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# Debating ObamaCare

By [Jennifer Rubin](#)

Last night in the Commonwealth Club a jammed-packed crowd heard a debate on the constitutionality of ObamaCare's individual mandate between Laurence Tribe and Cato Institute's Roger Pilon. (The debate was ably moderated by my former law school dean, Boalt Hall law professor Jesse Choper.)

It was both revealing of the left's arguments and instructive for the right in distinguishing between judicial argument and philosophical debate.

Tribe's argument was standard fare: You must use the healthcare system. It's commerce. Congress can regulate interstate commerce. It's constitutional. And if you don't like that there are an all-purpose Necessary and Proper clause and the taxing power.

This argument has been rejected by the 11th Circuit Court of Appeals. As a preliminary matter, the Obama administration disclaimed that the individual mandate was a tax. So forget that argument. Moreover, Tribe never seriously addressed the key point raised by the court's majority opinion in the 11th circuit: If you can force people to buy healthcare, what limit is there on government power?

Here liberals are stumped. "But you have to use healthcare," Tribe says. And your not buying healthcare insurance affects everyone else's cost of healthcare. (The later argument is achieved by exaggerating the cost of the uninsured.) Pilon said tersely, "You must buy food, shelter, clothing." And of course he is right. There is no difference between being forced to buy healthcare insurance or being forced to buy a car, for example, to help the UAW. Here the left's failure to understand markets is a hindrance. It's not just the cost of healthcare that may be affected by others' decisions; everything is. Take a look at the housing market if you doubt it.

As for Pilon, he was not making an actual legal argument, or at least one that the opponents of healthcare will make if the cases reaches the Supreme Court. His is an expression of philosophical frustration: In the New Deal the Supreme Court stopped paying attention to the Constitution and the jurisprudence that followed is all wrong. Go back to the Constitution. ObamaCare would have made the founders retch. Case closed.

That's an appealing argument for the right. It might even be correct. But not a single member of the Supreme Court buys that. It's not going to be the argument presented by the ObamaCare opponents' lawyers.

Conservatives should understand, as Pilon illustrated, the difference between an historical/philosophical argument and one that is within the realm of reality, one that can influence the court. Pilon and Tribe in a sense were talking past one another.

But will conservatives *win*? Afterwards, a prominent former Justice Department lawyer commented to me, “If we don’t win this, what’s the point of the last 30 years?” By that he meant, for decades conservative jurists have striven to change the terms of legal debate, to revive the 10th Amendment, to give meaning to limited government, to uncover the real meaning of the Second Amendment. In a real sense the ObamaCare case is the culmination of this. If that is lost, what do conservatives have to show for their decades-long struggle? Well, some expansion of prosecutorial and policing power and some interesting 10th Amendment cases, but that’s about it.

As always, the decision is likely to come down to Justice Anthony Kennedy. It’s not easy to discern where he would come down. To the extent he worries about a popular blowback if the court invalidates ObamaCare, he can put his mind at ease. The individual mandate according to an Associated Press poll in August is opposed by [82 percent](#) of Americans. In other words, Kennedy and the rest of the justices can do their job and — lovers of limited government hope — decide there are some things Congress can’t force you to do.

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