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## **Perspective Roundtable: The Constitutionality of the Individual Mandate**

**WENDY MARINER:** Welcome to a *New England Journal* Perspective Roundtable on the Patient Protection and Affordable Care Act's federal mandate to have health insurance. I'm Wendy Mariner, Utley Professor of Health Law at Boston University School of Public Health, School of Medicine, and School of Law.

As soon as the Affordable Care Act was signed into law, lawsuits began to challenge the constitutionality of the mandate. So far, three federal courts of appeals have issued conflicting decisions. The Fourth Circuit rejected two cases, ruling that the plaintiffs were not eligible to bring the lawsuits. The Sixth Circuit found the mandate to be constitutional, and the Eleventh Circuit found the mandate to be unconstitutional. Ultimately, the United States Supreme Court is probably going to decide the question.

To discuss what's at stake in this dispute and how it might affect country, I'm joined by Jack Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School, and Ilya Somin, Associate Professor of Law at George Mason University School of Law and an adjunct scholar at the Cato Institute.

Jack, let's begin with you. What's this all about? Can the federal government require people to buy health insurance?

**JACK BALKIN:** Actually, the federal government is requiring people to choose between purchasing health insurance, approved health insurance, or paying a tax,

which I believe in fiscal year 2014 will be about \$695. You're exempted from the tax if you already have qualified health insurance, if you get health insurance through your employer, if you're on Medicare, if you're on Medicaid, if you have a religious objection, or if you live overseas or you're in the military. So basically, the question is whether or not the federal government can make you choose between purchasing health care or paying a tax.

**WENDY MARINER:** Ilya, isn't that the same as a requirement, if they require you to choose?

**ILYA SOMIN:** Well, I think of course it's a requirement. What they're saying is you have to do what they say, buy the qualifying health insurance; if you don't, you pay a fine. You can describe that fine as a tax if you want to, but it's really like any other penalty for violating a law. There are lots of laws on the books where if you violate them, you pay a fine — say a speeding ticket: You can say that a law against speeding is just making you choose between staying within the speed limit or paying a tax of however many dollars you have to pay them if they catch you and assess you a ticket. I think this is exactly the same way.

**WENDY MARINER:** Well, we've talked about a tax, but the discussion seems to be all about commerce and Congress's commerce power. Can you tell us what that's about, Jack?

**JACK BALKIN:** Well, since the New Deal, Congress has a number of different means of engaging in economic regulation. One is the power to tax, the second is the power to spend, and the third is the power to regulate interstate commerce. And the individual mandate is probably justified either under the power to regulate commerce or the power to tax. We will talk about taxing later. Most of the effort has been arguing about the power to regulate interstate commerce.

And the government's position in the case has been that the requirement to purchase qualified insurance is a straightforward application of Congress's power to regulate commerce among the several states, which generally means commerce that affects more than one state or commerce that raises a federal problem.

**WENDY MARINER:** So Ilya, we're sitting here in Boston, Massachusetts, a state that has imposed an individual mandate in accordance with its 2008, in effect, law. If a state can do it, why can't the federal government do it under its commerce power?

**ILYA SOMIN:** Well, these are two very different things. Congress only has the powers that are specifically enumerated in the federal Constitution. On the other hand, states, at least as far as the federal Constitution is concerned, have any powers other than those that are specifically forbidden to them. So states can do a wide range of things that the federal government is forbidden to do.

In this case, the claim is that Congress can do this as a regulation of interstate commerce. However, what this is regulating is the state of not having health insurance, and not having health insurance isn't commerce. In fact, the whole point of not having it is that you chose not to buy insurance, not to engage in this particular commercial act. And it is also not interstate.

**WENDY MARINER:** Well, Jack, if Congress has enumerated powers, what does commerce mean? What is the power in commerce?

**JACK BALKIN:** Well, the Congress has the power to regulate industries, economic behaviors, and in a case that was decided in 2005, various forms of consumption, decisions about what to spend, what to buy. So the government's argument in this case is that this is an attempt to regulate the health care industry, which is a huge industry and a sizeable portion of the national economy. It

reaches into everybody's lives. It affects the well-being of everyone in the country and also the economy.

And what it's interested in is ensuring a rational method for people to get health care. Most people use health insurance as a way of getting health care, but some people self-insure. They wait till they get sick, borrow from friends and family, try to self-medicate by getting over-the-counter medicines or remedies. Or they present themselves at hospitals where, under federal and state law, they can't be refused for emergency care. And that activity, uncompensated care, was estimated in 2008 to cost about \$43 billion. That is a lot of commerce.

**ILYA SOMIN:** The point is whether participation in the market is actually what is being regulated here. And the regulation here is not in any way conditioned on whether or not you participate in the market for health care. Congress could potentially have adopted a regulation saying something like you're not allowed to purchase health care unless you have health insurance. Or you're not allowed to get free health care from the government in certain instances unless you purchase health insurance. That would have been an easier regulation to defend than the one that they've actually enacted.

Now, it is sometimes claimed, I think perhaps even by Jack and others, that this is a different case from other kinds of mandates which would force people to do something because, as Jack suggested, everybody, or almost everybody participates in the market for health care. But what they are being forced to buy here is not health care but health insurance. If you switch the focus to health insurance in that way, the same kind of bait and switch would justify any other mandate. For instance, you could say, well, not everybody participates in the market for broccoli, but everybody does participate in the market for food. So a mandate that people purchase broccoli would just be a regulation of the fact that they participate in a market for food at some point in their lives. And you could

do a similar maneuver for pretty much any other kind of mandate that Congress would care to impose.

**WENDY MARINER:** Is there anything that government couldn't regulate as part of economic activity or the wide definition of commerce that exists in the 21st century?

**JACK BALKIN:** Well, since the New Deal, the way this issue has been solved is by saying that if we're dealing with economic regulation and regulation of economic matters, regulation of economic liberty, that generally speaking the government is given wide discretion to decide the best way to solve problems. On the other hand, if the government is seeking to regulate informational privacy, autonomy, in the sense of bodily autonomy, speech, freedom from government searches and seizures, other kinds of fundamental liberties, then the government is held to a much higher standard in deciding whether or not its solution is rational and whether it's within government power.

**WENDY MARINER:** Well, that does raise the question that you do hear. Isn't the complaint from many people in the public one that they simply don't want the government interfering in their choices? Is that more of an argument about freedom to make decisions or liberty? And if so, how does that affect what the government could do here?

**ILYA SOMIN:** So some of the defenders of the individual mandate have said, well, this case is really about claims of liberty and not about limits on federal power, because legally speaking, if it were a claim about liberty it would be easier for the federal government to win the case under current doctrine. However, liberty claims and limited-power claims are not mutually exclusive. Indeed, the Supreme Court has repeatedly said as much, that one of the reasons why we have structural constraints on the power of the federal government is precisely to protect individual liberty.

**WENDY MARINER:** Would Congress ever enact a requirement to buy something by itself? Would Congress have enacted a requirement to buy health insurance without the rest of the Affordable Care Act?

**ILYA SOMIN:** So they probably wouldn't have enacted this particular requirement. However, the fact that this requirement is part of a broader program doesn't mean that other future mandates would necessarily be part of such, especially if you consider that there's so much that Congress regulates in different ways that almost any future mandate that Congress could care to impose if they win this case, they could always tie into some other program that they have.

**JACK BALKIN:** The issue that Ilya is adverting to, which is, as I said, the issue that I was going to talk about later, is the question of how do you achieve, simultaneously three different goals. One goal you might call minimum requirements for insurance. That is, what is the basic element of an insurance policy that, if you get insurance, you'll be guaranteed to have. The second is, guaranteed issue, that is, you can't be denied insurance because you have a pre-existing condition. You can't have lifetime caps on insurance. That if you move to a new job or if you move across state lines, you can be assured of getting health insurance. So a guaranteed-issue idea and a minimum-requirement idea are tied together as a matter of policy. But if you tie them together as a matter of policy and you regard that as a policy goal, you face another problem. If the government is going to guarantee that you can get health insurance whenever you need it, many people will simply wait until they get sick to purchase insurance. And what that means is that the risk pool of people who are paying for insurance will be limited to people who are already sick or likely to be sick or know that they'll be sick. And that will raise premiums for everyone in the pool.

So if you want to have a rational allocation of insurance and risk, the best way to do it is to get everyone in the risk pool so that everyone's premiums are made

lower, and that keeps costs down. That was the basic idea that Congress adopted when it passed the Affordable Care Act.

**WENDY MARINER:** Well, would either of you care to speculate as to what the Supreme Court might do if it accepts certorari and reviews this case?

**ILYA SOMIN:** I think it's close. It could go either way. I think the possible alternatives range from a 5–4 decision striking down a mandate to perhaps a 6–3 the other way. I think it's pretty clear that the four most liberal justices are going to vote to uphold the mandate, because they've been opposed to virtually all structural limits on federal power in other cases. And I can't imagine that they would change their minds in this instance. I think it is also pretty clear that Justices Thomas and Alito, based on their past records, will vote to strike down the mandate.

I'm almost, though slightly less, confident with respect to Justice Scalia. I think the key swing voters then are Chief Justice Roberts and Justice Kennedy, and particularly in the case of Kennedy, it's very difficult to predict where he'll come down. I would note that in recent opinions, including most recently in *Bond vs. the United States*, he has emphasized the importance of structural limits on federal power. And he has emphasized the ways in which those limits promote individual liberty. So if the federal government wants to get his vote, it's going to have to persuade him somehow that authorizing this mandate doesn't authorize pretty much any other kind of mandate that Congress might care to impose. And what Kennedy will ultimately conclude about that, you know, it's very hard for me to judge.

Also interesting is Chief Justice Roberts, who has been in some ways kind of cryptic on federalism issues so far. I find it unlikely that Chief Justice Roberts

would be willing to be the only conservative justice who votes to uphold the mandate. But if Kennedy votes to uphold it, it's currently possible that Roberts would as well.

**JACK BALKIN:** I'd approach this slightly differently. The Supreme Court might kick the case down the road because if, as we said when we began, we view this as a tax, there is a federal statute called the Anti-Tax Injunction Act, which was passed to prevent people from challenging the constitutionality of taxes in injunctions, but rather it required them to pay the taxes and ask for a refund. Now, if we regard this as a tax, then the Anti-Tax Injunction Act might apply, which means that we would have to wait until at least 2015 for someone to refuse to pay the tax — or rather pay the tax and then seek a refund. And then it would have to work its way through the courts.

That would be a technical means of kicking this down the road. However, if they reach the merits, you would have to strike down the law as both beyond Congress's power under the Commerce Clause and Congress' power under the power to tax and spend for the general welfare. And so, in other words, you would have to get a five-person coalition on both of those claims. As Ilya has said, you only need to win one of the conservative members of the court, the five. And so it's my guess right now that the government has — it's more likely the government will win. But of course, stranger things have happened in the history of American Constitutional law.