Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, President and CEO of The National Constitution Center, and welcome to We the People, the weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

This week, The Supreme Court heard oral arguments in California v. Texas, The Affordable Care Act case. On today's episode, we'll recap the oral argument and explore whether or not the ACA will survive its latest legal challenge. I'm joined by two of America's leading experts on The Affordable Care Act and The Constitution.

Abbe Gluck is Professor of Law and Faculty Director of The Solomon Center for Health, Law, and Policy at Yale Law School, as well as Professor of Internal Medicine at Yale Medical School. She's the author of many works, including The Trillion Dollar Revolution: How The Affordable Care Act Transformed Politics, Law, and Health Care in America. She filed an amicus brief on behalf of the petitioner, California, in the case. Abbe, it is wonderful to have you back on the show.

Abbe Gluck: [00:01:09] Thanks for having me, Jeff. It's great to see you again.

Rosen: [00:01:12] And Ilya Shapiro is Director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute and publisher of The Cato Supreme Court Review. He's the author of many publications, including, most recently, his new book, Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court. He filed an amicus brief on behalf of individual petitioners, in this case. Ilya, it is always wonderful to have you on the show.

Ilya Shapiro: [00:01:39] Good to be back, Jeff.

Rosen: [00:01:41] Let us jump into the question that the court began with, and that is the question of standing. Ordinarily, it's a technicality that we shy away from at the top of We the People, but the chief justice jumped right in and quickly both sides were talking about the theory of standing by inseverability. Ilya, disaggregate. What is the theory of standing by inseverability, and how did the court seem to respond to it?

Shapiro: [00:02:07] Right, well, the, the reason this is important is because, of course, the court doesn't issue advisory opinions. There has to be a live case or controversy. People coming into court have to actually be hurt by the government action, or, or law that they're challenging. And so here, this is why it's important that my brief supports only the individual petitioners, because there's two different theories of standing going on here. First, the individuals, Neil Hurley and John Nance, who argue that, that they are subject to the mandate even if there is a, a zero, tax or, or penalty attached to it, because they, by law, have to comply. And that's, that, that hurts them and the, the, the mandate, still applies. It's not theoretical. It's not going into effect, in the future.

more broadly, Texas, the lead, petitioners, in this case in a group of states, argue that, the mandate causes them to, expand their, paperwork, filings and, and other, costs associated with, enrolling in

Medicaid and, and other technical, issues. So the, a lot of the discussion here was, first of all, whether you can have standing if there's no enforcement mechanism. Because, again, this case is different than what the court took up eight years ago, because Congress in the interim zeroed out that tax on which John Roberts, justified his, his, taxing power, justification for the individual mandate. And so if you do not comply with this provision that, requires the purchase of insurance, there is zero tax, zero penalty. The IRS won't go after you. Nobody can, go after you, and nobody can go after the state.

So there was a lot of questions, for example, right off the bat, from Chief Justice Roberts and, and Justice Thomas, of the California solicitor general, asking what if Congress passed a law requiring everyone to mow the lawn once a week, but with a zero dollar fine. Would anyone have standing to challenge it? Or Justice Thomas asked, more topically if there was a mask wearing mandate with a zero dollar fine or tax attached, would anyone have standing, to challenge that?

And then the government, the solicitor general, came in and had a kind of more complicated argument about standing, not that the mandate, hurt anyone, but that the mandate was, because it's inseverable, inextricably connected to the rest of Obamacare, to the rest of The Affordable Care Act, and the rest of that law hurt, people and states in various ways, they had standing, to challenge it. So, I think this is, might be the closest issue of them all, and probably, the newest justice, Amy Coney Barrett, is going to be the, the deciding vote on this, on whether anyone, whether the states, the individual petitioners, or anyone else, has standing on this.

Rosen: [00:04:47] Thank you so much for that, and thank you for explaining the two theories of standing. One is that people are hurt by having to obey a law, even if it's not enforced, and the second is that they're hurt by other parts of a law that become unconstitutional but can't be severed, and that's the theory of, standing by inseverability. Abbe, what can you say about the justices' reaction to both of those cases, and in particular, Justice Breyer seemed to get rather exercised, for him, about the standing by inseverability argument, suggesting that lots of laws have kind of hortatory provisions, like mow the lawn or celebrate goodness, and many of them would become unconstitutional, according to this theory.

Gluck: [00:05:29] Yeah, great, so let me say a few things about that in res- in reaction to Ilya. I think that it was interesting that the entire California solicitor general's argument time was taken up by standing. I think people were surprised by that.

some people asked, why would the court be spending this much time on standing? Why is that so important? Well, obviously it's a threshold issue that the court has to pass before they can, get to the merits. But also, you know, if you think about this case and all the different principles that are at stake, the standing questions have a lot of staying power. The Affordable Care Act, some of these questions may be unique to The Affordable Care Act, or relatively limited on facts. But these questions about standing are pretty important and have longterm implication. The standing of the states in Supreme Court is a controversial topic. The court cares about that. And the standing by inseverability thing is very important.

So, let me just break that down and go to Justice Roberts. So, with respect to the individuals, I think Ilya characterized it well. The question is sort of can you be harmed by something that's not enforced? Chief Justice Roberts asked a really interesting question. if you don't buy health insurance and you have to check the box on an employment form, did I ever violate a l- not obey a law, do you check yes or no? And if you check yes, is that some kind of harm? So that's a really interesting way of putting it.

then there's this question about this inseverability argument, and Justice Thomas, I think, was out in front on that and, you know, with these telephonic arguments, he's, he's really active, so it's, it's really, great for a court watcher to see another justice's voice in the mix. And, you know, he's someone who doesn't lo- who has expressed reservations about severability in the past. He went right in and said severability's a doctrine of statutory interpretation. It's the merits. It's not about standing. You could be expanding enormously the number of cases that could be brought into federal court if you allow a litigant to say an entire statute is tied together in a tight ball, so I can challenge any piece. I can be harmed by any piece of it, as long as there's some viable constitutional challenge to another piece.

And, you know, he really characterized that as being extraordinarily aggressive, interpretation of standing and would really open the floodgates, they kept using the word floodgates, to litigation in the federal courts.

And I think Elena Kagan said something also really interesting on that [inaudible 00:07:59]. She said look at the modern context of legislation. We have tons of omnibus laws. If we adopt your theory of standing, we're going to be inviting litigation on virtually anything. You could be harmed by section 25 and bring it, and there's another challenge on section 1000. You can just run into federal court. So she really brought in the modern lawmaking context.

Now, Justice Breyer, what was going on there? He got, unusually upset, for him. He's very even keel. I think most people would not have even realized he was upset because he's always so even keel. But for him, he got pretty exercised. And this was an issue on which standing and the merits kind of conflict. So there's a discussion about whether, a statute that doesn't have an enforcement mechanism is valid. It s- goes to the question of not only whether it can be har- it can harm you, that's the standing question. But whether there's a constitutional basis for any statute that doesn't have an enforcement provision.

And there's a dialogue with Justice Kavanaugh where Justice Kavanaugh was suggesting that all of those precatory provisions are backed up by fines. They're backed up by sort of power. And Breyer got very upset, and he said, "Have you looked through the whole US Code? Have you?" And the, you know, gets the guy to say no, and then he says, "Well, I haven't either," and he says, "But, you know, I worked in Congress, and there are hundreds of statutes and hundreds of provisions on the books where you say you should name a sta- a post office after this guy. You should celebrate this. You should do this. There are tons of them in there and, you know, wh- are all those invalid? You know, what's happening with all those statutes?"

And, you know, I can bet you that some of Justice Breyer's law clerks are going to spend a long weekend with, in bed with The US Code going through every provision, trying to find those provisions for him,

because he got pretty exercised at the idea that, the ch- the challengers were saying those things don't really exist.

Rosen: [00:09:07] many thanks for that, and thanks to both of you for making standing thrilling.

Shapiro: [00:09:11] Jeff, just picking up on that one last point, I think that exchange with Breyer and the Acting Solicitor General, Jeff Wall, my law school classmate, was interesting because there was discussion about shall versus should and how you parent your kids. As a parent of a four-year-old and a two-year-old, this is very real for me, and, you know, if, if, if I tell my son, "Go to your room. Go clean your room. Go to bed," you know, but there's no explicit or even implicit, enforcement penalty, I'm not going to, you know, spank him or, or deny him candy for not going to his room right this second. Is that really a, a, a command? So that, I think, puts some flavor on or, or, or p- ma- makes, again, this, rather dry subject, more tangible, I think.

Rosen: [00:09:50] Well, th- thank you for that vivid example. And, and since... You're, you're right to take another beat on it. I'll, I'll ask Abbe, can you imagine the case being thrown out on standing?

Gluck: [00:09:59] Yeah, I think, what I think would likely to happen is that you're going to get a mix of votes, where some people are going to want to go to the merits and throw the statute out on severability, on the, the, [inaudible 00:10:38] on severability, but I think we're going to go to several justices who are going to say there's no standing. Or, or at least maybe with respect to some of the plaintiffs.

I think that the court seemed more taken, with the individual plaintiffs', positions on standing than with the states. I think all those questions about checking the box and mowing their lawn, or at least some of the justices, were taken by that.

Now, you know, some of the justices, particularly, we'll talk about this, but Roberts and Kavanaugh seemed to have very strong views on the severability question, and question is, are they going to want to say those views? You know, the question is, what kind of opinion are they going to want to write? Are they going to want to just knock it out on standing, or are they going to want to say, "I have something else to say here, too." And that's the problem with the standing opinion. They won't get to make those points, if they don't have to write that opinion.

Rosen: [00:10:54] Wonderful. Well, before turning to severability, let us go to the merits. And, several justices asked, now that, the mandate is zero, if it can't be justified as an exercise of Congress' taxing power, what constitutional authority supports it? Ilya, tell us about the claim that because, as Justice Kavanaugh noted, five justices in the NFIB case said that the commerce clause was not sufficient to support the mandate, therefore there's no constitutional authority to support it. And tell us about the response that it was, a valid exercise of, taxing power even if the penalty was zero.

Shapiro: [00:11:37] Right, so, recall what John Roberts did in ultimately upholding this provision, and consequently the rest of, the statute, eight years ago. He said that the most natural reading, of the individual mandate is as a mandate with a penalty for not complying it. However, we have the

obligation, the court does, he says, to, look at, to save, statues if possible, if there's a plausible or reasonable reading, in a different direction that could, just- be justified with another, constitutional power. And, and he said, indeed this can be read as a choice of either to buy, the health insurance or pay a tax, so this is a tax on non-purchase, and therefore can be justified under Congress' taxing power.

Well, five years later when Congress zeroed out that tax, or would-be tax, there is no longer any revenue being raised. and therefore that is one of the criteria for, finding, a justification under the taxing power. It's just a, a clean mandate, without any tax attached, so whatever it is, it, you know, once you get past the standing issue, it can no longer be justified under the taxing power. Kavanaugh said this. Gorsuch made the same point. the, he, as he, as he told, Don Verrilli, arguing for the House of Representatives, the defenders of the ACA are left to rely on provisions in The Constitution that lost, last time.

And John Roberts asked Verrilli, "Well, you know, did we discuss broccoli for nothing?" then Verrilli, because this was, a hypothetical eight years ago of can Congress force you to buy, broccoli, and Verrilli kind of made this into the, the salad days of the argument, if we wi- if you will, saying that this is, a carrot that works without the stick. So it's, it's just a carrot. It, the, the, the tax was not repealed. It's, you know, the, it was justified. It, it, it could still remain as a zero tax, in effect, and, and since it works, it, it, it can survive.

Justice Breyer, saw things a little differently than Gorsuch and Kavanaugh. He, well, I think Abbe mentioned this in our discussion of standing. there's exhortations to buy war bonds or plant a tree, without any, any mechanism to enforce them. And so are those, all of a sudden, unconstitutional because can't be justified under a commerce clause or necessary and proper, don't tax anybody. and here, the Texas solicitor general, who was, challenging the law, agreed that the government could make suggestions about activities it wants to encourage, but the individual mandate is different. It's not a suggestion. It's not an exhortation. It is a command, but an unusual one, and this is why this, the court is taking this up. even if you have these kind of hortitory or suggestive, statutes, it's hard to point to one that's a, an actual mandate or, you know, a mandate, a choice of comply or pay a tax, where the thing, where the tax part or the penalty part, the monetary enforcement mechanism, has been, zeroed out.

And then, Justice Kagan, appearing to side with California and the House, she told the Texas Solicitor General Hawkins, that the court ruled that the mandate was not an unconstitutional command, and that the 2017 zeroing out made it less coercive, by eliminating the penalty.

Now, so there's a, a bit of a tension, in, in, in fact, reading what John Roberts actually did in his transmogrification or recharacterization of the mandate, as a tax. And here in, in my brief, you know, I took the position that, indeed, if, if Rober- if there is no more tax, if there's no more raising of revenue, if there's no more choice of either comply or pay, then it connote the taxing power is, is not there. Whether it's a reasonable, plausible reading or, or not, and so you're left with the previous majority holding that it can't be justified otherwise. But ultimately, it will have to be up to Chief Justice Roberts to exactly explain, what he meant when, when he wrote that.

Rosen: [00:15:27] Abbe, so Il- Ilya just clearly, explained the position he argued in his brief, which, as he said, several justices seemed sympathetic to, which is that if the mandate can no longer be justified as a

tax, then it also cannot be justified under Congress' commerce power and therefore lacks constitutional support. Tell us about former Solicitor General Verrilli's response, namely that it, the power can be either inherent in the tax power or necessary and proper to it.

And do address this fascinating shift, Ilya, just called it the salad days aspect of the case, where, previously Verrilli, last time he argued the case, as Justice Thomas noted, had said that the mandate was necessary to make the whole scheme work. This time he said Congress is allowed to adjust its opinion based on experience, and it concluded it no longer was necessary. So tell us about that and its relationship to the merits arguments.

Gluck: [00:16:16] Right, so, I'm going to go to that part last, the carrots and sticks, because I really think he was just talking about severability there and he wasn't talking about, the merits of the mandate's constitutionality in that exchange. so I think with respect to... Start with the mandate. The question of whether, it's now it's an unconstitutional mandate.

So what's very interesting is that Don Verrilli said, "We're not making that argument. We are not arguing that this is valid under the commerce power." He did not want to go down that road with them. He didn't cede that there are X number of votes or Y number of votes for one position or another, but he's saying that we can validate the mandate on different grounds. We're going to validate it either as a tax or as a precatory requirement that has, you know, no, no power behind it.

with respect to the mandate argument, I think the one thing that was interesting was the newest justice, Amy Coney Barrett, was, quite, taken with the idea of saying that, "Well, this would be unconstitutional under NFIB," right? And so I think that there was sort of a, echo of her kind of desiring to go back and, like, not re-litigate NFIB, but kind of lock in the number of votes for the position, that, her old boss, Justice Scalia, did not win in that case, right? And so I, I, you know, there were definitely, of all the justices, I think she was the one that was sort of referencing NFIB the most and sort of trying to... she said at one point, "We only had four real votes" for that position on NFIB, and then the, the lawyer said, "Well, you know, you already have five. Part of Jus- Chief Justice Roberts agreed with you." And then there's a whole discussion of that, the votes, right? But she definitely seemed interested in that and trying to get some more words on the page about that ruling, sort of. I, I, I'm thinking of it as locking it in.

with respect to the taxing power, very interesting set of conversations among Sotomayor, Alito, and Gorsuch about whether, there can be a framework in place that a tax gets sort of dialed up and dialed down, even if it's temporarily zero. So with Alito and Gorsuch, who alluded to this argument, how much they care about it isn't clear, but they definitely engaged on it. Sotomayor had a really interesting back and forth with counsel about, "Well, what if we set a tax and said it doesn't begin for two years? So it's zero for the first two years. Is that a tax." He says yes. She says, "What if it phased down? Is that a tax?" He says yes. She says, "Then, well how long does it have to, you know, not be zero for, for it not to count as a tax?" So that was a very interesting set of exchanges. And Verrilli says, so it's either a tax or it's a tax in waiting, and the framework that sets up the tax, is, legitimate under the necessary and proper clause, right?

And then the third argument, it goes back to the precatory thing that Justice Breyer got so exercised about, exercised about, which is the idea that maybe it's a third thing entirely. Not a mandate, it's not a tax, it's just a precatory provision that has no bite, and that this goes to Justice Breyer's point. There are lots of those provisions in The US Code, and are you saying that hundreds of provisions are now unconstitutional because they don't have an enumerated power behind them?

Verrilli is saying, effectively, some things just don't need an enumerated power behind them. Things that are precatory are an example of that. And that got us into this exchange about is it a shall? Is it a should? If it says shall, is it an enumerated power? If it's a should, is it enumerated power? If it has a fine behind it, is it an enumerated power? Kavanaugh said, "Are any of those precatory provisions formally backed by a fine?" There's a whole bunch of discussion about that. I think that if it gets down to that point, there are going to be some very nitty gritty opinions looking through The US Code looking for other kinds of provisions on that front.

So let's go to salad, carrots, sticks, broccoli. and as a, maybe as a bridge to severability, which is, you know, Brey- Roberts opens the argument and, which Verrilli gets on. Verrilli is Obama's former Solicitor General. In 2012, he was in the court arguing on behalf of the Obama Administration that the mandate was constitutional, but if it was struck down, they suggested that it be severed with two other provisions, two key insurance provisions, guaranteed issue and community rating. That was the position of the Obama Administration because they were afraid the insurance markets would collapse without the mandate at the time.

So Roberts cuts right to the chase. He says, "Mr. Verrilli, we talking about broccoli for nothing? Eight years ago, you told us this thing was essential, and now you're telling us we can live with it. You know, talk to us." And he sort of cl- clear, basically, let's clear the air. And Verrilli gets in there and he says, "Yeah, you know, when Congress passed this law, they thought they needed a carrot and a stick for the law to survive. The mandate's the stick. And it turns out over time, the stick isn't necessary. Congress has learned, with the benefit of time, that it only needs carrots, and 2017 Congress was free to alter the statute based on that conclusion, and that's where we are today, and it really doesn't matter what we said back in 2012, because it's no longer relevant given the intervening facts and the intervening legislative amendment."

Rosen: [00:20:43] Thank you for that great, summary, and, elucidation. Ilya, severability. First, define what it is for listeners who may not know what it is. and there's no reason anyone should. second, tell us about the law of severability and the case Seila Law, which is relevant. And then tell us why you argued in your brief that even though you believe that the mandate, may, may be unconstitutional, it nevertheless can be severed from the rest of the law, and therefore the law can be upheld.

Shapiro: [00:21:14] Sure. severability is a fancy legal term that simply means, can the constitutionally defective part of a broader law be cut out, or how much of the rest of the law has to fall with it? And this is a prudential doctrine, that is, it's not something that, somewhere in The Constitution, you know, originalists say this is the meaning of severability or, or, or the text, you have to interpret. you know,

sometimes in statues, there is a severability clause, which says if any part falls, you know, that's the only parts that fall. It can be severed. Or some other formulation of, of a severability clause.

here, that's, that doesn't exist, and which is why, there was this discussion of, well how is this different from eight years ago? Because, everybody accepts that it's not simply a do-over. It's not, you know, NFIB verses Sibelius reconsidered with a different composition of justices, because you, this, this interim, event of Congress zeroing out the, tax penalty thing, without, changing the rest of the law, gives courts an indication of what Congress, would like to have as a complete statute.

Because court asked, asked two questions. First, what of the rest of the law is, works without this defective provision? What is inextricably connected to it? and, and second, what would Congress have enacted? And they kind of have to get in Congress' heads a little bit, and this is why, for example, Justice Thomas doesn't like severability doctrine, because he doesn't like legislative intent or trying to get at the purpose of a statute. He looks at the words of a page, and if something's, defective, then, then, you know, the whole thing falls, and give Congress another, bite at the apple.

and this is why, as Abbe said, there was this, colloquy between Chief Justice Roberts and, and Don Verrilli, how last time around, well, we thought everyone understood that the mandate was at least very closely connected. At least this was what Verrilli, the Obama Justice Department, position was. It was connected to guaranteed issue and, minimum coverage, the, the kind of, the, the central core that enabled, to enable people with preexisting conditions to be covered, you had to, you know, that, that, that requirement for healthy people to buy insurance, the, the carrot and stick had to be there.

but now we see, A, that Obamacare for better or worse is in place. It is working. Whether it's efficient, whether it's effective, that's a separate question. But it, it's working, and Congress, when it had the chance to, shave off other, parts of it, along with zeroing out the tax, it did not do so. And that's why this is different, and that's why cross-ideologically, including Abbe with, several, colleagues filed a brief, including challengers to the, to The Affordable Care Act eight years ago. Filed a brief saying, well, this is a different case. the rest of the law, does not fall. It can, the, the, the mandate, even if it's, even if it falls, the, the rest, can be severed.

And I generally agree with that. The one little caveat, and it's very technical and it's very legalistic, which is why I filed on the, on the side of the individual petitioners, is that for Nance and Hurley, they buy insurance on the individual, non-Obamacare exchange market. That is, not with, through their employer. Not through, you know, obamacare.gov. None of that. They, they go to the individual market that has policies for people, and they're more expensive than they would otherwise be with all these, this regulatory architecture on top of it. And so that's why they say they're harmed, and so the remedy for them, again, assuming they have standard, assum- assuming, standing, assuming the mandate falls, would be to cut out some of these other, regulations.

That's the point of my brief. It's a very technical remedy point. It d- for moral argument, it didn't seem like the court was interested in, in any, any of that kind of nuance. It looked like there were clearly, probably six, if not more, votes at least. some justices simply didn't speak on it. to, even if the mandate falls, to sever it from the rest of the law.

Rosen: [00:25:11] Abbe, tell us about the much-reported comments of Chief Justice Roberts and Justice Kavanaugh, which seemed to suggest that they were sympathetic for severing the mandate. do you agree with Il- Ilya that there are at least six votes for severing? what votes do you see on the other side, and what arguments would those justices make, against, severing?

Gluck: [00:25:29] Okay, great. let me say a few things by way of, background. So, it is true that there are some statutes that have severability clauses, but the professional drafters in the House and Senate, those, those drafting manuals, discourage, explicit severability clauses because the court applies a default strong presumption in favor of severability. As Justice Thomas said in oral arguments, severability is this doctrine of statutory interpretation. to be clear, it's part of the court's settled statutory interpretation doctrine.

And while Ilya is correct that in the past, some justices, including Justice Thomas, have expressed some discomfort with the old formulation of the doctrine in the sense that it asks the court to kind of guess what Congress would have wanted, Justice Kavanaugh answered that question last term in his opinion in American Political Consultants v. Barr, in which he acknowledged that the old-fashioned severability inquiry was something of a rabbit hole, puts you in an analytical rabbit hole, and he instead said, "Let's reformulate this more strongly as a doctrine, a strong presumption of statutory interpretation. We presume statues are severable. The rest of them stand absent the offending provision, unless Congress says otherwise."

And you heard Don Verrilli in response to Justice Alito yesterday, who said, "How do we know if some members of Congress didn't secretly want to get rid of this thing and threw a poison bomb into the statute?" And Verrilli says, "First of all, that's not, an appropriate assumption for this court to make about Congress. But second of all, the reformulation or strengthening of the doctrine last term, that's the whole point of a strong presumption. You don't have to guess what Congress wanted. You wait for Congress to tell you."

and so that's what the back and forth between, Kavanaugh and Roberts and the litigants were about. So Justice Roberts says, "Look, Congress got rit of the, penalty for the mandate, elimi- zeroed it out and left the rest of the statute standing. It spoke as clearly as it could in formal terms. Maybe they wish that we would strike it down. Frankly, some of them probably hope we would," but he said, "They didn't do that, and it's not our job." Right? Very strong statement by him on that. And then Kavanaugh puts his cards right on the table and says, "This seems like a very straightforward case for severability, you know, based on the argument that Justice Roberts made." And then both of them, really very forcefully rebutted the only argument that the challengers were really making.

So while Ilya's correct, that sometimes people do argue, when they are against severability, that the statute can't function without the offensive provision, the litigants here did not do that because they can't. The evidence, undermines that claim. They never argued functionality in their briefs, and actually, Justice Alito said this was originally conceived as a critical piece of a plane. We're taking that piece out, and the plane hasn't crashed. So even Justice Alito said that in oral argument in a very vivid description.

So the only thing they coulda argue is that Congress said otherwise. Congress dictated that over, that the strong presumption should be overcome. And the, where they pointed to that was in the Congressional findings that were enacted to support the mandate under the commerce power. When Congress enacted the mandate in 2010, it has findings to justify its use of the commerce power, as it always does. In those findings, it says the mandates are essential to interstate markets.

The challengers pointed to that language and said, "Aha, Congress was telling us it was inseverable. It was essential." And Roberts and Kavanaugh say, "Not so fast. Those were commerce clause findings, and in fact, Congress knows how to write an inseverability clause. It does so very clearly in The US Code. This isn't that. No, we're not buying it."

So the liberals said nothing on severability. That basically gives you an obvious, you know, assuming they do- don't stop on standing, five votes, we assume, that are going to give you a severability ruling. Where the sixth vote could come from with Alito's comment about the plane, maybe, if that tips his hand at all, he might be the sixth vote. I don't, I'm not so sure. I wouldn't predict the last three. I think that Gorsuch was totally silent on severability. Barrett, despite all her talk of severability at the confirmation hearings, said nothing about severability. Justice Thomas, as I said before, interestingly sort of reaffirmed severability as a doctrine of statutory interpretation, even a- as he has, played with reformulating the doctrine in other cases.

So, you know, I think it's possible. I would, I would predict more that those justices kick the case out on standing rather than on severability. and I do think we might see a repeat of the Thomas-Gorsuch, alternative formulation of the severability doctrine, which would be to just join the offending provisions with respect to the litigants directly in front of them, rather then, as Justice Thomas says, blue pencil the statute. last term, Justice Kavanaugh rather strongly disputed the validity of that approach, and it's not necessarily clear that it would lead to a different result in this case, so we'll have to sort of wait and see where they come down. I would say five, maybe a six on severability.

Rosen: [00:30:06] well, Ilya, do you see any votes for striking down, any parts of The, Affordable Care Act beyond the mandate, including the ones that you questioned? And then more broadly, tell us about the significance of this severability debate? As aspects of the regulatory state are challenged, as, as you do so, so, vigorously at, at, at Cato, will the practical effect of these challenges be mitigated by the fact that this court is willing to sever out the offending provisions or, or not?

Shapiro: [00:30:37] Yeah, I'm actually, I seem to be more confident, in Abbe's position than she is, and she's more confident in mine than my, than I am, because, I think there will be, there won't be a single vote, to, strike down the entirety, of the law. and I hope that, Thomas and, and, and Gorsuch, if not more, will enjoin it with respect to the individual plaintiffs. I, I'll, that'll be two votes for my position, effectively. that'll be great. but, the, the, the broader concern, is, you know, we don't, nobody spoke up in a sense that this cannot be severed, that the whole, the whole statue has to fall, as they did, as several justices did during the oral argument in NFIB, eight years ago.

So again, this is a different case, and assuming there are at least five votes to get past standing, which I think there will be, because at the end of the day, the merits of the, mandate is sort of the same

question as standing. If you, if it's not longer a tax, then it's a mandate, and therefore, you have standing because you're subject to the mandate. I mean, it's, it's a very odd law, in effect. I mean, John Roberts' saving construction eight years ago was a very odd formulation, and so this might be, i- in that respect, a standing argument that I will agree with, Jeff Wall, not on the inseverability standard, which may or may not open up the, you know, the challenges of all sorts, but at least in this particular way, when you have a previously taxing power justified statute that now can no longer be justified with that, but still has a command, then you have standing to challenge that mandate.

So as, came out in a colloquy with John Roberts, someone in the future won't be faced with the dilemma of, if asked by the employer, to check a box saying have you ever violated federal law, there was not a dilemma of, well, I'm not complying with this toothless mandate. What does that mean for me?

So, again, assuming, and, and I think there will be, five votes for standing, at least five votes to strike down the mandate or to enjoin it or hold it inapplicable or unconstitutional, after that, there will be, I think, six and possibly, probably, more. More likely to be nine than six, in f- for that matter, votes to, sever and, or, or, or at least not to, invalidate the entire ACA.

What that means for other broad-based statutes, whether in financial regulation, environmental or otherwise, depends on how exactly both the standing and the severability arguments are written. I think in general, a lot of the justices in various contexts, you mentioned, Jeff, Seila Law, which was an appointments clause, case, last term. and in other cases, the, severability comes up in different contexts. Abbe men- mentioned the, the robocalls First Amendment case, Political Consultants v. Barr. there, there's a majority of the court that is hesitant to invalidate entire laws, so I don't think, adding or, or replacing Ginsburg with Barrett changes that, majority.

Rosen: [00:33:19] Abbe, your responses to what Ilya just said, and then your broader reflections on what the holding in this case could mean for future challenges to the regulatory state, of which there may be many. In a prospective Biden Administration, it's quite possible that we will see, The Supreme Court pitted against, regulations, passed by, Biden agencies. What significance could the severability and standing holdings in this case, if any, hold for those challenges?

Gluck: [00:33:48] So, first let me just clarify something that, Ilya said. I, I don't, absolutely do not think that there, did not say that there'll be, you know, no votes, that there'll be some votes to strike down the entire statute. what I said was that I thought that there were five clear votes, that were interested in severability. I think that there will be more justices who will find other ways to get out of the case. Some of them might be on severability, but some of them might be on standing.

I don't think, I think if there was one justice who might, strike the whole thing down, it might be Justice Barrett, because she is so interested, in revisiting NFIB. but I think it would be a, a bold move for a brand new justice to be the one dissenter to strike the whole ACA down, so that would be interesting.

I also s- think that, you know, that I don't think it's crystal clear that, the, the, I think that it's possible that some of the more liberal justices are not going to want to endorse, the, the, the broad theory of standing, even for the individual plaintiffs, so you might wind up losing some of those five severability

votes if some of the liberals want to be a little narrower on standing for those individuals. So I just don't, I think it's a vote count issue. I think it's very, I feel very confident that The Affordable Care Act is going to survive. Feel less confident that the mandate will survive, and I don't think that matters very much on the ground. but the exact calculation of votes, seems a little less clear.

So what does that mean for the future of the regulatory state? you know, on the one hand, I found the argument extremely encouraging in the sense that it seemed to actually be, focused on how Congress acted and what Congress did and how Congress legislates, which is what I write about a lot, and I've been very happy to see justices interested in thinking about the realities of the workings of Congress. I think wha- whatever Congress we have, however it's, cons- constituted, that's a good thing for the court to be focused on, looking to how Congress actually writes legislation and, and what it intends.

I don't think it's, I don't think it tells us much about, administrative challenges, as we enter a world in which, perhaps, some Trump regulations are repealed and new Biden regulations are in place, other than I do think, the standing, arguments are going to be important in that context, and that is why I think the court spent 30 minutes on standing in the beginning, because, as I said before, that's the, decision with the long tail here. Those, whoever comes out of those standing holdings, is going to have a broader effect than just whatever happens to the ACA.

I don't think we're done with the ACA and The Supreme Court. I think we're likely to have more regulatory challenges. There are a whole bunch of things happening with the ACA. Presumably, contra- the contraception mandate that, that, that Trump passed, and his version will be gone. Biden might have another one. We'll see a bunch of reruns of various ACA regulatory challenges that may come back up. I don't think we're in a constitutional world with the ACA after this, but, you know, there are a ton of regulations, and I think you may well see those coming back, although I, I, I'm, we're all getting tired of these ACA challenges, and it'd be nice to move on to, a different topic.

I do think one thing you can take, from the argument is, if there were any doubt, which I don't think there was, is this NFIB holding on the commerce clause. You know, there do seem to be, you know, even with the new constit- the three new justices who have since replaced, justices since NFIB, you know, there seems to be a majority on the court, that has concerns about, you know, broad use of commerce clause power. And now especially when it's regulated things that are, you know, even questionably related to the market. Although I would have argue- I argued that, you know, failure to buy health insurance truly is part of the market, but we lost that battle.

And I think that, in thinking about legislation and regulation going forward, as they, as the government has been since NFIB, a commerce clause ruling is going to have to be in the back of everybody's mind in thinking about how to structure, laws that are going to last. And the irony of all this, of course, is that taxing is probably the safest way to go, after NFIV, and politically always harder.

Rosen: [00:37:29] Ilya, Abbe just suggested there might be more challenges to the ACA on the horizon. Are you cooking any up? And what might they look like [laughs] statutory or otherwise? And then, let me ask you, what you made of Justice Barrett's questions. she'll obviously be crucial in these cases. She seemed quite interested in the details of regulations. She asked, you know, in this case, you have to

certify whether you've complied or not, and the government keeps track of that. Whether or not you've purchased health insurance, does that change your view of the injury? did you detect in her, a justice who might be sympathetic to your future, challenges to the regulatory state or not?

Shapiro: [00:38:04] well, I don't know if you're giving me, too much credit. I, I, I'm a simple friend of the court. I support other people's challenges. But, I think this is the last, existential, challenge that we'll see. Certainly, whenever you have a major piece of legislation, I mean, it goes on for decades, that you have challenges to various regulatory parts, sub parts, how things work, interpretations, and, and, and so forth. and, and, you know, we, we still have litigation over the clean water act, the clean air act, and, and different other, you know, provisions. Sarbanes Oxley, you know, is 20 years old now.

So we're, we're going to, certainly have healthcare litigation, which, a- after a while, I mean, it's no longer Obamacare. This is the, the healthcare code, the healthcare, you know, federal law. that, that is not going to stop, but I, I don't see any more, existential challenges. Indeed, this, this whole challenge itself, is, my, my colleague, Michael Cannon, the director of Cato's health policy studies, calls it, trolling John Roberts. you know, I, I, he disagrees with, my standing argument and, and, you know, the part about the individual plaintiffs, whatever. he calls the entire suit, meritless.

you know, I, obviously we have that disagreement, but I do agree that it's very much saying, oh yeah, Chief Justice? You think it's a tax? Well, how about this zero? How do you justify it now? And even knowing that it's very unlikely for all of it to fall, it's kind of, you know, calling his bluff on that and seeing what he does with it, with that, what I called at the time a unicorn tax, a creature of no known constitutional provenance that will never be seen again.

And indeed, as Abbe said, all future expansive powers have to be called, a tax and run politically, through the gauntlet of, of, of the use of a tax, which is harder than a regulation. Rather than this bait and switch of saying it's a regulation, but then justifying it legally, as a tax.

As far as Justice Barrett, I mean, I think this, what we saw puts def- pu- puts paid to, all of the demagoguery during her confirmation process over, Judge Barrett, now Justice Barrett, being the deciding vote of whether to uphold or invalidate Obamacare, whether tens of millions of people will, will lose their healthcare. I mean, that was transparently electioneering. It was either disingenuous, by those senators and other activists, or simply a demonstration that they didn't understand the case.

I, I don't see Justice Barrett being, voting to invalidate the entirety of the law. I'm she would have in 2012, agreeing with Scalia for the, the reasons explained by the joint dissent, those four votes there. but now it's a different case, so I see her, like Kavanaugh, probably like Roberts, certainly like, Alito, saying that it's, it's, the mandate falls, but it's severable.

Rosen: [00:40:41] Abbe, what did you make of Justice Barrett's interesting questions, and what do you think it said about how she might, fall, both in this case and in future cases involving regulation?

Gluck: [00:40:50] Thank you for that. first of all, I did not say that all expansive legislation has to go through the taxing clause. What I said was that, now that we have a bunch of justices who seemed

aligned with the dissenters and NFIB on the specific commerce clause question there, Congress is going to have to think about similar mandates to the NFIB mandate under that rubric. I, I don't think the commerce clause is dead, far from it. but I don't think that you can say that NFIB is gone just because some people have died. Scalia's not with us [inaudible 00:44:04] support. so that's what I said about that.

With respect to Justice Barrett, I, I, I respectfully disagree that the concerns that were raised, about The Affordable Care Act case and advance of the case were disingenuous or, or, or lacking in knowledge. I think that 10 years of watching this statute, which is the most contested statute in American history, there are 1700 cases pending in the lower courts challenging it, okay. It's the, yesterday was the seventh case in eight years, so I don't, and we've had now, this frivolous challenge and what some thought was not a frivolous challenge in 2015, but which I did think was a frivolous challenge in 2015 in the matter of statutory construction being brought against the statute.

So having watched this for 10 years, I don't think, anyone was wrong to be concerned, about the changing demo- the changing composition of the court and how it might affect the act. I do think that Justice Kavanaugh and Justice Breyer's opinions from last term on severability, ha- we- were helpful in predicting how they would go on this, but a new justice changes the court, changes the tone, changes the composition, changes the feeling, changes the atmosphere, and I do think that Justice Barrett's comments yesterday indicated that sh- as Ilya said, that she would have struck down the statute in 2012. That would have been a fifth vote, had the court been exactly the same but for that switch. And I heard her saying several times that she sort of wanted to go back and, and re-lock in that holding, as part of her, as part of yesterday's case.

So, with respect to anything else, I don't think we can see anything else. So unlike Roberts and Kavanaugh, she didn't seem interested in severability. So that tells me, you know, nothing much, but it gives me a hint that maybe she's not so interested in statutory interpretation. We don't know where she is on the administration with [inaudible 00:45:52] Chevron. She did teach, some seminars on legislation at Notre Dame. I was surprised she didn't say anything at all about severability.

and so I don't think it tells us very much. I think we're going to have to wait and see, where she is on some of these cases and, and really get a flavor for, how she approaches administrative law. it's different. She has, she was not on the DC circuit. DC circuit jus- judges tend to be more favorable towards Chevron going in, than judges who did not have that experience on the DC circuit. And so I would not be surprised if she, moves to narrow, but I think we don't have any information that really gives us, a clue either way.

Rosen: [00:43:35] one last question before closing arguments. Ilya, Justice Ruth Bader Ginsburg, for whom Abbe clerked, was very, concerned about, Chief Justice Roberts' argument about the commerce clause in the NFIB case, and she strongly objected to it as a misconstruction of the commerce clause and suggested that it would come back to strongly limit Congress' power. both of you have suggested Justice Barrett might, well be with the chief and the conservatives on the commerce clause. As someone who

challenges federal regulations, in what ways will you use that vision of the commerce clause, and, how significant do you think these commerce clause challenges will be to regulations in the future?

Shapiro: [00:44:18] Well, it largely depends on whether the government tries anything so unprecedented as, mandating commerce in over- in order to regulate it. we could see that potentially with a mask mandate, although it, it... I, I don't know if, if President-elect Biden's going to, try to do that as a direct, mandate rather than working with states or enforcing it, to the fullest extent on federal lands and federal buildings and interstate, travel and, and things like that and kind of letting states fill in the gaps, which would be fine.

but, what, what Justice Barrett, I think, wants to lock in, to pick up on what Abbe was saying, is that commerce clause and necessary and proper clause holding. what was novel about NFIB wasn't that it was a, a, a big law. It was that, unlike in the courts, to just restate, the, the litigation from eight years ago, unlike the court's commerce clause presidents- precedents, which were so expansive that, federal, that Congress could reach even, in-state, non-commerce, as, Justice Scalia put it, for, growing marijuana in your own backyard for your own personal use, but to actually, you know, this was one step further.

And so, I don't know if Congress is ever again going to, try that kind of, breathtaking expansion of federal power. you know, certainly if you try to do it under the taxing power, that's politically much more, much more difficult.

So, but that, that's, that's what that means. it's not a matter of, of, you know, spending a lot of money or creating new regulations. under, under existing precedent, under Wickard v. Filburn from 1942, under Raich v. Gonzalez in 2005, we've gone from wheat to weed, and that gives, an expanse of federal power, already, under which plenty of, environmental, financial, and, and other, regulations, have, historically been justified without having to disturb NFEB.

Rosen: [00:46:08] Abbe, if you could channel Justice Ginsburg, that would be much appreciated. She was strong in her partial concurrence and dissent in NFIB. She expressed great concern about the future of the regulatory state. what was she concerned about and, and in what ways might this narrow reading of the commerce clause, co- fulfill her concerns?

Gluck: [00:46:32] So if I channeled her, we would be here all day, because I'd have to speak very, very slowly. and I would have to choose every word with extraordinary care, which she did so beautifully all the time.

so, you know, I, I, I think we've sort of, we've covered the landscape. I think that, she took, first of all, took Congress at its word and respected the view of Congress that failure to buy health insurance, was indeed, a, a market, a problem in the market, a decision, a decision that was economic in nature and did affect interstate commerce. So there was a bottom line factual dispute in NFIB about how to understand those, those individuals who forgo health insurance but still get their healthcare in emergency rooms and all the other places that are in the market.

and I think that part of her concern was deference to Congress, and deference to Congress' fact finding. I think another part of her concern, and this also came out in the Medicaid ruling in NFIB, was, you know, wanting to allow the federal government to regulate in different ways and ways in which we saw fit. She said in the Medicaid ruling, "Look, they could repeal the Medicaid program. They enacted the whole thing as a federal law, as a national law, and then it would have been fine. is this the way we want to force Congress to regulate, to sort of forgo these relationships and forgo these different kinds of regulatory schemes?"

So I think she was concerned about that, and she was concer- concerned about an artificial curtailing of federal power. She was always concerned about, you know, the federal government's role in making sure that all Americans of all walks of life, including those less fortunate, you know, were taken care of by the federal government. She sees the federal g- she saw the federal government as an important protector of sort of, s- s- more level dignitary rights filling in or even preempting or states to not, you know, live up to the task. So I think that she's always concerned of that, concerned about that.

going forward, you know, I obviously, she would have been concerned as many other liberal justices were about the future of the regulatory state, delegations to administrative agencies, you know, and how the new majority of the court is going to face those questions. You've already seen a desire to scale back on delegation little by little over the past several years. I was teaching my administrative law unit in legislation today and teaching all of these cases.

and, you know, I think that we're going to have to see how the next few years develop, and I think it's going to be important to know where Justice Barrett is on those topics. Just as Gorsuch came to the court with writing on delegation, we knew where he stood when he came to the court. Justice Kavanaugh also came to the court with writing on Chevron, being more pro-Chevron, than Gorsuch was when he came on the court. We don't really have much information on where Amy Coney Barrett is on those issues, and I think it's going to be very important, to sort of watch her and see what happens as it develops.

Rosen: [00:49:11] Well, and it's time for closing arguments in this extremely illuminating discussion. Ilya, the first one is to you. how do you think the court will decide the Affordable Care Act case, and how should it decide it?

Shapiro: [00:49:22] Well, to, to sum up, the, there will be standing. They will reach the merits, or least a majority of the justices will, and declare that the remaining mandate, such as it is, is unconstitutional because can no longer be justified under the taxing power, and then sever it from the rest of the law, and so not touch any of the, part of The Affordable Care Act that's, currently operative.

if, Justices Thomas and Gorsuch, concur separately to, enjoin some or all of the rest of the law with respect to the individual petitioners, in this case, Nance and Hurley, that, I, I would take that personally as a moral victory because that's, that's the point of, of my brief. I'm not holding my breath, necessarily, on that.

but at the end of the day, I don't think, here's my ultimate prediction. When we're thinking about October term 2020, I don't think California v. Texas in this latest and last existential challenge to Obamacare will be one of the major cases that we'll be thinking about.

Rosen: [00:50:21] Abbe, the last word is to you. How will the court decide the Affordable Care Act case, and how should it decide it?

Gluck: [00:50:27] I think until it comes down, a lot of people who care about healthcare, one fifth of our economy, are going to feel that it's major, just to be sure. So I think, again, I think that no one's, going to be able to rest easy, and I don't mean just ACA supporters, I mean the entire healthcare industry, until that ruling comes down.

but I do think we will probably have, s- at least one or two justices it does not reach the merits that decide the case on standing. I would suspect we have something like five, six, maybe seven votes on severability. I think that we don't know if Alito, would go with the severability group. I think that he might. I think Barrett is sort of a wild card. I think Gorsuch and Thomas, if they find standing, and I think that's an if, it might well enjoin, as Ilya says, with respect to the plaintiffs.

I think it's a big deal if they find standing only with respect to the individuals and not to the states, because enjoining The Affordable Care Act's operation with respect to all the red states, or even all the red and blue states, is a much bigger deal than enjoining it with respect, the offending provision with respect to the individuals, and I'm curious to know if Barrett goes along with that reformulation of severability or if she's going to align herself, as she claimed at the confirmation hearing, to sort of the bread and butter settled doctrine, the strong presumption in favorability.

How do I think it should come out? I, you know, I, the, well, I, I have concerns about the standing doc- doc- doctrine arguments, and so part of me would like to see the case thrown out on standing alone. I agree with Michael Cannon on many of those arguments. Another way which this case makes str- strange bedfel- strange bedfellows, as John Adler and I have said many times. However, as a statutory interpretation professor, just delighted with the court's understanding of the severability doctrine, its reading of the statute and its reading of the findings, and it would be lovely to have a strong statutory interpretation case to assign to our students going forward to teach them, about this whole exercise.

Rosen: [00:52:14] Thank you so much, Ilya Shapiro and Abbe Gluck, for a reasoned, nuanced, and extremely illuminating discussion of California v. Texas, the Affordable Care Act case. Ilya, Abbe, thank you so much.

Gluck: [00:52:29] Thank you, Jeff. Thank you, Ilya.

Shapiro: [00:52:30] Good to be with you.

Rosen: [00:52:34] Today's show was engineered by Greg Sheckler and produced by Jackie McDermott. Research was provided by Mac Taylor, Ashley Kemper, and Lana Ulrich. Please rate, review, and subscribe to We the People on Apple Podcasts and also check out Live at the NCC, which is our

companion podcast, which runs the great town hall programs that The National Constitution Center is running nearly every week. so eager to share them with you.

And always remember, friends, in these polarized times, don't you feel as I do that these civil constitutional dialogues are more important than ever? They bind us with the light of reason, and they provide a common discourse for this divided country. and that's why it's so meaningful to learn with you every week, and that's why I am so encouraged when you write to me, and please consider joining The National Constitution Center to signal your commitment to our shared mission. You can support it by becoming a member at constitutioncenter.org/membership or give a donation of any amount, even a dollar, to signify your moral support of our crucially important Project of Reason, and you can do that at constitutioncenter.org/donate.

On behalf of The National Constitution Center, I'm Jeffrey Rosen.