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## Foreword—A Student Symposium on National Federation of Independent Business v. Sebelius

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FOREWORD—A STUDENT SYMPOSIUM ON *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS*

*Joshua Silverstein\**

In June of 2012, the United States Supreme Court decided *National Federation of Independent Business v. Sebelius* (“*NFIB v. Sebelius*”).<sup>1</sup> The case addressed the constitutionality of the Patient Protection and Affordable Care Act (“Affordable Care Act”),<sup>2</sup> which enacted wide-ranging changes to the American health care system. Health care reform is one of the most substantively important and politically salient issues in American public life. And the legal challenges to the Affordable Care Act implicated fundamental aspects of our constitutional structure, including the limits of Federal power, the nature of state sovereignty, individual liberty, and interpretive methodology. As a result, *NFIB v. Sebelius* was the most closely followed Supreme Court case since *Bush v. Gore*. It captured the imagination of the public and inspired an extraordinary amount of commentary in the build up to the decision. Given the political and legal importance of the issues addressed in the case, the editors of the University of Arkansas at Little Rock Law Review and I concluded that *NFIB v. Sebelius* merits substantial attention in the pages of the review.

In addition to being significant, the constitutional issues that the Supreme Court adjudicated in *NFIB v. Sebelius* are complicated. And there are many such issues. The case thus does not lend itself to traditional student scholarship. It is simply too long in length and too broad in scope for a single student note or comment.<sup>3</sup> Accordingly, I proposed that the Law Review conduct a written student symposium on *NFIB v. Sebelius*, with each student piece tackling one of the difficult questions raised in the case.<sup>4</sup> The editors accepted my recommendation, and the results are set forth in this volume of the review.

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1. 132 S. Ct. 2566 (2012).

2. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of titles 5, 18, 20, 21, 25, 26, 28–31, 35, 36, and 42 of the United States Code).

3. For example, the various opinions in the case took up a total of 112 pages of West’s Supreme Court Reporter. The decision runs from page 2566 of volume 132 through page 2677.

4. My thanks to David Schlesinger of Jacobs & Schlesinger LLP, located in San Diego, California, for assistance in developing the idea of a student symposium on *NFIB v. Sebelius*.

The symposium starts with “The Patient Protection and Affordable Care Act: A Constitutional Analysis,” by David Jung. This article serves as an introduction to, and background for, the remaining pieces. Jung begins with a political history of health care reform in the United States, covering the period from the early twentieth century up through the adoption of the Affordable Care Act. He then presents an overview of the statute. Next, Jung discusses the procedural history of the constitutional challenges to the act in the lower courts. Finally, Jung summarizes the various Supreme Court opinions in *NFIB v. Sebelius*. He sets forth all of the pertinent rulings as well as the arguments of the concurring and dissenting justices.

The second piece in the symposium, by Josie Richardson, is entitled “Let Them Eat . . . Broccoli?” Richardson analyzes the Supreme Court’s ruling that the individual mandate in the Affordable Care Act exceeds Congress’s power under the Commerce Clause. The mandate is a requirement that all citizens either purchase health insurance or pay a “penalty.”<sup>5</sup> As Richardson explains, the Court concluded that the Commerce power extends only to the regulation of existing commercial *activity*. It does not cover the failure to act; Congress may not use the Commerce Clause to regulate mere *inactivity*. Compelling a person to engage in a commercial transaction, such as by mandating that the person buy health insurance, *is* the regulation of inactivity. Thus, it is beyond the authority conferred by the Commerce Clause.

*NFIB v. Sebelius* is only the third Supreme Court opinion since the New Deal to find that an act of Congress exceeded the limits of the commerce power. That might lead one to conclude that the decision significantly altered Commerce Clause jurisprudence. But Richardson persuasively argues otherwise. In fact, she concludes that the law “essentially remains unchanged.” Most importantly, Richardson explains that the individual mandate is unique. Congress had never before attempted to force individuals to enter into commercial transactions with other private parties. Finding that something so novel is beyond Congress’s commerce power says very little about either the vast bulk of legislation on the books or statutes likely to be proposed in the future.

The astute reader will note that I did not describe the Court’s conclusion with respect to the Commerce Clause as a “holding.” That is because there is some dispute as to whether the ruling was necessary to the Court’s ultimate judgment that the individual mandate was a valid exercise of Congress’s taxing power. And that question turns, in part, on whether Chief Justice Roberts properly used the canon of constitutional avoidance in his opinion for the Court. This is the topic of the next article in the symposium,

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5. See 26 U.S.C. § 5000A (Supp. V 2012).

“Avoiding the Unavoidable: The Canon of Constitutional Avoidance as Applied to the Patient Protection and Affordable Care Act,” by T.J. Fosko.

The canon of constitutional avoidance provides that courts should interpret a statute in such a way as to avoid raising constitutional questions when the language of the statute is susceptible to such a reading. More specifically, as between two interpretations of a law, one that makes the law constitutional and another that makes it unconstitutional, courts should adopt the former unless that understanding is clearly inconsistent with Congressional intent. In *NFIB v. Sebelius*, Chief Justice Roberts used the canon in holding that the payment a person must make if they choose not to buy health insurance is a tax rather than a penalty. He reasoned that if the payment constitutes a penalty, it is an *unconstitutional* exercise of Congress’s *commerce* power; but if the payment is a tax, it is a *constitutional* exercise of Congress’s *taxing* power. And so the Chief Justice adopted the latter reading.

The potential problem here is that, under the modern understanding of the canon of constitutional avoidance, the canon is about *avoiding* constitutional questions. But Chief Justice Roberts did not avoid the constitutional question implicating the Commerce Clause; he addressed it in full. Why? According to Fosko, it is because the Chief Justice relied on precedents that applied the older, classical version of the canon of constitutional avoidance—a version which requires that the Court resolve the constitutional question at issue on the merits. Moreover, Roberts used those precedents to craft a new canon that addresses the unique circumstances of *NFIB v. Sebelius*.

The Supreme Court struck down only one aspect of the Affordable Care Act—the provisions conditioning the states’ existing Medicaid funding on their adoption of the Affordable Care Act’s Medicaid expansion. The Court held that Congress lacked the power to impose such a condition under the Spending Clause of the Constitution. This is the subject of the final piece in the symposium, “Breaking Down the Supreme Court’s Spending Clause Ruling in *NFIB v. Sebelius*: A Huge Blow to the Federal Government or a Mere Bump in the Road?” by Ellen Howard.

Congress may use its spending power to provide incentives for states to take certain actions, such as by conditioning the receipt of federal funds. But the Constitution prohibits Congress from coercing the states into action via spending conditions. Howard explains that the *Sebelius* Court adopted a new test for determining whether such a condition coerces the states: Congressional action is coercive if it conditions “significant” funding on the adoption of an “independent” program. The Medicaid expansion condition met both prongs of the test. First, the Medicaid funding that Congress provides to the states under pre-Affordable Care Act law is significant. Second, the Medicaid expansion that the states were required to adopt in order to keep their pre-Affordable Care Act funding was a separate, independent

program, despite Congress's use of the label "Medicaid." Accordingly, the condition was coercive and beyond Congress's spending power.

*NFIB v. Sebelius* is the first time in American history that the Supreme Court held that Congress exceeded the powers conferred by the Spending Clause. However, as with the Commerce Clause, the ultimate impact of this ruling is likely to be quite small. Howard forcefully demonstrates that the vast majority of Congress's spending conditions are not coercive under the new test. She establishes this by showing that three important conditional spending programs—those enacted by (1) the No Child Left Behind Act, (2) the Clean Air Act, and (3) "Megan's Law"—survive application of the new constitutional framework. What distinguishes the Affordable Care Act is the sheer size of Medicaid. No other Federal spending program has anywhere near the impact on the states that Medicaid does. In other words, like the individual mandate, Medicaid is unique. Therefore, the constitutional infirmity of the Medicaid expansion condition says very little about other existing programs or about those Congress is likely adopt down the line.

The common themes running through the three substantive articles in the symposium are this: *NFIB v. Sebelius* raised issues that are critically important on legal and political grounds, but the ultimate holdings and supporting reasoning did not significantly change American constitutional law. The Federal Government's power to regulate under the Commerce and Spending Clauses is largely intact. Striking down the Medicaid condition and ruling that the individual mandate exceeds the commerce power are best understood as minor adjustments made at the outer boundaries of federal authority, not dramatic changes to our constitutional order. And since most legislation is well within the scope of federal power, *NFIB v. Sebelius*'s impact will be rather limited. Finally, Chief Justice Roberts's new understanding of the constitutional avoidance canon reflects not a radical innovation, but a cautious extension of long-established precedents.

I would like to thank the authors of the four symposium pieces, their faculty advisors, and the editors and board of the University of Arkansas at Little Rock Law Review for their work in bringing this written symposium to fruition. I hope that the readers of the Law Review get as much out of the four symposium pieces as I did.