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AALS Hot Topic Panel Question & Answer Session

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PROFESSOR JOONDEPH: We would now like to open this discussion for questions, and I will be repeating them for purposes of the podcast.

AUDIENCE QUESTION: I have a question on economic activity. Erwin suggested that Randy was implicitly relying on a transaction test for activity and that something was economic activity only if it involved an economic transaction. So I'd like to ask Randy whether or not that is, in fact, an implicit premise of his argument. The second question relates to the idea that framing is important. The question is whether or not the approach that any framing for which Congress could have a rational basis is consistent with the outcomes in *Lopez* and *Morrison*, given that Congress could rationally have seen *Lopez* as about the economics of education at large, and given that in *Morrison* they could have seen the statute as framed in relationship to the economics of women's role in the economy and their ability to use transportation and travel freely.

PROFESSOR JOONDEPH: The first question, to Randy in particular, is whether, under his view of "economic activity," that category only includes activities involving an economic transaction. And the second question is to everyone: whether the rational basis test really applies across the board in light of *Lopez* and *Morrison*.

PROFESSOR BARNETT: No, transaction is not a word that enters into the doctrine at all; activity is the word that's used time and time again in every single case involving this sort of thing. In the case of *Raich*, Angel was certainly engaged in activity when she possessed medical marijuana and when she used it and when it was grown for her. It is not all that difficult a distinction to make. In fact, we make it all the time. I realize that, as law professors, we're used to questioning the act-omission distinction, the difference between doing something and not doing something. It's something we're accustomed to doing in class, but in the real world, we make this distinction all the time. It's really essential to moral responsibility. We're responsible for what we do; we're not responsible for what we don't do unless we have a pre-existing duty that we must do something.

So, that is a pretty fundamental distinction. It's the difference between telling Angel that she cannot engage in an activity–the activity of cultivating cannabis for her own use–and telling her that she must grow cannabis for her own use. I think you have to go to law school to

not understand this distinction. Even the Supreme Court should get this one.

That's the first thing I would say, and then I would use that as a springboard to something that Gillian said about the military draft. She said, "Well, of course we've mandated activity before–we can draft you." Well, stop and think about the implications of that argument. Because Congress has the power to draft you to defend the country, they have the power to make you do anything else that they wish you to do as long as there is a rational basis for thinking it's related to the regulation of the national economy? Seriously? Do you believe that?

Drafting you into the Army is really the functional equivalent of enslaving you, and there is a prohibition against that in the Constitution. So what was the way around that? When this was litigated, what did the Supreme Court say was the reason why the Thirteenth Amendment did not apply to the draft? The answer the Court gave was that there is a fundamental duty of citizenship to defend the country in return for the benefits and protections the country affords you. It's a fundamental duty of citizenship. So, it's an exceptional power that they have. There are very few such duties that American citizens owe to the government. Part of what defines us as American citizens is the fact that we have a limited number of duties to the government that are essential to our citizenship.

If this principle is recognized and accepted as law, it will mean that as a citizen you owe a duty to Congress to do anything that Congress has a rational basis for thinking is necessary for the regulation of the national economy. And that is a very sweeping claim of power indeed. That's one of the reasons why it's never been done before.

And I just want to make one further clarification. Erwin offered a very nice summary of the arguments that would be argued in the Supreme Court opinion, but there is one little mistake in what he said. You can decide for yourself who is right about this, but I don't believe that, under the *Raich* test, Congress can do something if it rationally *believes* that it is regulating economic activity. I think *Raich* says that Congress can do something if it has a rational *basis* for regulating economic activity. It is still a judicial matter as to whether something is economic activity or not. The Court will not defer to Congress to determine whether it's economic activity, only whether there is a basis for regulating it if it *is* an economic activity. It's a small disagreement, but I think some of Erwin's argument turns on it.

PROFESSOR METZGER: On your second question, whether or not one of the things we are seeing in *Lopez* to *Morrison* to *Raich* is an emergence of how we are going to do the economic activity analysis, and

whether we could go back to *Lopez* and see that as having actual economic activity there. That is a question people have argued and debated. The more important point is that the Court has made clear that economic activity remains an overall limit, so the scope of the regulation and the nature of the activity matter. And as Randy mentioned, the Court is going to do an independent assessment of whether the nature of that activity is economic or not. So, going back to your point about *Lopez* versus this case, I do not think that there is any doubt that the overall context here is one of economic activity, whereas in *Lopez* the Court rejected the idea of an educational effect as being enough to create economic activity. The other thing that was different about *Lopez* is that you did not have this very broad regulation and activity as a whole. As Professor Oedel alluded to in his remarks, the provision is just one part of an incredibly elaborate bill, and I think that matters for how the Court copes with the question of the level at which you judge the scope of congressional regulation. Those are obvious distinctions between the two cases.

Professor Barnett, on your point about the draft and that there is no limit to what the government can require you to do if they can require this: it cannot be that only law professors could ignore the act-omission distinction, and I think that only law professors could come up with some of the absurd hypotheticals that have come up in this area about things Congress might do as showing the need for this kind of limit because otherwise all hell will break loose. I resist these hypotheticals for a variety of reasons, one of which is that Congress is not doing some of the extreme measures that have been articulated–like requiring individuals to buy GM cars and eat our vegetables and so forth. And it is not doing that for a very important reason that has nothing to do with activity and inactivity. Congress could mandate that, if you are going to buy a car–that is, engage in activity–you must buy a GM car. Congress is not imposing that requirement in large part because of political constraints, and we should not ignore those because they are quite potent. In addition, there are individual liberty constraints that have been recognized under the Constitution–protections against intrusions into bodily control and individual liberty. So, there are absolutely limits on Congress here that matter.

The key point is that the activity/inactivity limit really does not work. It is not much of a limit at all. I also do not think that it is one that the Court is going to go off on. Most likely, the Court is going to take the broader framing and see this as actually a part of regulation of economic activity–even though I think that if the Court reached the question, it would say that Congress could regulate inactivity.

DEAN CHEMERINSKY: Let me try to address both parts of the question. In response to the first, once it is conceived that economic activity does not require a transaction, then the broad definition of economic activity shows that this clearly fits within the scope of Congress's Commerce Clause power. Once you raise the status that growing marijuana for home consumption is regarded as an economic activity, then surely the economic transaction of purchasing, or the economic decision not to purchase, health care insurance fits within economic activity.

Imagine that it costs $100 a month to either buy health care or pay the penalty. The choice of whether to spend that $100 for health care is an economic choice, which fits within the broad definition of economic activity. Or another way to think of it is to imagine if Congress had decided to have a national health care plan–a single-payer plan–and raised everyone's taxes by an amount necessary to pay for that. Is there anyone who would doubt that Congress would have the authority to do that? Well, Congress has essentially done exactly the same thing here by requiring everyone to purchase health care or pay an amount of money that can easily be seen as a tax, so as to subsidize it.

It is here that *Johanns v. Livestock Marketing Ass'n*[175] becomes important. That is the case where Congress said that everybody who produces cattle has to pay a $1.00 per head fee, and this was challenged as unconstitutional. The Supreme Court said Congress could impose a tax just on cattle, and if Congress wants to then spend that money for advertising for beef consumptions, it is permissible. This seems to parallel the health care legislation.

Now, the second part of the question. Professor Barnett and I have a slight disagreement over how Justice Stephens is using the rational basis test under the third prong of the *Raich* test. I think what the Court is saying here is, so long as Congress has a reason to believe, a rational basis to believe, this economic activity has a substantial effect on interstate commerce, then Congress can regulate it. I think what *Lopez* and *Morrison* stand for is the proposition that those situations were too attenuated for economic activity to fit even within the rational basis test. A gun near a school seems too far away from economic activity. Sexual assault is too far away from economic activity. But this, as I said, is a trillion-dollar industry.

Now, keep in mind, *Lopez* and *Morrison* are 5-4 decisions, *Gonzalez v. Raich* is a 6-3 decision, and what we have in *Gonzalez v. Raich* is that some of the dissenters from *Lopez* and *Morrison* now are in the majority,

175. 544 U.S. 550 (2005).

so it is not surprising that *Gonzalez v. Raich* has the rational basis language that *Morrison* and *Lopez* do not. But it is a language that precedes *Raich*; it goes back to much earlier cases, and I think the Court would say Congress can certainly reasonably believe this is within the scope of Congress's authority.

PROFESSOR OEDEL: Far be it for me to take issue with one of our leading constitutional case scholars. I use Erwin's book in my constitutional law class. However, I do want to take issue with a couple of things that I think are factually problematic in Erwin's citations. I think these factual details are meaningful for our present purposes.

Erwin said that Roscoe Filburn was just growing wheat on his farm and that it was just an activity that is almost like inactivity, economically speaking. Actually, if you look at the factual record in the case of *Wickard v. Filburn*,[176] Roscoe Filburn was taking subsidies from the agricultural price support program. He was looking to get handouts from the federal government and then also wanted to go over the allotment to raise wheat above the agricultural limit that he was supposed to reach. Erwin also said that after Title II of the Civil Rights Act of 1964 was passed, people who were engaged in providing public facilities were required to serve all people. Well, that's true, but that's only true for people who are engaged in that activity. As a factual historical matter, the guy who lost the case of *Heart of Atlanta Motel*,[177] guess what he did after that case? He shut the Heart of Atlanta Motel down. He, a reprehensible fellow no doubt, chose to be outside of that activity, but he was not required to go ahead. I think there's a mischaracterization going on of the actual cases that we're looking at.

PROFESSOR JOONDEPH: And the next question?

AUDIENCE QUESTION: I'm interested in what role, if any, the word "regulate" in the Commerce Clause plays, either as a limit on federal power or as a justification for federal power. Everybody uses the word here in passing, but there hasn't been any focused attention on what role the meaning of the word has in the larger question you're debating.

PROFESSOR JOONDEPH: So the precise question concerns the import of the word "regulate" in Article I, section 8, clause 3.

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176. 317 U.S. 111 (1942).

177. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

PROFESSOR BARNETT: As a matter of doctrine, it has very limited implications. The reason is that, even though the original core meaning of the word "regulate" was to make regular or to subject to a rule, it has also been, from the very beginning, thought to include a power of prohibition as well as regulation. In fact, Madison used the phrase "prohibitory regulation." It shows that the word "regulate" basically does include prohibition because you have to add prohibitory regulation to it. But, nevertheless, that's part of it.

Second, almost nobody thinks, with respect to the mandate, that Congress is directly exercising its power to regulate commerce among several states, which is what it is doing under *Southeastern Underwriters*[178] when it is regulating the insurance company by telling it how it should go about doing its business. Here, Congress is purporting to reach activity that is *not* commerce among several states, but which it claims it may reach because it is "necessary" to regulating commerce, even if this may not itself fit the definition of "regulation." I just don't think that, under the current doctrine, the meaning of "regulate" has much bite.

PROFESSOR JOONDEPH: Next question?

AUDIENCE QUESTION: We all use the roads and the instrumentalities of interstate commerce, but would Congress have the power to require us each to spend 100 hours a year working on the roads under the commerce power? This is somewhat in relation to Randy's distinction of this mandate from the draft.

PROFESSOR JOONDEPH: The question goes to extending the logic of this argument and whether Congress could force all Americans to work on the nation's roads.

PROFESSOR METZGER: My short answer to that is going to be, to the extent there is any limit on Congress's ability to do that, it clearly is not about activity, because, as you said, we all use the roads.

AUDIENCE QUESTION: It would not be economic activity?

PROFESSOR METZGER: Right. I assumed you were focusing on forcing individuals to work on the roads. It is connected in that way to activity, so that is not what is doing the limiting. There are plenty of

178. United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944).

things that we could call upon to prevent that. A big one is political checks. I think there are actually very potent political checks against that being required, one coming in the form of unions of highway workers, so I am really not too worried about that one. But, you know, we have the political checks. We also have individual liberty protections. Those kinds of questions really show the point that Professor Chemerinsky made about understanding the liberties that are actually at stake, and maybe we should focus our attention on those issues rather than on these questions of congressional power.

DEAN CHEMERINSKY: I am going to echo Professor Metzger. I do think, as we always teach our students, that there are two separate questions here. One is whether this is within the scope of Congress's power, and second, does it violate some constraint, some liberty interest? I think what is really animating your question is the latter. The sense is that we should have a liberty interest in not being forced to work on the roads. As a matter of congressional power, I think this is an easy question without ever getting into the Commerce Clause. If you look at the law that created the interstate highway system, it was actually done by Congress as part of national defense. The title of the Highway Act includes national defense. If Congress wanted to say that, in order to get the highways ready for national defense, we need to have work on the infrastructure done, and it is the Necessary and Proper Clause that provides a way of doing that, or Congress's ability specifically under a different clause of Article I section 8 to provide for roads and post offices, I think Congress under the Necessary and Proper Clause could do so.

Now, I am, like Professor Metzger, not troubled by that hypothethetical because the political realities would keep it from coming about, but it does animate the question, like it animates so much of the objection to the federal health care law as a liberty interest that I do not think would work as a successful basis for challenge either.

PROFESSOR BARNETT: I want to say a little bit about the political constraints in the context of the tax power theory. There is a lot to be said about it, and more than I can say now, but it is generally true that the principal constitutional constraint on the exercise of the tax power is political. But for the political constraints to kick in, there must be a clear exertion of the tax power that would then draw political attention to the fact that it's being exercised, and that would provide the political constraint. This is not simply putting a burden on Congress to somehow have a clear statement generally. Rather, if you are going to rely on a political constraint, you've got to have the assertion of the power. In this law, none of the rationales that were given for this power were tax-

power related. They were all regulatory. They all dealt with the Commerce Clause.

Other provisions of the bill, as Gillian noted, are called excise taxes; this wasn't one of them. And in a very important part of the bill–which was very important to Congress because it had to do with how you scored the bill for purposes of the CPO so you could get its costs under a trillion dollars–there is a listing of all the revenue provisions of the bill. But the money that would be gained by the penalty is not listed among the remedy-raising provisions of the bill. There is a substantive definition, and a modern one, by Justice Souter that distinguishes between a "penalty" and a "tax." This particular measure fits Justice Souter's definition of a "penalty," which is a sanction imposed for the failure to perform a duty that exists, or a legal duty, which is what this really was. So, the "penalty" enforcing the mandate is not a tax, based on the substantive definition of a tax, and the fact that it wasn't clearly identified as a tax, together with *why* it was not clearly identified as a tax: precisely to avoid political accountability for having exerted the tax power because doing so would have violated the President's pledge not to raise taxes on persons making below $200,000. The President had some interest in not violating that pledge, as did the other senators who drafted this bill. As you know, on television the President denied this was a tax in response to George Stephanopoulos's challenge that he had violated his pledge, to which he replied, "No, I haven't. It's not a tax." So, if the principal constraint on the tax power is political, then it does make a difference whether this is called a "penalty" or a "tax."

Finally, in every one of the New Deal cases and the post-New Deal cases that upheld the use of the tax for regulatory purposes, Congress was expressly asserting its tax power. In these cases, the Court stated that it would not look behind an expressed assertion of the tax power to see whether Congress had a regulatory purpose beyond its powers to regulate. By the same token, the Court will not look behind an assertion of a Commerce Clause power to state that the measure *could have been* recast as a tax precisely because doing it this way evades the political constraint on the tax power, which is the only constraint that exists.

PROFESSOR JOONDEPH: Next question?

AUDIENCE QUESTION: First, if a so-called tax is set at such a high rate that it passes the optimal revenue rates, so it's actually revenue-depleting in its terms, would that still count as a tax? It can have a regulatory purpose, but if the amount that you pay is above the optimum revenue rate, wouldn't that just be a clear regulation? Second, if this is

a tax, is it a "direct" or "indirect" tax? It doesn't look like the normal excise tax. It's not clear what transaction is being taxed. And if it's a direct tax, is it apportioned? Obviously, the answer to that is no.

PROFESSOR JOONDEPH: The first question, if I've understood it correctly, is whether a tax rate that everyone admits is higher than necessary, and indeed so high that it reduces the revenue generated by the exaction, is really a regulation and not a tax. The second question is whether such a tax, if it is a tax, is a "direct tax," and therefore subject to the apportionment requirements set out in Article I.

PROFESSOR METZGER: Your first point relates to the idea of whether a punitive rate, among other things, can show a tax to be regulatory. And you are right, that does matter. When you look at the case law on the tax power, what has emerged as, perhaps, the most instructive case in terms of whether or not we look behind a measure's being called a tax is the *Kurth Ranch*[179] case. *Kurth Ranch* involved a state measure that was called a tax, and the question was whether or not it was really a criminal penalty sufficient to trigger double jeopardy. And the punitive amount of the penalty was one of the factors that was emphasized there. So, you are right, that does matter.

But the key point is that the inquiry is into whether what is going on is an effort to avoid constitutional protections by circumventing criminal procedure protections by calling something a tax which is really a criminal penalty. The fact that it is called a tax does not matter and underscores my point that labels have not been definitive here. In terms of regulatory purpose as a whole, I think the Court has said in the *Bob Jones* decision, any distinction we used to have between regulating and regulatory taxes is cast aside.[180]

In terms of direct apportionment, after you look at the case law about what is a direct tax, this really does not fall into that box. Going back to very early on, in 1796, in the *Hylton* decision,[181] the Court read direct tax quite narrowly as including only a capitation tax or a tax on real property, and then expanded it in the *Pollack* case to include personal property.[182] But it has never been read to apply to taxes beyond that. This is not that kind of a tax. This is not a tax on people because they exist; this is a tax on an event, the decision to forego insurance. There are also many exemptions for people who do not have

179. Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994).
180. Bob Jones Univ. v. Simon, 416 U.S. 725, 741 n.12 (1974).
181. Hylton v. United States, 3 U.S. 171 (1796).
182. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

insurance, yet are not liable for the tax for a variety of reasons. As the provision is neither a capitation tax nor a tax on property, I do not think the apportionment requirement is an issue.

I want to respond briefly to the point that Professor Barnett made about political constraints and the importance of policing Congress. First, I think there is much more evidence in the record that Congress intended to use the tax power here than the opponents and the district courts have acknowledged. I love this use of the President's statements to determine a congressional intent, but more importantly, there certainly are also statements by members of Congress invoking the tax power. The bigger issue here, however, is the jurisprudential one about requiring it to invoke the basis on which it acts. Again, there are ways of limiting Congress that involve objectively assessing whether or not something falls within a power that do not involve this kind of second guessing of a possible basis for valid enactment. The clear statement requirements that courts have used in the past have been used to narrow the scope of an enactment. They are not used to question whether or not it comes under a particular basis. So, I think the effort to use a clear statement requirement here would be a dramatic change from how such requirements have been used in the past. It is something that could be imposed; but, again, given the case law holding that labels are not determinative and no requirement of a clear statement so far, it would be a change in existing law.

PROFESSOR BARNETT: I want to move to category three constitutionality, whether there are five votes. I'm moving away from the others on the tax power question. My view is that if there are five votes to uphold this law, it will never be on a tax power theory. It will be under a (unintelligible) theory. One reason I feel confident about that is they have Erwin's theory they can use, so they don't have to go to the tax power. And why would they not want to do that? For the first time in American history, Congress would have the power to mandate or compel and actually order Americans to do anything at all as long as it limits the sanctions of a monetary fine that is collected by the IRS. It would be essentially unlimited police power that would be subject to no constraints whatsoever. I can't imagine the Court willing to go down that road if they have five votes. If they have a theory of a kind that Erwin said, which I think has its own problems, and obviously I don't agree with it, but given the availability of that, I can't believe they would do that. If they were unpersuaded by Erwin's theory, I don't think they will be persuaded by the tax power theory. I think it's a very good reason why even the lower courts that turned away the challenge have rejected a tax power theory. I just predict that's what will happen under

category three, rightly or wrongly.

DEAN CHEMERINSKY: If there is any place where the Supreme Court since 1937 has been very deferential to government at all levels, it is when it comes to taxing and spending. Let me address the first part of the question. If the tax is greater than what is necessary for revenue, will it then be deemed a penalty? I think what the Court is likely to say is, the line at which the tax generates more revenue than is necessary and becomes a penalty is one in which there has got to be great deference to Congress. How is the Court going to ever calculate how much health care is going to cost in the United States? In *United States v. Butler*,[183] which even precedes the change in the Court, the Supreme Court says Congress can tax and spend so long as it believes it serves the general welfare.

As to the second question, whether it is direct or indirect, I agree with what Professor Metzger said. Imagine that Congress said the following: "Everyone is going to need health care in their life. We want to make sure that everybody has health insurance. Therefore, everybody must pay a tax if we are going to subsidize the program, but if you purchase your own health insurance, you can opt out of the tax." Wouldn't that be constitutional? If that is constitutional, then isn't this, as Professor Metzger says, just a choice of the labels to be used? I do not have a prediction on whether the Court is going to uphold this under the Commerce Clause or the taxing power. I think that in both instances the precedents are clear that Congress can do this and it fits within the scope of federal authority.

PROFESSOR BARNETT: I just want to say, and maybe we'll end on a point of agreement here, that if Medicare is constitutional, then Medicare for everyone is constitutional. I don't think there is any question under existing doctrine, that if Medicare, a tax and spending program, is constitutional, then putting everyone into a Medicare program is constitutional. Perhaps extensions from that program could be put into effect of the kind that Erwin described and as some people favor, for example, Social Security. But Congress would have to do that. Erwin calls these mere labels, but I don't think that they are mere labels. I think the Constitution has certain rules, and Congress has to follow the rules, and particularly when there are ways for Congress to accomplish its purposes under the rules, they need to follow the rules for doing so. Why? Precisely because of the political constraints Gillian is

183. 297 U.S. 1 (1936).

talking about. And why didn't they? Because there were not the votes to adopt a Medicare-for-everyone program. Most of my colleagues who are health care regulation advocates wanted Medicare for everyone. They wanted a single-payer plan, but there were not the votes for that, so Congress decided to go this way. Instead of taxing the people, as Medicare does, Congress decided to make people give their money directly to insurance companies for the first time ever.

Let me just close on a thought experiment. If this had never been done before, if the American people as a whole had never been mandated to engage in economic activities under the Commerce Clause power, each and every one of you in this room would be aware of that fact because you would know about the economic mandates to which you must conform your conduct. You all are witnesses to the fact that there are federal mandates. You know you have to file a tax return and sign up for Selective Service, and you know you might have to respond to a census form. But other than that, you don't know of any economic mandates on yourself or that have ever been imposed on your parents or your grandparents. That's the sense in which I mean this is unprecedented. Can the Supreme Court uphold this for the first time ever? Well, they've upheld expansions of power, and maybe there are five votes to do so this time. But they would be doing something new and different, and they would have to do so knowingly. I suspect that there are not five votes to do this because the doctrine has never been stretched this far. They are certainly not compelled to allow this the way they would be by the doctrine, for example, that allows Congress to regulate the insurance companies, which I remind you has not been challenged by anyone in this litigation.

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