The Constitutionality of the Patient Protection and Affordable Care Act

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Richard A. Epstein*: The topic of the discussion between Professor Jesse Choper and myself is the Commerce Clause and how it relates to the constitutionality of ObamaCare, or, more dispassionately, the Patient Protection and Affordable Care Act. I approach this topic with much ambivalence. As a matter of first principle, I do not have much faith in all the individual mandate arguments that have been raised with great effectiveness and imagination by Professor Randy Barnett of Georgetown University Law Center. Randy is one of the few people who can mesmerize you with his low-key approach. What he says in measured tones may seem at first to be outrageous, only to become more persuasive to audiences as he continues to talk.

But for these purposes, I do not want to begin on the assumption that *Wickard v. Filburn*[1] and *NLRB v. Jones & Laughlin Steel*[2] are good law, much as if these controversial New Deal decisions had been handed down from Mount Sinai. In a sense, my objection to these decisions stems from my deep conviction that, on this issue at least, I count as a naïve constitutional originalist. I do not think, therefore, that the appropriate place to start this debate is by looking for an exception to the broad readings of *Wickard v. Filburn* and *Jones & Laughlin*, insisting that these cases do not touch the individual mandate on the ground that ObamaCare seeks to tax and regulate individuals who have done, quite literally, nothing at all. I see no reason in principle to start a constitutional debate on the assumption that the baseline for discussion is, or has to be, *Wickard* and *Jones & Laughlin.*

Instead of working within the framework set by these cases, it is better to begin with the original incarnation of the Commerce Clause, which, when properly understood, makes the rejection of ObamaCare on constitutional grounds one of the easiest tasks on the face of the Earth. But that negative judgment holds, almost without exception, to virtually all the signal legislation of the New Deal, which should disappear down the tubes, never to be seen again. I might add that this approach is not likely to strike a responsive chord on the current Supreme Court, where (with the possible exception of Justice Thomas) everyone has more or less bought into the status quo on the strength of Justice Rehnquist's decision in *United States v. Lopez,*[3] which started from the ingenious assumption that even if *Wickard v. Filburn* was on sacred ground, it was still possible to strike down Texas's gun control law regulating the possession of firearms within 1000 feet of a school.

What Justice Rehnquist said, in effect, was that carrying a gun within a hundred yards or a thousand feet of a school does not alter the price of goods or the quantity of guns shipped in interstate commerce. Therefore, that activity does not have a substantial effect on interstate commerce. But everything else that happened since that decision seems, with one or two exceptions, to have that forbidden type of effect. Certainly, running a comprehensive health care scheme would pass muster under the standard reading of *Wickard v. Filburn*. So, I suggest that it is likely that Justice Rehnquist would have voted to uphold the Obama Care legislation—at least before hearing the discourse prompted by Professor Barnett.

But let us go back to the beginning and examine what the Commerce Clause actually says. My naïve view of constitutional interpretation begins with treading a text in full, carefully, before entering into any lofty discourse about its function and purpose. However radical this approach is in an age of deep constitutional reflection, it proves instructive in this case: "Congress shall have power . . . to regulate commerce with foreign nations, among the several states, and with the Indian tribes." That is all it says. The question is, what do we mean by "commerce" when it's used in that particular three-part sequence?

It was clear in the early days, starting with Chief Justice John Marshall's decision in *Gibbons v. Ogden*,[4] that "commerce" meant "intercourse"—that is, trade across state lines. This reading would cover interstate sales or contracts having to do with things like navigation, including, after some hesitation, transport involving both goods and passengers.[5] Note that commerce with foreign nations and Indian tribes could cover both these categories.

What commerce did not cover was the manufacture, production, or use of goods and services within any particular state. Indeed, if Chief Justice Marshall had the temerity to decide that question in the opposite way in *Gibbons v. Ogden*, the entire nation would have come apart at the seams, because it would have allowed the national government to regulate (indeed to forbid) slavery inside each individual southern state. Yet at the time, everyone agreed that Congress had an immense amount of power to deal with the importation of slaves from overseas (after 1808) and with the movement of slaves across state lines but that power stopped once the slaves reached the plantations. To stress this point is not, obviously, to defend slavery. It is only to point out how the huge controversy over slavery shaped the scope and limits of congressional power in the antebellum years.

But if we put the slavery question aside, there is indeed much to say to defend this version of the commerce power as a matter of first principle, even today. Let us assume that one sensible objective of government is to establish, generally speaking, competitive economies that cross state lines. On that point, the activities that are of greatest concern deal with the ability of states to blockade the shipment of goods and

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services across their own boundaries in ways that necessarily fragment the national market so that production in any one of the thirteen (now fifty) states could not be shipped across state lines. That Balkanization would have produced the same dangerous situation that existed in Europe, where petty duchies along the Rhine blocked navigation along that great river. Indeed, the 1648 Treaty of Westphalia actually counts as one of the great acts of liberalization in Europe. Given the extensive discussion of "navigation" in *Gibbons*, it surely counts as one of the models that the Founders considered when they drafted their own Commerce Clause to deal with the great rivers of North America.

Their somewhat optimistic view—it turned out to be a gross miscalculation—was that, armed with the Commerce Clause, Congress would undertake the job of removing these destructive state barriers. On this version the Commerce Clause works in tandem with the prohibition against the taxation of imports and exports among the various states.[6] It is not a bad attempt to solve the trade problem, because if it worked, competition across state lines would have created a national market within which each of the states could locally regulate goods and services from other states and from overseas, along with their own.

Indeed, to push the European example, a European free trade zone makes more sense than a European Union, with its endless central directives from Brussels. For this system to work one has to adopt the same basic principle that is found in international trade contexts, which is a general nondiscrimination provision such that the states cannot tax more heavily or regulate more severely those goods and services coming in from outside than those which are produced locally. That outcome, in fact, represents a stable solution to a vexing problem, for it produces a vigorous domestic economy that avoids huge amounts of national cartelization, which is the sad fate whenever one government is empowered to craft a single rule for all producers or all shippers within the entire nation.

It turned out that this system at best had only partial success in practice. The reason it did not work as intended was because, for the most part, Congress rarely stepped in to prevent states from acting in petty anticompetitive ways. So in one of the major developments of constitutional law, *Gibbons v. Ogden*—especially with the concurrence of Justice Johnson—slowly led to the emergence of the "dormant" commerce clause jurisprudence, which put the Court in the position of knocking down various state restrictions on interstate trade unless Congress dictated otherwise. Indeed, the Supreme Court has discharged this task rather elegantly, even though the textual authority for this bold initiative is weak at best.

But what happens then on the affirmative side, when Congress does choose to regulate? *Gibbons*, for all its claim of breadth, was in hindsight a fairly narrow decision. Fast-forward to the 1895 decision of *United States v. E.C. Knight*,[7] and we come across a situation that could not easily be analyzed within the framework of *Gibbons. Knight* did not involve the manufacture of goods. Rather, the question in that case was how the Commerce Clause applied to the Sherman Act prohibition against combinations in restraint of trade as it applied to the acquisition of smaller sugar companies, located in different states, by the American Sugar Refining Company. The case did not involve the shipment of goods back and forth across state lines. Originally, the Supreme Court said that the Commerce Clause did not reach these efforts to coordinate sales across state lines, which in principle would have allowed the states to attack those acquisitions of companies located within their boundaries under their admitted police power. But within three years, in *Addyston Pipe v. United States,*[8] the Supreme Court essentially gutted the narrow holding in *E.C. Knight,* so that by degrees the full set of antitrust sanctions applied to most business practices, including mergers, exclusive dealing contracts, tie-ins, predation and the like. But the manufacture and production of goods proper did not fall within the scope of the power.

In this regard, it is worth noting that my reading of the Commerce Clause was well accepted at the time. For many years I wondered how the 1906 Food and Drug Act was consistent with this reading of the Commerce Clause. I found out this past winter when I taught a course on the FDA, the Food and Drug Administration, at NYU Law School. Much to my amazement, I discovered that the 1906 Act made it clear that Congress could only regulate the manufacture of drugs within the territories, in accordance with the constitutional provision that provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,"[9] but not within the states proper.[10] Rather, it only covered the shipment of drugs across state lines, just as *E.C. Knight* would have it.[11] Even the power to regulate the movement of goods in interstate commerce was, to my mind, a very broad reading of the Commerce Clause. Indeed that authority was barely sustained by a five-to-four vote in the 1903 decision of *Champion v. Ames*,[12] which decided—wrongly in my view—that Congress could regulate the shipment of lottery tickets in interstate commerce, even when their production was legal in the state in which they were made and the sales were legal in the state to which they were sent. It was never explained why Congress could nonetheless prohibit their shipment, even though these goods did no harm while in interstate commerce. Just think of what would have happened if before 1865 Congress had sought to prohibit the shipment in interstate or international commerce of goods made with cotton produced by slave labor.

Clearly, it was a bold move to allow the stoppage of goods made in individual states, and when the issue moved from lottery tickets (which were long considered to be immoral)[13] to ordinary goods (such as clothing), the Supreme Court balked, holding in *Hammer v. Dagenhart*[14] and the *Child Labor Cases*[15] that the control over interstate affairs could not be used to leverage complete control over local production. Anybody who looks seriously at the jurisprudence between 1900, say, and 1935, when the early synthesis starts to unravel, will be impressed, not with its intellectual incoherence, but with exactly the opposite. Every relevant player, both in the courts and in Congress, understood the basic rules of the game, and only passed laws that were in perfect conformity to the dominant rules. Indeed, as a matter of historical aside, the irony is that the FDA only received power to regulate manufacturing within the

states in 1938, usually by requiring nominally some connection with interstate commerce.[16] That expanded power was in part driven by some real failures in manufacturing. But before 1937 those failures would have led to a call for state regulation. By 1938, however, *Jones & Laughlin* was on the books, and an alert New Deal Congress was quick to exercise its extensive new powers.

Historically, it is easy to measure the enormity of the shift by noting that in *Jones & Laughlin* the Supreme Court had to overrule decisions of three lower circuit courts,[17] including the Second Circuit with Learned Hand, all of which held—rightly, in my view—that the National Labor Relations Act was unconstitutional because it sought to regulate manufacture rather than the shipment of goods in interstate commerce. If *Jones & Laughlin* had been correctly decided, *Wickard v. Filburn* (which, in order to cartelize nationwide grain production, regulated wholly local agricultural markets) would have come out the other way. Congress would have had no power to regulate wheat grown on one's own farm and fed to one's own cows. So understood, neither *Jones & Laughlin* nor *Wickard* are the humorous cases they are often made out to be. Rather, both catered to the deepest and most dangerous progressive impulse: the only way to create an effective system of labor unions is to confer upon them gobs of monopoly power. The moment state legislatures seek to achieve that goal, businesses will migrate to other states, and workers and jobs will follow. So to stop what many unionists misleadingly call the "race to the bottom," either regulation takes place at the federal level or it does not work at all. In this instance, the narrower view of the Commerce Clause thus discharges a high social function by thwarting the passage of the National Labor Relations Act.

A similar story can be told about *Wickard v. Filburn*, which upheld the Agricultural Adjustment Act. The regulation of feeding your grains to your own cows was simply the tag end of a very comprehensive Act with its own cartelization arrangement that bears the distinctive imprimatur of the New Deal. What these provisions did was authorize farmers, by national vote, to establish quotas for the production of various crops, after which the Department of Agriculture had the power to allocate to each farmer a production quota, which allowed for the maintenance of the cartel price.

It is important to understand the progression of events that led to the statutory reforms that were challenged in *Wickard v. Filburn.* The easiest case for federal regulation under the Commerce Clause is the prohibition of the shipment of goods across state lines, which I regard as problematic for the same reason that *Champion v. Ames* is problematic. But the blunt truth is that no prohibition solely on interstate sales can keep prices artificially high. Instead, farmers will redirect their "excess" (over quota, that is) supplies to the *intrastate* market, even if those lines of transportation are somewhat more costly. So it becomes necessary to block intrastate sales of excess crops to keep the price of grain from falling below cartel levels, which was done in *United States v. Wrightwood Dairy*[18] in the case of milk. But once this step is taken, farmers will adopt a new strategy to produce grain in excess of the allowable amounts: vertical integration. One producer of grain would acquire—or be acquired—by a cattle farmer, so that there need be no sale, interstate or intrastate, to use that excess grain. This evasion was no small matter, but constituted about twenty percent of the grain produced in the United States, enough to destabilize a cartel.

Sensible people should regard these evasions as welcome countermeasures to state-imposed cartels. Franklin Roosevelt and his New Deal advisors had a different world view. They were strongly opposed to monopoly, but strongly supportive of cartels on the ground that those within a given market sector knew what was best for its members. So the essence of New Deal policy was to prop up private cartels with federal power, the major function of which was to curtail production by current farmers and prevent entry by new ones. It is as though every impediment to competition was sustained by government power on the ground that what the farmers wanted is what mattered, and the consequences to others were systematically ignored. It was a complete repudiation of sound antitrust principles. What the New Deal sought was to create some model of a corporatist state that would oversee sweetheart deals with farmers, unions, and large corporations to divide up monopoly rents among the privileged insiders. It was, to my mind, the worst of the possible visions for running a country. Roosevelt, however, thought it was just fine to rail against monopolies while supporting cartels. He did not want one person to own all the dairy industry. Instead, he wanted all the farmers to get together and decide their total output and let the Department of Agriculture do the rest. The Supreme Court in *Wickard* twisted the Commerce Clause to allow it to implement that indefensible use of government power. The older system served this nation far better than the newer one.

The Current Debate Over Health Care. Against this background it is possible to put the debate over the Patient Protection and Affordable Care Act in perspective. I start with what is a common assumption. The hodge-podge health care arrangements in the United States are the source of massive dislocation because of the peculiar effort to combine the various public and private systems of health care provision. The public systems are inept, and the private system is overregulated. In this context, it is odd to hear people ask me how I could defend the market in health care, seeing the way in which it operates today. My response is that most of the odd market behaviors are in response to unwise government regulation on a full range of issues, which lead to all sorts of dubious practices. Firms that are given bad incentives will behave in bad ways, and take whatever options are available to exclude rivals and gain subsidies for themselves. It is therefore critical to control the public incentive structure to reform the private sector.

If you go back to late 2008 and early 2009, the President and his Democratic allies had to make threshold decisions about the way in which to use their huge congressional majorities in reforming the health care system. They could have taken one of two paths, the first of which is congenial to about ninety percent of the political spectrum and the other to the remainder. That dominant position was that reform should stress a direct improvement of access to health care in ways that brought all people into the system, *without* making structural reforms that would allow the overall system to work in a more coherent fashion.

The few lonely voices on the other side, which included myself and David Hyman, held that this approach got everything exactly backwards.[19] What government officials should do is first look at every single aspect of the health care system in order to determine what current regulations could be stripped away. The one constitutional point that is clear is that major deregulation at the federal level is consistent with any vision of the Commerce Clause. In effect, this approach means that even in the charmed rooms of Boalt Hall Law School, the question of redistribution is always approached *last,* once the allocative issues are handled. To state this position is to risk the charge of being completely asocial: Does this man not care about the poor and downtrodden? No, it is exactly the opposite. The proper approach is to first figure out how to release the productive capabilities of the people in order to expand the pie and lower costs such that access is increased without government regulations here and massive subsidies there. Once the efforts toward market liberalization have been completed, what is left by way of redistribution can (a) usually be done by the private sector more effectively than by the government, and (b) if done by the government, can be done working with a larger pie which now needs to help a smaller fraction of the population.

The worst approach is to embrace the status quo in delivery systems. What is needed is to figure out the most expeditious line of reform. On this matter, it should not take a genius at the federal level to realize that it is a mistake to have all these mandates. Nor does it take much imagination to say that it is wiser to let physicians move from state to state to practice their craft than to require extensive relicensing that is required largely for anticompetitive reasons. Nor does it take much imagination to remove barriers that prevent insurance companies from competing with each other across state lines. Nor do we want to create a legal regime in which only doctors can practice medicine. If Wal-Mart knows how to assemble the right teams for providing health care, let them do it. If people do not like their services, they can move to CVS. Right now the party that does not like government health care has no place to go at all.

These are not small changes. The amount of improvement in the total productive capacity of the American medical system that you could get by cutting regulation is probably two- to threefold, without putting a single dime of extra revenues into the system, all the while saving the millions—soon to be billions—spent on direct regulation by the government.

Let me refer to a piece that Atul Gawande wrote two years ago in *The New Yorker*: "The Cost Conundrum—What a Texas town can teach us about health care."[20] Atul is an inspired stylist, a great surgeon, a wonderful descriptive reporter, but a weak economist. He manages to describe conditions perfectly accurately, only to miss the proper response to the errors that he observes on the ground. It turns out that the huge disparities in health care costs arise under Medicare, which indicates that the system suffers from weak cost controls. But the variations are far smaller in the private health care market where there is someone looking after the shop. At this point, the argument should be to reduce the size of government actions, and not to pretend that an increase in government activity under Medicare, Medicaid, or both, will somehow make all the problems go away. And what government needs for its own activities is a way to make hospitals richer when they find ways to improve care at a lower cost. Yet the current Medicare system only has rigid reimbursement formulas so that global results at given facilities make little or no difference as to how these institutions are rewarded. If you can find a way to increase access by lowering costs, you do not have the problem you have now, in which massive taxes on other sectors are going to have to subsidize the health care system, distorting everything including other government programs that compete for the same dollars.

Any look at the global situation makes it clear that the individual mandate is not the centerpiece of a health care regulation that already has so many other demerits that it is hard to know where to begin. It is therefore an irony that the most visible portion of the system attracts the greatest wrath. But for our purposes the question is whether under the current rules the mandate is ripe for constitutional invalidation in ways that could bring down the rest of this complex system with it.

At one level, the Court could just treat the mandate as part of a larger constitutional system so that it is constitutional as well. But the argument gets much closer when one looks at the strained rationales that the government offers to keep this program alive. The government position begins with the half-truth that the mandate is needed to make sure that individuals do not free-ride on the health care system. Of course, they do not believe that any more than you do. The best way to stop free-riding is to tell people that if they do not get health care insurance, society is not going to give it to them for free out of the public coffer. And at that particular point, most people will buy at market prices, at least if the insurance costs them an actuarially fair price, i.e. does not have built-in payments that subsidize other individuals.

But, of course, the designers of the PPACA do not want to stop free-riding. What they really want to do is to create cross-subsidies by asking the supposed free-rider to contribute, say, $2,000 into a system from which he or she will derive in expected value terms only $200 worth of benefits. So the new definition of a free-rider is somebody who, in fact, is reluctant to subsidize other individuals through a system of social insurance that has as its raison d'être the transfer of funds from one individual to another.

One reason why some judges are skeptical of the entire PPACA is because its defenders talk out of both sides of their mouths by offering two inconsistent rationales for the legislation: the prevention of free-riding and the need for cross-subsidies for those same people. They do not seem to realize that the two messages are totally discordant with one another. Even in the low-scrutiny rational basis world that dominates the interpretation of the Commerce Clause, it is rather difficult to claim that two separate reasons support the same outcome when the two reasons are manifestly at war with each other. At this point, the inactivity of those who want to stay out of the system looks a bit more credible than it appeared at first blush. These individuals are not trying to game the system. They are trying to make sure that the system does not take advantage of them. Reading the Commerce Clause to cover activities only helps

to advance this sensible view of the world, precisely because it is intended to limit the level of redistribution that the federal government could achieve by massive regulation.

In dealing with this constitutional question, my friend Professor Jesse Choper has introduced a different justification for defending the PPACA, which is that the law responds to a collective action problem which the individual states, acting separately, cannot solve. As Choper sees health care, it is a version of a prisoner's dilemma game. But there is a catch to this commonly made argument, because we cannot tell whether the PD game is good or bad outside of context. Competition is a collective action problem for all the parties who are engaged in it, and the solution to their collective action problem is a cartel. The reason most analysts reject this particular solution to a collective action problem is that the systematic externalities on third parties outweigh the gains to the parties who are determined to cartelize the market. So just because it is possible to show a PD game does not show whether the game helps or blocks overall social welfare.

To see why the PD game argument is a constitutional nonstarter, it is useful to recall that this argument was, in fact, made very ably by none other than John W. Davis when he was an assistant attorney general for the United States in *Hammer v. Dagenhart*.[21] In that case, the question was whether Congress could prohibit the shipment of goods in interstate commerce that were made by firms that used the labor of children under the age of fourteen. At the time, North Carolina only barred children under twelve years of age from employment.

What Davis said was exactly what Professor Choper said: to allow each state to set its own standard will lead to a race to the bottom because each state will lower the age to attract more business, so that all states will settle on twelve years individually, when collectively they prefer fourteen years. The federal statute thus set the correct minimum.

Davis's argument is antithetical on structural grounds to the Commerce Clause, which by design leaves these decisions over employment relations to state governments. Quite simply, the entire scheme is an effort to regulate local manufacture in a way that was not permissible under *E.C. Knight*. Here the argument relies on the same kind of game theoretical consideration on which Professor Choper relies. Any firm recognizes that the ability to employ child labor in its business is certainly worth something. But by the same token, the ability of any firm to reach national markets is worth a great deal more. Anybody and everybody will surrender the one right in order to gain the other. And so, essentially, you would have the forbidden kind of regulation.

But the other point is, who are we to say that fourteen years is better than twelve years with respect to child labor? Indeed, there is much to be said for the lower age limit if parents have the best interests of their children at heart in making decisions on letting them work, and if so, where. As that is the case, we cannot be sure whether the federal decision honors state preferences or shatters them.

I think Justice Day hit the nail on its head. Predictably, Holmes was in dissent. He was almost always wrong on the great progressive challenges of the time, and *Hammer* is no exception. In this context, it is instructive to look at the history of child labor in the United States, both before the decision and after. That practice was consistently decreasing, just as the number of hours that were being worked by adults was consistently going down, and this at a time when maximum hours laws were unconstitutional.

The simple truth is that collective action solutions that make competition across state lines impossible should not be encouraged. Collective action problems that facilitate competition ought to be encouraged. The whole point of a federal system is to keep open arteries for commerce going back and forth across states, and then allowing competition to attract and hold workers in markets where both firms and individuals have exit options. So what I think, in effect, is that what Davis and Choper describe as the cure for labor markets is in fact the problem. We would be much better off having states constantly trying to figure out ways in which they could make themselves more attractive to business, such that others feel necessary to follow. By the time you are done, higher productivity will translate into higher wages, which will have as one of its consequences improved health, more medical innovation, and a smaller set of health problems. Every time the government engages in forced redistribution, every time it imposes federal mandates, it also engages in the destruction of wealth. When there is less to go around, somebody is going to be hurt. There has never been a good, long, sustained argument for shrinking pies on the ground that anyone inside or outside Congress actually knows how to cut the slices in the ideal fashion that ties individual utilities to individual wealth so as to generate in practice that theoretical ideal of getting more utility out of a smaller pie. Talk about a mug's game, and this is the bipartisan affair that Congress has been engaged in for years. This criticism is not directed only to Democrats. The Republican positions on farm subsidies for ethanol show that they have no purity either.

Once again, Professor Choper's response allows factions to dominate. The New Deal, summarized in a single sentence, takes the view that the choice between competition and monopolies is foremost a political matter to be decided first by the central government and then by the states. In contrast, the classical liberal tradition of which I am a part rejects that form of Holmesian indifference. It sets a firm presumption in favor of competition and never lets the government use coercive force to convert well-functioning competitive markets into monopoly markets. In all cases the government has to make a very powerful showing to explain why it is going to regulate competitive markets, which it cannot do with virtually all the common government programs. So understood, the one key point about well-designed constitutions is that they are meant to stop degenerative democratic processes—not cater to them—on economic matters just as on matters of religion, speech and social equality. If a constitution sets the right political constraints, legislatures at the state and federal level will perform better, and even do useful activities like revising the UCC, or improving the recordation system, or running a decent highway system. A narrow focus will lead to a higher level of political performance, which would block statutes like the PPACA.

In all discussions of PD games, no one should take the position that allows political factions to dominate. The New Deal, summarized in a single sentence, takes the view that the

choice between competition and monopolies is foremost a political matter to be decided first by the central government and then by the states. In contrast, the classical liberal tradition of which I am a part rejects that form of Holmesian indifference. It sets a firm presumption in favor of competition and never lets the government use coercive force to convert well-functioning competitive markets into monopoly markets. In all cases the government has to make a very powerful showing to explain why it is going to regulate competitive markets, which it cannot do with virtually all the common government programs. So understood, the one key point about well-designed constitutions is that they are meant to stop degenerative democratic processes—not cater to them—on economic matters just as on matters of religion, speech and social equality. If a constitution sets the right political constraints, legislatures at the state and federal level will perform better, and even do useful activities like revising the UCC, or improving the recordation system, or running a decent highway system. A narrow focus will lead to a higher level of political performance, which would block statutes like the PPACA.

It is also the case that the government has fared very badly with its tax argument in favor of the PPACA. The reason is that that it did a bad thing: it started to lie about the program by insisting that if the Commerce Clause did not cover the situation, the power to tax and spend did. But in doing that, the Administration representatives had to acknowledge that the only way they could get this legislation through Congress was not as a tax, but as a penalty for bad behavior. It did so, moreover, to avoid going through budgetary hoops that could have easily doomed the entire enterprise as it wound its way through congressional committees. It does not sound credible to then reverse course and say that this mandate was really a tax, not just a penalty. At this point, no court has accepted the taxation rationale, which suggests that it does not have much of a future at the Supreme Court, either.

In addition, it is worth noting that this supposed tax is antithetical to any sound tax theory. What is the sense of imposing a tax on a group of individuals who has done nothing wrong in order to supply a subsidy for others who want to spend more than they can afford? The argument at this point, quite simply, is that selective taxes are a terrible way to organize redistribution, *even if* redistribution is itself a legitimate end. The last thing that any democratic process should be allowed to do is to fasten huge costs on small groups for the benefit of other such groups. A basic rule of redistribution is that it should always be funded out of general revenues, to make sure that the majority of the population has to bear some fraction of the cost of subsidizing various transfer systems. It is political dynamite to let those parties who are dictating the transfer payments to pay no fraction of the bill. It leads to a massive form of political irresponsibility and systematically to over-taxation. So, when you start looking at the PPACA, no matter how one slices the details, every single sound principle of economic accounting and of medical rationality is violated up and down the line, over and over again. That danger, if brought home to the Court, is likely to have some impact on the constitutional resolution of these issues.

So how, then, does this particular constitutional debate turn out? Well, surrealistically, the supporters of the legislation have a one sentence winner: if *Wickard v. Filburn* is good law, then the biggest industry in the United States is subject to comprehensive constitutional regulation—end of story. Hence the one imperfection among many—the individual mandate—has no particular constitutional salience, so the spirited complaints about the wisdom of this legislation are just directed to the wrong forum. The courts cannot pick particular threads from the tapestry, pull them out, and watch the rest of the structure come tumbling down. Justices of the Supreme Court are not mad. They do not look at the wisdom of the overall bill, or of any of its pieces. They see and hear no evil, and do their best to distance themselves from policy debates better conducted in Congress. On this view, they have to uphold the legislation. My attitude toward this position is that, after a fashion, it is right.

But the other side is right as well. If the government has the admitted power to run this program through a legitimate broad-based taxing system, it should be told that it cannot contrive to get this program through Congress. To use its commerce and taxing powers, it should meet with the minimum requirements of sensible legislation and sensible taxation, which it has failed to do. So strike down the PPACA and let Congress start over, which is exactly what won't happen because this legislation will not make it through Congress when all the procedural niceties are observed.

So once we have started off down the illicit road of *Jones & Laughlin* and *Wickard,* we face the question of which set of hypocrisies, which set of mistakes, which set of intellectual blunders should succeed? Do you want to seriously question the foundations of the creaky constitutional edifice of *Wickard v. Filburn*? My guess is that the answer in the current Supreme Court is no, if only because I have heard Justice Scalia say multiple times off the Court that he is a fainthearted originalist who knows that too much water has gone over the dam for him to overturn *Wickard*.

But it hardly follows that he cannot follow the line that Professor Barnett has proposed as a damage control argument. The response, therefore, is that the current expansion of federal powers under the Commerce Clause has generated a federal government whose large size is its own greatest enemy. It has made, or is making, blunders out of its use of the broader commerce power. Now that it is trying to push the envelope one step further, the Supreme Court may have to live with *Wickard v. Filburn*, but it need not treat that dubious decision as the last word in constitutional wisdom. A constitutional decision that is this suspect should not be used as the springboard for the greater exercise of federal power. On that note, I would strike down the legislation. In the world of the second-best we cannot expect ideal decisions. The defenders of the PPACA have no ground to uphold this sprawling statute if the Commence Clause is taken at its word. They have gone one step too far in this case. Invalidation of the legislation is, on balance, the proper response for any Justice who tries to make sense of the disparate threads of our constitutional order.

Jesse H. Choper*: Thank you. It's always a treat for me to "spar"—Richard used the word—with Richard Epstein on constitutional issues. But when it was announced I had ten to fifteen minutes, I thought that they ought to measure the time not by the minutes, but by the word. That at least gives me a fighting chance under the circumstances.

I was surprised by Richard's presentation because I came expecting two major arguments. One is that the "individual mandate"—that the government requires someone to do something—is unconstitutional. That's the major argument that has been used in the lower courts that have struck it down, at least by those who were challenging it. And I thought that Richard would argue the substantive due process right not to have to purchase something. That was what I planned to talk about.

I want to be clear. The last thing I want to do is to debate what is the best policy to handle the health care problem. That is, I do not want to say it is a wonderful statute. I do not think that the people who voted for it thought it was a wonderful statute. It is, by virtually unanimous agreement, a flawed statute. The notion was to get it on the books and then fix it up. Get it there while you still have the votes.

So let me discuss the major constitutional issues. Interestingly, Richard does not want to dispute that under existing doctrine, the individual mandate, which is what is principally under challenge in the courts, is okay. I fully agree with Richard's conclusion, and that disposes of a lot of what I was going to say. But he goes on to say that this is not part of the original understanding. One thing on which I would differ with Richard is that there *is* someone on the Supreme Court who takes his view, and that is Justice Thomas, who wrote a long opinion in the Gun-Free Schools Zone Act case, saying that the purpose of the Commerce Clause was to grant only the power to regulate interstate matters, i.e., things traveling from one state to another, or transactions and the actual transfer of goods between states. Justice Thomas contends that the clause does not apply to agriculture, mining and manufacturing, and therefore it certainly does not cover one person buying health care. Richard quite candidly, and Justice Thomas clearly, concede that they would invalidate, if not the whole New Deal, a great chunk of it. That is truly a dramatic position.

Let me add this. I do not pretend to be someone who has carefully studied the history of any of the grants of national power. Of course, like anybody else in the field, I have read of it. I come to the conclusion that not very much can be proven specifically about the history in most instances. And even when you can do so, this approach to constitutional interpretation may interfere with certain other judicial values considered at the time of the Founding. Let me just leave it that vague for the time being.

I don't think that you can simply say, as Justice Thomas argues, that the original intent does not apply to matters that occur wholly within the borders of a single state, but rather that the activity must cross state lines. Interestingly, Richard argues that one of the major purposes of the Commerce Clause was to give Congress the power to remove state-erected impediments to a national economy. I agree, and I think the originalist understanding was that there was more to it, and that the provisions of the Virginia Plan were part of the Constitution.

Even this generation of distinguished constitutional historians—Jack Rackove at Stanford is one—take the view that original understanding was that the power of Congress was to extend to matters of national import in respect to which the states were incompetent to deal. Economists have a name for that now: collective action problems. I have always believed that if there were an effective judicial criterion to enforce the limitation on congressional power versus states rights, it would be that. But my long-held position has been that there should be no judicial review of the consitutionality of the scope of national power versus states rights because, for a number of reasons, states are well represented in Congress, and they do not need the Supreme Court to come to their defense.

But put that theory aside. It seems to me, for example, that the Court could well have ruled that the Gun-Free School Zones Act did not regulate a subject on which the states are incompetent to deal—i.e., the problem of guns in schools. I forget how many states, I think well over twenty, had laws very much like that which Congress passed in the Federal Act. I would have said: it is nonjusticiable. Nonetheless, if there had to be a judicially manageable criterion, I would have agreed on that one.

But the health care problem is one over which the states plainly are separately incompetent to deal. It presents a collective action issue for a number of reasons. The most obvious is that, if a state were to undertake the expense of enacting one of these statutes, it would be costly economically and would usually make the state less economically competitive. Anyone who lives in California knows that that this sort of situation is one of the great political issues in the state, that is, whether California, through its various systems of regulations and taxes, has become inhospitable to businesses, and that we are attracting and retaining fewer businesses than we would otherwise. I am confident that there is some truth to that.

But how true it is does not make a real difference. The fact is that there is a perception that a state that on its own undertakes an individual mandate will economically disadvantage itself. As everyone knows, Governor Romney proposed a plan similar to the national health care law in Massachusetts. They are living with it, although how well no one knows. But Kentucky enacted one and abandoned it after a very short time. Why? Several insurance companies left the state, and it became very unpopular. Kentucky did not want to be there by itself. This is very much like minimum wage laws in the first third of the 1900s. There is a substantial deterrent to enacting a minimum wage law because it raises the cost of goods, it raises the cost of doing business, and makes the state's goods less competitive.

Indeed, not only is it more difficult to sell the goods across state lines, there is greater difficulty selling them in the home state because more cheaply produced goods will come from someplace else. It is a pretty simple proposition, which we see all the time at a national level—the low cost of doing business abroad takes business away from this country.

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Another reason that this directly involves commerce between the states—one that I am usually not a big believer in, but I am so far as health care is concerned—is that people are going to have a powerful incentive to move to those states that will give them health care of one sort or another if other states do not do it. And most other states are not going to do it. Virtually none have done it on their own because they are hesitant to do so.

For these reasons, it seems to me that even under the original understanding, this is plainly within the Commerce Power. It is a classic illustration of a situation of transportation across state boundaries. And beyond that, no one disputes the fact that this matter has a substantial effect on interstate commerce. If you take seriously—it need not even be very seriously—the notion that something that goes on within the borders of a single state may have ramifications in other states, this is one. Forget *Wickard v. Filburn*. For me, health care is powerful in respect to that particular principle, and I would not be surprised if there were as many as seven or more votes to uphold this provision when it gets to the Supreme Court.

Finally, there is an argument that a state could not have an individual mandate because it violates the Due Process Clause. But this is certainly quite a stretch under existing doctrine. Moreover, it seems to me to be more than that. I believe that this view is antithetical to the basic position of judicial modesty and restraining the power of judges that its proponents especially adhere to. This is the other constitutional issue that I was prepared to spend some time on.

I can answer Richard's points about what he says are the policy problems related to the health care law very simply. It may well be true that the better policy way of approaching this is by stopping federal regulation. I am no great fan of federal regulation. I do not want you to misunderstand that. Indeed, I am no fan of state regulation, but that is not the issue.

The issue is what is constitutional. In my judgment, whether or not Congress chooses the right way or the wrong way to deal with a matter that it believes the states are separately incompetent to deal with, is up to Congress and not the Court. To me, that is true as a matter of original intent. Economists could debate the best way to deal with problems like this for a long time. But that is why we have the democratic process.

Endnotes

1 317 U.S. 111 (1942).

2 301 U.S. 1 (1937).

3 514 U.S. 549 (1995).

4 22 U.S. 1 (1824).

5 The Passenger Cases, 48 U.S. 283 (1848).

6 U.S. Const. art. I, § 10.

7 156 U.S. 1 (1895).

8 175 U.S. 211 (1899).

9 U.S. Const. art. IV, § 3, cl. 2.

10 Pure Food and Drug Act, 34 Stat. 768 (Section 1): "It shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act"; for discussion, see Arthur P. Greeley, The Food and Drugs Act, June 30, 1906 (1907) (on Google books). Section 2 dealt with the shipment of adulterated or misbranded drugs across national and state lines.

11 34 Stat. 768 (Section 2).

12 188 U.S. 321 (1903).

13 Stone v. Mississippi, 101 U.S. 814 (1879).

14 247 U.S. 251 (1918).

15 Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

16 Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (Section 301).

17 NLRB v. Jones & Laughlin Steel Corporation, 83 F.2d 998 (5th Cir. 1936); Fruehauf Trailer Co. v. NLRB, 85 F.2d 391 (6th Cir. 1936); NLRB v. Friedman-Harry Marks Clothing Co., 85 F.2d 1 (2d Cir. 1936).

18 315 U.S. 110 (1942).

19 Richard A. Epstein & David A. Hyman, Controlling the Costs of Medical Care: A Dose of Deregulation, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158547.

20 Atul Gawande, *The Cost Conundrum: What a Texas Town Can Teach Us About Health Care*, New Yorker, June 1, 2009, *available at* http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande.

21 247 U.S. 251 (1918) ("The health of children in competing States was injuriously affected by the interstate transportation of child-made goods. Thus, if one State desired to limit the employment of children, it was met with the objection that its manufacturers could not compete with manufacturers of a neighboring State which imposed no such limitation. The shipment of goods in interstate commerce by the latter, therefore, operates to deter the former from enacting laws it would otherwise enact for the protection of its own children.") (unpaginated).