

>> Peter: Welcome to Uncommon Knowledge, I'm Peter Robinson. Known to students at the University of Chicago and NYU Law Schools as the libertarian, make that the Libertarian, Richard Epstein [assumed spelling] has established himself as an expert in constitutional law, contracts, corporate law, real estate law, torts, labor law and even Roman law a field in which he is reputed to possess more knowledge of the Justinian Code than anyone since Justinian. The Peter and Kristen Bedford, Senior Fellow at the Hoover Institution Richard Epstein will soon be publishing his newest book The Case Against the Employee Free Choice Act, Richard thank you for joining us.

>> Richard: It's my pleasure.

>> Peter: Segment one, What's going on? The AIG bonuses Speaker Pelosi plans to introduce legislation that would tax at 90% bonuses awarded to executives of any company that received 5 billion or more in federal bail-out funds. Would such a measure be found constitutional?

>> Richard: Well in -- under the laws as it is today unfortunately to the answer to that question is probably yes. You have to understand that everybody's intuitive sense of justice and intuitive sense of what The Constitution means is essentially at odds at which The Constitution has been interpreted. I could recall some years ago a British man came to me and he was talking about some terrible retroactive statute that had been passed by Parliament and he says, "This kind of thing could happen in the United States because you've got a written constitution," and I said, "Yes." And on economic affairs, on taxation, on contract rights on property it has been interpreted essentially to ensure what you would call Parliamentary and what we will call congressional supremacy. The question is how do they achieve this particular result and then why is it wrong? The way in which they achieve it is through multiple different ways. The first thing is that many of the kinds of provisions that you have under The Constitution are binding only on the state, so there's a clause which says that no state shall impair the obligation of contracts which would mean that retroactive taxation should be bad. There's another one which talks about bill obtain [phonetic] which isolated individuals of a certain group of particularly harsh treatment, there's one about ex post facto laws none of these apply to the federal government and even if they did they would not be right to cover these cases. So we're left with -- there's a combination of constitutional protections under the takings clause, constitutional protections under the due process clause and for those of you who don't know what they are this is what they say, "Nor shall private property be taken for public use without just compensation," and, "No person shall be deprived of life, liberty of property without due process of law." Very broad, very general kinds of provisions and so the first question you'd want to ask is well now is a tax, in fact, a taking of property and to the ordinary person if the government will pose a lean on your house and seize it if you refuse to pay the tax, would paying money under a kind of duress and the tax would be regarded as the take. So the wag would come up and say that means that the income tax is unconstitutional, no because you have to worry about the just compensation side of it and a well functioning government will try to match its benefits with its burdens so the compensation that you get from the tax is in the form of public services. Well, the next question is, that's not a bad formula how would this tax apply under that formula?

>> Peter: How would Nancy Pelosi tax?

>> Richard: Yeah, well the answer is you're putting a disproportionate tax on a certain number of people you're trying to do it to welch on a contract that had already been approved by the government the benefits don't match the burdens. The Supreme Court is already on to this trick and it says that when you adjust the benefits and burdens in life under system of taxation there's no matching principle at all you can take from A and give to B all you have to do is to have a reason. What counts as a reason? Anything you can think of counts as a reason.

>> Peter: Wait a minute, wait a minute. So one of your -- well --

>> Richard: Colleagues

>> Peter: I was gonna say a colleague -- nobody is quite as literate -- nobody has quite the views of The Constitution that you have but Antonin Scalia has had it up to here with legislative intent. But this is one place where, perhaps, legislative intent -- his point is too much attention is paid to legislative intent by the so called -- the liberals or the living constitutionalists. Let them pay some attention to legislative intent in this case because it's clear, just as you said, everybody's just trying to go backwards on a contract.

>> Richard: Well now Scalia was talking about a different problem and it's not this one. He was talking about the question to as whether or not private statements, about what a bill means should be used to interpret its meaning and he's worried about having an endless array of discordant statements introduced to take the text of a plea statute and make it muddy. When I'm talking about the desperate impact of these things you don't even have to look at legislative intent all you have to do is to see the mismatch, these people are not getting a single iota of additional services from the government and virtually the additional taxes they're now being asked to pay they're being singled out for special treatment and it's being imposed upon them retroactively in the sense that the congress had already signed off on the contract.

>> Peter: Right, right.

>> Richard: All you need to know is special and retroactive to damn it, if you're doing constitutional law seriously but the Supreme Court has already said special taxes are fine and retroactive taxes are fine so long as you have a "reason for it". And well what's the reason for it? In this case it's to quell the popular outrage that the people have received bonuses that the populous thinks that they ought not to get. Anything counts as a reason.

>> Peter: So in the analysis of Richard Epstein the Supreme Court of the United States does not do constitutional law seriously?

>> Richard: Well it doesn't do it well that's for sure. And the reason --

>> Peter: [laughing] Okay, hold on let me move to a slightly different question. Some 58% of federal judges, Supreme Court, the rest of the federal bench have now been appointed by republican presidents over 1/3 by George W. Bush, what kind of difference on the federal bench will President Obama make?

>> Richard: He will basically, on this issue, appoint people who believe pretty much what the republicans believe that all economic and taxation matters are not for the courts to review under any constitutional doctrine, they'll be a bunch of other areas in which there will be a very profound difference and those you have to really hold your pants because you don't know what's gonna go on. For example, if you're gonna start to talk about racial discrimination my own view about this subject is that we made enormous strides in this particular area and it's time for people to back off the course of use of the state and Obama --

>> Peter: You agree with Sandra Day O'Connor?

>> Richard: It's enough is enough.

>> Peter: Let the thing dwindle down to nothing it shouldn't take more than a quarter of a century.

>> Richard: Well I don't agree --

>> Peter: Affirmative action.

>> Richard: I mean affirmative action stuff is not what I worry about what I worry about is the coercive side of this in which you sue people for violation of the anti-discrimination laws. Now we've already seen the coercion come to bear with the Lilly Lead Better Act, which is designed to really tighten the screws on employers in sex discrimination cases, then you look at the newspapers and you see that most of the layoffs in all age and all educational groups turn out to be men more than women so what you do is you have this sort of congressional myth that discrimination is alive and well, they pass statutes which are based upon what in fact the marketplace is already turned over from what it had previously been. And a republican type of judge would not be particularly enthusiastic about giving these statutes of broad construction the kinds of liberal democrats that Obama's about to appoint, I suspect, will have exactly the opposite point of view.

>> Peter: Segment 2, Collapse. In October of 2007 the Dow Jones Industrial Average stood at over 14,000, those were the days. By early March of this year the Dow had fallen to just over 6,500 that's a decline of more than half. What happened?

>> Richard: Why does one ask a question like this of a lawyer but I will give you some sense of --

>> Peter: Because I've heard you talk about it and it's pretty interesting. Give me a shortish paragraph because I want to ask follow-up questions.

>> Richard: Okay, well there is no single cause of why this happened. The first seepage started with respect to the sub-prime crisis and this was largely a function of private parties responding to government incentives and the government incentives were perverse so the actions of the private parties were perverse.

>> Peter: Government incentives were perverse, by which you mean to suggest that by the argument that the fed was too easy from 2002 to 2004, roughly.

>> Richard: Yes, well I'm --

>> Peter: You [inaudible] on Taylor's argument?

>> Richard: Yes, I mean anybody who can count and see that the interest rates that are being charged is below the rate of inflation realize that you're getting free money when you're borrowing.

>> Peter: Okay

>> Richard: And if you then combine that with the situation whether it'll be through Fannie and Freddie Mac and then through the various other subsidy programs situations in which governments will basically guarantee the loan you have easy money which boosts up the entire amount of production and the purchase of assets and then we have guaranteed loans that the banks were issuing these various kinds of papers, they don't have to do any underwriting they just know that the government's gonna pay for it so sell it to anybody for anything. And since the bubble is keeping on moving this note tomorrow and people will start to buy and mortgage the properties they have, buy others mortgage those properties until in the end what you do is you have an equilibrium where there's no greater fool out there at which point the entire thing starts to collapse and when it collapses the general rule is it goes down a lot faster than it goes up.

>> Peter: Listen to two quotations. Paul Krugman, Princeton Economist, Paul Krugman and New York Times Columnist. "Regulation didn't keep up with the system and because of the ideological environment of the times there's was not attempt to expand regulation." Second quotation, Stanford Economist, John Taylor. "Government actions and interventions not any inherent failure or instability of the private economy, government actions caused prolonged and worsened the crisis." Whose side are you on?

>> Richard: Well I'm much closer to Taylor than I am to Paul Krugman on this and probably every other question and the account that I just gave dealing with the way in which the feds changed the money rate is, in fact, an account of how regulation fails in some sense.

>> Peter: What about that 2004, I think it was 2004 the SCC --

>> Richard: I was gonna say --

>> Peter: Okay go ahead, explain that. First of all explain the facts in that.

>> Richard: What happens is, I think the one mistake that the government made in this area by way of deregulation was the question of whether or not when you're engaged in these various kinds of hedge funds swamps you have to have certain kinds of minimum capital or margin requirements so that you can't leverage yourself so much. Leverage means having very little of your own money in this and huge amounts of borrow. And at that time the SCC was approached by a coalition which included amongst it, I believe, people like Robert Rubin, if I'm not mistaken, and they said count the party's security we'll handle this entire problem. What that means in ordinary English is if Goldman is dealing with Bear Stearns each of them knows enough about what's going on that we can trust them to make sure that the deals are stable, and so they relaxed the margin requirements. And I remember taking a deep breath saying why on the earth are they doing this I know that there's more profit.

>> Peter: But you're a libertarian why shouldn't they do it? Why shouldn't the market handle its own risk?

>> Richard: Because what happens is that when you engage in these kinds of situations the counter parties are not just the two parties of the transaction there is a serious kind of externality that any one of these two parties should miscalculate its losses will be on its balance sheet but the losses it creates to the third party down the road is not something that's likely to continue, so it's the same problem that you always get with banking, which is that you have these complicated relationships and when one of them starts to fall all the dominos follow with it and the counter party takes into account some of the losses that you have to worry about but doesn't take into account all the losses that you have to worry about.

>> Peter: So what you're making is a pretty standard free-market libertarian argument Milton Friedman would have made the same argument that the externalities is one place where there is a legitimate role for the government to come in and establish rules or boundaries, is that correct?

>> Richard: Yes and the question is what kind of externalities and in this particular case or what you're worried about is a kind of a domino affect with respect to the credit transactions going one after another are crisis incompetents that follows. And so what happened to Bernard Madoff and what happens to everybody else is that many private plans are grafted on the assumption that you could always call your money back at any time if you get nervous with the situation, and that's perfectly good in ordinary times because the people were calling back at random. But the moment folks sense that there's some kind of a serious danger inside the system everybody demands their money out at once, the assets have been invested in ways that are somewhat liquid so you can't provide it you start selling assets to the door, that then triggers to drive the price down, that

triggers mark to market regulations and so forth and by the time you're done you've got a run on the bank as it were and that's what this form of government regulation is about. So Milton, you know, has been widely denounced as a "free-market economist" the irony is he was the man who really thought that the key to success in running a free-market was to have a stable money system which required very strong and purposive government action to make sure that people did not go beyond the parameters one way or another. And we fell outside those boundaries in the 1970's when by late 1979 the prime rate was about, you know, 21% --

>> Peter: Right

>> Richard: and so forth and a long-term mortgage rate was 16% and everybody said oh it's over. We stabilized for almost 30 years and then starting with the cheap money policies and with the various subsidies we started to lose site of what it was that Milton had said and all the private systems which were predicated on stability in their own internal operations failed when the central thing started to fail.

>> Peter: Okay, Segment 3, How have 2 administrations handled it? During the final months of the Bush administration, just listen to this, the fed and treasury cooperated in overseeing a fire sale of Bear Stearns, the effective nationalization of Freddie Mac, Fannie May and AIG and in bailing out GM and Chrysler President George W. Bush on January 12th, 2009, "I readily can see that I chucked aside some of my free-market principles." Did Bush and his administration do right?

>> Richard: Not really. Let me sort of indicate what I think first the proper approach is structurally and then how to treat it [inaudible].

>> Peter: In the early days --

>> Richard: In the early days.

>> Peter: 'cause I'm gonna talk about Obama in a moment.

>> Richard: Yes, I mean not the first and kind of difficult situation was the Bear Stearns situation in 2008. And I had actually looked at the terms of that transaction and it looked like a pretty standard bankruptcy situation in which the priority rules apply so that the debtors got money before the shareholders got money and when all the shareholders at Bear Stearns claimed that they had been given a haircut that was a good not necessarily a bad sum.

>> Peter: You're saying that Bernanke and then Treasury Secretary Paulson handled it reasonably well? They achieve a close facsimile of actually bankruptcy?

>> Richard: But the steak was that they did it and it would have been much better to have a bankruptcy clause do this.

>> Peter: The original sin in all this was letting Bear Stearns go not letting Lieman [assumed spelling] go down later it was letting Bear -- it was saving Bear in the first place?

>> Richard: Well it was saving Bear through political means through the treasury. What happened --

>> Peter: Straight forward bankruptcy let it go down.

>> Richard: It won't go down what bankruptcy has is two forms it has liquidation and it has reorganization.

>> Peter: Right

>> Richard: If a concern has going concern value that is it continues to work in a sensible way --

>> Peter: Which Bear did.

>> Richard: you'll keep it alive in the reorganization thing, sell off useful units and rationalize the rest of the structure and it'll be free of political complications and the shareholders may come out with a little and they may come out with a lot. The reason why I give them pretty good marks is that when they try to do this through the Treasury Department in the Federal Reserve they were trying to do what a bankruptcy judge did and they were left relatively free of political interference. The danger is when you start getting to Lieman and everybody else and now you're keeping it out of bankruptcy if it's in the political arena you're gonna save some, you're not gonna save others, you're gonna get a lot lobbying to see what you get to save and why. In addition to that you're not gonna be able to keep it off of congress' desk so if you go back and you look in the October transformation the first of the bills which was designed to deal with the AIG problem and so forth was about 3 pages it was a kind of standard bail-out bill. The republicans vetoed it because it was a giveaway, they had a point right? By the time you got it past a week later that bill was 150 pages and my favorite portion of the bail-out program is the Paul Wellstone [assumed spelling] mental health and addiction provisions which were designed to establish parity in health care markets in the treatment that's afforded to mental illness and addiction treatment with physical injuries, somehow or other that had to be part of the bail-out right? And so at this particular point you're having regulatory chaos come into place because everybody says oh you want my vote on this bail-out you got to do my favorite things and measures that could never pass while standing alone get passed when bundled up with everything else.

>> Peter: Right

>> Richard: And that's just a terrible kind of mistake. And so if you put this stuff into the bankruptcy situation no bankruptcy judge can pass a mental health parity bill as part of a reorganization, and then you would have this outside the political system, you would

salvage the good, get rid of the bad and at this particular point the government still has some options. If you're really worried about the way in which some of these things are working you can infuse monies to companies that are also in bankruptcy.

>> Peter: Hang on, hang on here I want to get to Obama here. So far the noon -- let me give you this --

>> Richard: And we haven't even gotten to GM which is inexcusable.

>> Peter: Hold on [laughing] okay that's -- GM is almost too easy for you Richard.

>> Richard: Yes

>> Peter: So far new administration, Obama administration has enacted a stimulus package amounting to almost \$800 billion, proposed a budget amounting to \$3.6 trillion, working with the Obama Treasury Department the fed has announced it will take the unprecedented step of purchasing some 1.2 trillion in long-term treasury instruments and as we sit here this morning Treasury Secretary Geithner has announced a public private investment program of 500 billion to buy toxic assets, the market, by the way, is up 300 points as we began taping. Question, how is the Obama administration doing?

>> Richard: Well the single best indicator is the Dow and notwithstanding today's burst it's at or slightly lower than it was over the day he took office. And you have to sort of disentangle these things because some of them make a little bit more sense than others but let's just start with the beginning. First of all using a depression or recession as an excuse for a sort of substance of regulation of the market in labor areas or in these various insurance programs is always a complete mistake, these things don't make sense standing alone they're not gonna make sense standing with everything else. Secondly when you start looking at the bail-outs again you have to worry about the bankruptcy type situation. The number one and easiest case to let go down the tubes is General Motors, Chrysler, Ford if it had to. You do not want to put any money into a group of institutions which are so encumbered with pension obligations one way or another and so encumbered with dealer obligations that they can never rationalize their business no matter how much cash you put into them. One of the advantages of going into bankruptcy is there's an orderly way to shuck to get rid of losing contracts in order to bring the business back into some kind of equilibrium, and so we spend hundreds of millions of dollars. The only political question --

>> Peter: You know what -- can I just -- one of the common threads here in your comments about the Bush administration and the Obama administration is that they don't know enough about bankruptcy law, they don't understand -- it sounds to me as though they're permitting themselves to be spooked like an ordinary layman to think that bankruptcy equals --

>> Richard: Death and destruction.

>> Peter: death and destruction, exactly it's a relatively orderly process, we have legal, this law is well known, there are bankruptcy judges who know how to do it, right?

>> Richard: Yeah what we do is we take it away from experts and give it to a collection of congressional individuals who are charitably called clowns, I mean it really makes no sense whatsoever to do it in this particular fashion. And as I look this over time and time again I'm always struck about how it is when you bring things to congress it becomes politicized and politicized decisions become destructive decisions. Now, the bankruptcy courts can not handle the cash infusion issues --

>> Peter: Right

>> Richard: and it's a very difficult question as to whether or not you want to infuse cash into your economy. And here I have a very mixed emotions there are certainly very respectable people like Gary Beck [assumed spelling] who said you put it in today and then you pull it out tomorrow. I'm not that confident that anyone could be a fine tuner.

>> Peter: I want to distinguish here; you would accept the Milton and Becker argument that the fed should indeed have pumped liquidity into the economy?

>> Richard: No

>> Peter: You're not even sure about that?

>> Richard: I'm not sure about that, no, and let me explain why. There's no liquidity problem we have huge amounts of cash just sitting on the sideline right now and, you know, in the hands of large investment bankers with tremendous sophistication they don't want to lend, why not? Because they don't believe that the money they lend today is gonna be collected tomorrow under the mortgages that they issue. Just the reason why they're balking about joining all these partnerships that Obama announced today or Gitner announced today it's 'cause they don't think that the deal they get today is the deal they're gonna have tomorrow. After all, if you're welch on AIG you could welch on anybody and that's what they're really afraid of. So what's happened in this market there is now a complete lack of confidence that long-term transactions will be consistently construed over their entire lives. And that's worse than a liquidity crisis 'cause even if you got the money nobody wants to do anything but put it into treasury bills.

>> Peter: This brings us to Segment 4, My neighbor Barrack Obama. Your law school colleague at the University of Chicago, your neighbor in Hyde Park, Illinois.

>> Richard: Yeah

>> Peter: Quote -- this is what you wrote, you've gone public with this much Richard from you weekly column in Forbes Online I am quoting you to yourself. "I know Obama through our association at the University of Chicago Law School and through mutual friends in the neighborhood. We have had one or two serious substandard discussions and

when I sent him emails from time to time in the early days of his senate term (you're the kind of person who gets to send emails to Senators.) he always answered in a sensible and thoughtful fashion and yet for assessing the likely course of his presidency I don't know him at all." How can you say such a thing?

>> Richard: Oh it's very easy. One of the things about Obama is that he has the world's most perfect human disposition he can sit in a room with you, he can listen to you, he can talk to you and what happens is you really get the sense of a man who's in complete self-control, but that's the various feature that makes him so hard to read. He is so much in self-control that if he doesn't want you to know in a conversation where he's thinking you can be there for 30 minutes and never be able to figure out what he believes you can only have him question you about what it is that you believe he keeps all of his thoughts to himself.

>> Peter: So he's Leonard Nimoy --

>> Richard: Yes

>> Peter: playing Spock he's the Vulcan.

>> Richard: He basically knows how to keep that shield over his face. And it's almost a little bit unnerving to talk to him because you want to say, well I agree with you as opposed to having another question to sort of unformulated your position so he can understand it a little better. The second half of it, of course, is that the speech is completely inconsistent with the political record in the sense that as a member of the Senate he had the, I guess, the most left-wing voting record of anybody there, more so than people like Hillary Clinton and that's, of course, the way in which he moves. And what I say about this is there's a side of him which I never knew personally but when he starts saying that he was an organizer I actually believe that he did this and, you know, many cases it was tremendously constructive. You're trying to organize public partnerships to get homes for down [inaudible] people in the city of Chicago; this is not where I'm gonna really start to blow my cork. But the difficulty that you get with somebody who's only worked out of that situation he thinks that the creation of private wealth is something that government can not influence or destroy. And so you have all of your fancy redistribution schemes and you've read every one of them up here right?

>> Peter: Right

>> Richard: And you forgot to mention the healthcare plan that he's put in favor and you didn't talk about the labor statute which he's kind of slightly distancing himself from but he's certainly not repudiated, these are all wealth killers. And so what this guy is about to do, in my opinion, is to engage in a series of proposals that will redistribute wealth that we do not have.

>> Peter: From the Boston Globe you talked to a reporter at the Globe --

>> Richard: You're very thorough.

>> Peter: and the Globe wrote, "Richard Epstein who taught with Obama at the University of Chicago rejects the suggestion that Obama is an intellectual arguing that he merely mimics an intellectual's mannerisms."

>> Richard: Yeah

>> Peter: How good is his mind Richard?

>> Richard: Well his mind is pretty good but it's a clever means ends mind where he has never written a scholar article in his entire life.

>> Peter: He was President of the Law Review at Harvard but never wrote --

>> Richard: Anything

>> Peter: an article. He never wrote anything?

>> Richard: Well if he did it was unsigned and it certainly wasn't gonna be significant that he never wrote anything in an academic nature, it's just not --

>> Peter: Would you give him tenure --

>> Richard: No!

>> Peter: at the University of Chicago Law School?

>> Richard: No, no, no, I mean this is Jody Kanter [assumed spelling] got this story from somebody and I don't know where it was although I have my hunches. Now we had made him a tenured offer, what we did at least the faculty he was such an engaging fellow everybody, myself included would have been more enthralled to offer him a tenured track position.

>> Peter: Get started.

>> Richard: And then --

>> Peter: Start publishing.

>> Richard: But, you know, you have to -- the way it works in an institution is the Dean approaches somebody that's not an offer the offer can only come from the faculty after it's been approved by the Provost and so forth and for that we never got there because one of the things about this man is he has this higher level of self-knowledge as anybody I've ever met. In the sense he realized he wasn't cut out for academics, hell I'm not cut out to

be President of the United States so we're even, right? And you therefore decide that, look, he just wasn't gonna try this because it would not be the kind of thing that you want.

>> Peter: A headline in Political last week, "Obama tightens reigns on Capitol." First sentence of the story, "President Barack Obama and his allies around Washington are about to give the Capitol a bracing lesson in one party rule." Surprised?

>> Richard: Nope, it's the same element the guy is absolutely in control of himself he's a fierce competitor; he likes to be in control of his general environment. And since his positions are not close to the middle he sees no reasons whatsoever to compromise with the republicans unless until they can mount the veto threats with the Senate. I think that, as I said before, he's very, very dogmatic in terms of his substance of positions he knows what he believes and he knows why he believes it and it's extremely difficult for people on the outside to change his mind. And the fundamental mistake of his entire world view is that he treats contracts as devices for exploitation he doesn't treat them as devices for mutual gain and he assumes that redistribution can take place without any negative impact upon production. And if you live in that kind of a fairy land, which is what I think he does, everyone of your major social and economic initiatives are gonna A miss-fire and if they succeed, God forbid, in getting through they're gonna create an intensification of the downturn that we've already experienced. So wrong guy for the job in terms of his intellectual format the question is whether you could force him back.

>> Peter: Smaller point but maybe not so small, he has a reputation as a brilliant orator we now know that he will not give even brief remarks the kinds of things the Chief Executives from Washington through Regan through even George W. Bush would give with only a note card or off the cuff he won't speak without a teleprompter, how come?

>> Richard: Same point he's very much a man who wants to be in total control.

>> Peter: Alright

>> Richard: And the moment you start to improvise you're like me and you'll start calling the President this guy and then you'll say, well that's not the phrase I should have been using under this circumstance.

>> Peter: Charles Krauthammer described the dinner that Barack Obama attended at the home of George Will with a number of conservative journalists shortly before the inauguration. Krauthammer said that after Obama left Will, Krauthammer, several others stayed around and talked about it for an hour or so and they could not decide whether he was a centrist who wanted to throw bones to the left or a leftist who was willing to throw bones to the center, which is it Richard?

>> Richard: Well, first of all the reason they couldn't figure it out is the same thing that I mentioned before the man has this sort of stone-face experience and is quiet on purpose. Look, the answers, I think, pretty clear he's a man on the left who will if necessary throw bones to the center; this is not a man from the center. Some of the appointments he has

may sound centrist but, again, I just don't believe in this as a serious indicator. David Axelrod is a hardcore political he has much more influence on anything that Obama does than somebody like Lawrence Summers who might have much more sense on these economic issues. How do I know that, well I certainly am not there for the conversations but when I hear Larry Summers announce how it is that collective bargaining and organized labor and produces productivity I don't treat that as a statement of an independent judge. What I treat that as is a sense that if the administration is really strongly pro-labor you have to sort of throw some bones in that particular direction as an independent advisor in order to lend a certain degree of gravitas to what's happening.

>> Peter: Let's pursue that, Segment 5, Epstein on policy. The democrats hold the White House both House's of Congress, as you know, a couple of measures that they seem to want and your views on them the so called Employee Free Choice Act which you're just talking about here commonly called the Card Check Legislation which would enable unions to gain recognition without a secret ballot. Richard Epstein, once again I quote you to yourself Richard.

>> Richard: Wow

>> Peter: "It is commonly supposed that economic regulation is immune to constitutional challenge since the new deal, that's not the case with this labor law." Explain yourself.

>> Richard: Okay, well, first of all it's not just a card check regulation that's the "good part", quote, unquote -- the worst provision is probably the mandatory arbitration provision and that's a provision which essentially states after you win your card check there's 130 days in which you can negotiate to an agreement the last 30 of which is through a mediator after which a panel which is designated by the head of the Federal Mediation and Conciliation Service, i.e., an Obama appointee through the Department of Labor, gets to set the contract for the entire business with that unit and there's no appeal from it and there's no standards for which the arbitration has to take place. And so the argument that I made is that notwithstanding the fact that we allow everything by way of taxation and everything by way of contract regulation. The rules have always been that we will never force you into a deal that you won't want we will only say if you want to hire somebody you have to pay them minimum wage we will never say here, Peter, hire this person and pay them the minimum wage. And they've crossed that line under these circumstances so I --

>> Peter: The card check legislation -- the mandatory arbitration would cross a constitutional line.

>> Richard: Yeah, and now the card check is a different issue.

>> Peter: Can I just ask, when you say it's unconstitutional do you mean it's unconstitutional if we were construing The Constitution properly or it's so unconstitutional that even the Supreme Court would find it so?

>> Richard: It's so unconstitutional that even the Supreme Court would find this one unconstitutional.

>> Peter: Got it.

>> Richard: And I have actually been much to my own surprise what happens is you give people an inch they take a mile and so after a while you get the kind of legislation in this constitutional environment that nobody would even dream of trying. In a sane environment they'd think maybe I got a shot at it. I think they over-crossed a line and I think they over-crossed it because when they introduced this thing years ago they never thought it had a prayer of passage. Card check's a different issue; this has to do with political participation. You can run a card check and get a union representative and the descending workers who have no idea that any of this has happened it could all be done in secret. So now you're not talking just about economics now you're talking about political participation and speech standards of review there are much higher. And so there's a question as to whether or not if you're going to buy the people, which is what you're doing, do you have to give them a chance to talk? And when they did the Wagner [assumed spelling] Act; this was absolutely critical, you had an election for the union and you had a ratification for the contract all which had to go through some kind of political deliberative process.

>> Peter: Right

>> Richard: So even if you're a believer in deliberative democracy what you have to do is to look at the statute as having a [inaudible] hobnail boot and knocking out the liberation at the two key points in any union deliberation. And there's a very respectable argument that that process would offend the First Amendment, Freedom of Speech, which has been construed to cover freedom of association.

>> Peter: And you consider that argument compelling enough to persuade Mr. Justice Anthony Kennedy?

>> Richard: Well you know what --

>> Peter: Do the trick.

>> Richard: well you never quite know. I think the first one on the mandatory arbitration piece is pretty compelling I can conceive winning 9 votes on that one. I mean I've never met a person when you've actually explained what this particular statute does who doesn't look at you saying kind of you're kidding, you know. I have a reputation for hyperbole and this is still to be one of the ways in which I'd demonstrate it but you read the text to them it's relatively short and there's really no way out of it. On the card's check issue it's gonna be a little bit more tussled but I think that there's possibly even money that Kennedy will go there. More importantly I hope this never happens and this is why. You put a statute like this on the books it takes affect, in this case, instantly so the unions will already have people who have signed their cards we don't even know whether those cards

would be valid if signed before the act they're gonna start the process going today. How do you try to negotiate if you don't know whether the law you're working on is constitutional and how do you run a system of arbitration when nobody knows what the rules of the game are? I mean, you realize that they had this fiasco with the lead statues where they put it in place, everybody had to inspect buttons in thrift shops to make sure that there was not offensive amounts of lead in it, they suspended the regulations for a year 'cause nobody knew what they meant. There's no suspension provision here guys are gonna enter into contracts, arbitrators have to make decisions, there'll be thousands of decisions going on with unqualified people and nobody knows what to do; this will be basically a convention where everybody arrives and mills around in a room desperately looking for the guy --

>> Peter: So is this another example of wealth destroying legislation?

>> Richard: This one is the worst.

>> Peter: Okay, Richard let me ask you something here; this is -- we're coming up to the end of the program but I want to -- this is a kind of outlandish, struck me at first as outlandish but then I began thinking about it and it worried me that maybe it wasn't as easy to refute as I might have liked. Here's the notion, lawyer and journalist John Hinderaker put up on his blog Powerline, "If the Pelosi Bill, (Now we're back to talking about the --

>> Richard: AIG

>> Peter: tax away, the AIG bonuses.) if the Pelosi Bill is enacted into law there is no limit to the arbitrary power of Congress. In that event we have no property rights and there is no Constitution, are we a banana republic?" Now, we've national -- in the past couple of months we've nationalized major financial institutions, two of the three major auto makers, the President has made clear his desire to nationalize the entire healthcare industry 1/7 of the economy, federal spending and federal debt have, in a matter of weeks, reached levels unseen since the second world war and the fed appears to, particularly with the recent announcement that it'll buy 1.2 billion in long-term instruments --

>> Richard: Yeah

>> Peter: that's unprecedented. The fed appears to have surrendered its independence to become a tool of administration economic policy, one institution after another being swept aside, one set of cultural and legal constraints after another being ignored. Does this make you nervous, are we --

>> Richard: Nervous!

>> Peter: stepping in the direction of becoming a banana republic?

>> Richard: Well, I mean the social democratic republic with sort of stop/go economies of the English style of 1950. I don't think of this as a banana republic 'cause I don't think that they will break into people's houses and seize them arbitrarily or shut down the newspapers but I do think in affect what happens is we will have a system of total and pervasive control over these issues which will be an engine for, shall we say, a very serious and prolonged failure of the economy if the characters in Washington will say, ah ha, this is a reason to regulate still further because we haven't gone far enough and they're basic propositions will be unfalsifiable by anything that takes place on the ground. Will there be a stop, well the line that I've always thought about with our constitution was the one from Madison who said, "Enlightened statement will not always be at the helm," meaning you want to have your political institutions organized in a fashion that they can stand these down draughts. Separation of powers is one of the tools for slowing things down. What they found is understood, perhaps, but could not possibly design around if every organization that you have, the President, the Senate, right, the House of Representative and the Court seems to be --

>> Peter: and the press.

>> Richard: And the press seems to be --

>> Peter: And the fed appears to have joined the parade.

>> Richard: and all the independent agencies there's no break on this particular system. And the reason why I get so worried about it is is that Obama whips up this populous fure by calling everything outrageous and so forth.

>> Peter: Now see that's the bit where it does resemble Guatemala rather than 1950's Britain.

>> Richard: Well --

>> Peter: Don't you think there's a certain -- there's a feel of a cultivar person. You see 2 million people on the mulch chanting Obama on inauguration day. Does that make you nervous or is that just too outlandish?

>> Richard: No, no that doesn't make me particularly nervous --

>> Peter: Alright

>> Richard: 'cause there was nothing particularly directed against it that was all fuzzy goodwill.

>> Peter: Alright

>> Richard: What gets me nervous is not when people are praising and hugging one another it's when they are ganging up and attacking a bunch of people who don't know

what's hit them. Could you imagine being an AIG financial tech who understands how to manipulate derivatives and being faced with this kind of a threat and saying, well, now how do I get access to explain my side to this thing, well the answer is the way you get access is to resign from the position. Now we've already seen nobody wants to join in an Obama plan, by the way the Gitner plan is not very good because I think there's just too much --

>> Peter: Right

>> Richard: federal risk in guarantees built into the entire systems but nobody wants to work at it because they're afraid they won't get any guarantees on compensation and this is what I would tell them, you can't get it they could write it in blood today that they're gonna and let you pay whatever you want to these fellow sacred covenants Congress could rip it up tomorrow. Because when you say that so long as you have noticed that Congress may misbehave you have taken the risk of their misbehavior, that's what leads you very close to the banana republic. Why is not a complete banana republic, we do that with respect to financial regulation we don't do it to allow the police to break into your house. We could not pass today a statute which says that Congress can seize the Epstein house at 4824 South Woodlawn Avenue because he spoken such harsh words against the current administration. So we're protected against possession against invasions of possession but we're not protected in terms of the way in which we use and dispose of our property and that's a huge part of what a market economy requires and it's what the President doesn't understand.

>> Peter: Last question, if you could make one request of your old neighbor Barack Obama in the confidence that he would dare to grant it what would you ask?

>> Richard: Find me a way to deregulate before you try to redistribute.

>> Peter: Find me a way to deregulate, explain that.

>> Richard: What happens is deregulation will expand the pie, increase the tax revenues, bring people back --

>> Peter: Right

>> Richard: into an economy. The more you can deregulate the less need you have to redistribute. So I'm not saying you have to throw every poor person who's helpless and crippled out on the streets but first you want to get the base expanded and if you follow this line it means you're gonna go back to Adam Smith, you're gonna have high taxes, low taxes, moderate regulations designed to deal with bank solvents who we've already talked about that controls the monopoly and the provision of infrastructure. And if you do that you can switch the stock market down not by 300 points but by 3,000 points over night. And in doing that you will solve a lot of the financial strains by getting people back to [inaudible] again.

>> Peter: Richard Epstein, thank you very much. I'm Peter Robinson for Uncommon Knowledge and the Hoover Institution, thanks for joining us.