

CHOPER: We all know that an alternative to the bill that was passed, and one initially preferred by the administration was a single payer option, and that is to simply have the government provide health insurance for everyone and pay for it out of tax funds. Why is this different?

PILON: Well, first of all, it was not billed as being passed under the so-called General Welfare Clause—the taxing power. It was billed, and, indeed, expressly,

as passed under the Commerce Clause, because even supporters didn't want to increase taxes to pay for it. The problem with doing that two step that Larry spoke of is this: it's not honest legislation. Second, and more important, the reason you do things through the taxing power is to put the costs "on budget" so people know whether and how much they're being taxed. And that's one reason why tax bills must originate in the lower House, where the members are closer to the people.

When you do the cost shifting, as it were, through government under the regulatory power, nobody really knows what's going on. It's all off budget. It's like with the Takings Clause concerning property rights. If government condemns uses that people can make of their property, in order to provide the public with goods like lovely views or wildlife habitat, the costs of those goods rest on the property owner, who can no longer use his property, while the benefits inure to the general public. With those costs "off budget," there's no incentive for politicians not to engage in regulatory redistribution rather than tax redistribution because those costs are hidden from the general (voting) public, which is why this is a sinister way of pleasing the public.

Since you've raised the single payer issue, Jesse, and I'm glad that you did, if I may be not too cynical—I come from Washington, it's hard not to be cynical—let me say that many of us understand this Act as one that will either cartelize the insurance industry, as so many Progressive schemes have done in so many industries, or result in a massive breakdown of our health care system, as many expect will happen. In the latter case there will be a call, inevitably, for single payer as the remedy. In other words, it's a textbook example of how you use one government intervention to lay the foundation for another government intervention to rectify the problems that were created by the first government intervention.

CHOPER: A crisp response.

TRIBE: There is nothing hidden about the fact that this bill operates entirely through increasing the income tax liability of people who don't purchase the insurance that's required. It wasn't off budget. It was a way of reducing the debt. That's what the CBO concluded. That's why the tax penalties collect \$4 billion in addition to what was otherwise collected as revenue by the government.

It's simply a canard to say that there was some sleight of hand going on here. As I mentioned, representatives in Congress, several of them, a number of senators, kept calling the mandate an exercise of the taxing power. There was nothing secretive about that. It's true that in today's atmosphere you don't run around with a scarlet T on your head every time you describe the law that you want to pass, but there is no secret about it.

And I still don't hear an answer to the proposition that if Congress could impose a tax directly and then provide the insurance, just like expanding Medicare to people way below the age of 65, why it can't do it this way? The only answer has been that well it doesn't originate in the House. Well, this Act was carefully passed through a reconciliation device that did involve origination in the House. They did it the way they did it partly so that they could invoke the taxing power. So it rests both on the Commerce Power, which is enumerated in the Constitution, and on the Taxing Power.

There's also—and I've heard no answer to this—the Necessary and Proper Clause. If you are going to ban discrimination against people with preexisting conditions, then the only way to make that work without basically breaking the back of the insurance companies is to expand the base of the people who are insured. And as a perfectly conservative jurist, Justice Scalia, said, when a law is generally under the Commerce Power you have the power under the Necessary and Proper Clause to reach entirely intrastate activity. In California, for example, the federal government can regulate homegrown marijuana because of the broader power that the federal government is exercising to regulate the market in drugs.

The use of the Necessary and Proper Clause is an additional basis for the constitutionality of this. This is not some fancy idea that was cooked up in the heads of some justices in 1937. It was written in the original Constitution, and when Justice Marshall spoke of the broad powers of the government in *McCullough v. Maryland*, he was not denying the importance of personal liberty, but he was disagreeing with the proposition that the government is not there to do things, to solve problems. It is there to solve problems that people can't solve themselves.

PILON: Larry's asked me to respond to a couple things, and I'm delighted to do so. One of the things is the taxing power and the other is the Necessary and Proper Clause. The taxing power is the first of Congress's enumerated powers, and most people today, including Larry, think that Congress has an *independent* power to tax and spend for the general welfare. That is of course the post-New Deal version that came out of the *Helvering v. Davis* decision, the Social Security case, and it's dead wrong. This debate took place early in the nation's history when Hamilton introduced his Report on Manufacturers, a national industrial policy scheme, and his idea that Congress had an independent power to tax and spend for the general welfare.

Madison, Jefferson, and virtually everybody else said that couldn't possibly be right. Why? Because, since money can be used to accomplish anything, then anytime Congress wanted to do something that was not authorized to it because no power had been given with which to do it, it could simply say that it was taxing and spending for the "general welfare" and make an end run around the doctrine of enumerated powers. Indeed, they added, what was the point of having enumerated

Congress's other powers? They could have stopped right there with that first enumeration, because Congress could do all it wants under that single power? And yet that is pretty much what we've got today under the modern theory of the so-called General Welfare Clause.

Now the Necessary and Proper Clause is the last of Congress's enumerated powers. It affords Congress the means to carry into execution its forgoing powers. Accordingly, it's parasitic upon there being one of those forgoing powers, and that's just the issue between us. If the Commerce Clause does not justify the individual mandate, because there's no "act" ("not buying") to regulate, then the Necessary and Proper Clause won't give you a bit of traction.

CHOPER: We now have time for a more formal statement by each of our speakers, for about three-and-a-half minutes, each. We'll have Professor Tribe go first.

TRIBE: Thank you. Of course the necessary and proper power has to attach to something. That's why I explained that even if Congress didn't have an independent power to require us all to buy insurance, it certainly does have power under the Commerce Clause to prevent insurance companies from discriminating against those of us who already have preexisting conditions. That's an exercise of the Commerce Power, pure and simple. But to make that work, it also has to be able to take this additional step, which I've also explained Congress has independent authority to exercise.

But what I want to do is step back from this just for a moment and talk about humility. The idea that Roger has figured it all out, that all of these justices for decades have been completely wrong, it's possible. But I simply ask how likely is it? How likely is it that decades upon decades of jurists, including conservatives like Nino Scalia and William Rehnquist, have erred when they said that *Wickard v. Filburn* was right? And even if it wasn't right, it's too late in the day to rip it all apart. It seems to me that the radical approach that is being proposed here is one that we ought to pause very long before swallowing. It's a very strong form of medicine and it's medicine of a kind that I think would do the country great harm.

PILON: You said that the Commerce Clause allows Congress the power to prevent insurance companies from discriminating against people who have preexisting conditions. Well, that eliminates the insurance principle, which you mentioned earlier in your talk. The insurance principle entails guarding against *unexpected* things in the future. Your house might burn down, you might die prematurely, and so forth. But when you prevent insurance companies from doing normal risk rating ("guaranteed issue," "community rating"), then, yes, you have to then bring in this individual mandate. So there, once again, is a perfect example of one government

intrusion requiring another government intrusion to make up for the first one that you've done, and so it goes on and on.

There was something else that you said that I need to address. It is that we can't stay out of the stream of commerce for healthcare. Well, we can't stay out of the stream of commerce for food, clothing, shelter, and much else. Does that mean, therefore, that there is a federal power to regulate all of these aspects of life? I mean, this is the kind of thing about which Madison, who wrote that the powers of the new government would be "few and defined," would just shake his head and say, "What on earth are you talking about?"

Larry invites us to a parade of horrors if these fundamental principles are resurrected, as these courts are doing, and, indeed, as the Rehnquist court did, starting with the *Lopez* decision. I suggest it's just a rediscovery of our founding principles. By abandoning those we have put ourselves in a situation where politicians promise more than they can ever deliver, such that we now have 40% of the budget paid for by borrowed money. We have a debt approaching \$15 trillion—trillion, that is—that no one knows how we're going to pay off. And this is all playing into this ObamaCare debate, because this is just one more example of government promising what we all know it's never going to be able to deliver, and therefore adding to the federal deficits and debt.

And that's why I come back to what I said at the outset, about how the Tea Party Movement has come about. These people are marching in Washington with signs saying, "Give Us Back Our Constitution!" And the signs I like best say, "We Want Less!" When was the last time you saw people marching in Washington with signs saying, "We Want Less!"? There's a new day dawning in this country, and I thank the ObamaCare debate for helping to bring it about.

Thank you.

CHOPER: One final question for each of you. It's a two-part question, One leads to the other. As we all know, the court's most recent appointee, Justice Elena Kagan, served in the Department of Justice at the time that the healthcare debate was going on in the Congress. Should she recuse herself for that reason? And, second, how is the court going to come out, and what will the vote be?

TRIBE: I'll address the first and not the second. If you live by the crystal ball you have to learn to eat ground glass, and it's not my favorite diet.

Elena Kagan was one of my favorite students, and I was in Washington at the same time she was. She very carefully stayed away from anything to do with Obama Care. She was there as the Solicitor General, and I see no conceivable reason why she should recuse herself.

PILON: Well, I think the wisdom in Washington goes just the other way. She was right there at the heart of it, and the expectation is that she really does have to recuse herself, at least the people I've spoken to in Washington say that. We shall see.

As for how the vote will come out, pass me the ground glass. My expectation is, first, that there are four sure votes for ObamaCare. You know who I'm talking about.

TRIBE: Not if you get Elena to recuse herself.

PILON: Well, then let's make it three, okay? I'll give you that point, Larry. The other five are interesting. I think you've got three for sure—Clarence Thomas, probably Scalia, and Alito. That leaves Roberts and Kennedy. And Chief Justice Roberts is famous for his view about judicial modesty, and I think that Larry can take some comfort from that, except. . . .

TRIBE: He was also my student, by the way.

PILON: Well . . . Larry, we're all your students. But with respect to John Roberts, he has not always practiced judicial modesty. In fact, the *Citizens United* case is a good example of that. And, finally, Justice Kennedy, look at the recent *Bond* decision—that involved the jilted woman who brought suit under the Chemical Weapons Treaty, where Kennedy opined that federalism is not really about states' rights, it's about individual liberty. This case is about federalism, and I think we may get Kennedy's vote.

CHOPER: Well, our thanks to Laurence H. Tribe, the Carl M. Loeb University Professor, and Professor of Constitutional Law at Harvard Law School, and to Dr. Roger Pilon, Vice President for Legal Affairs and Director of the Center for Constitutional Studies at the Cato Institute, for an enormously informative and spirited debate.

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