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Introduction
NFIB v. Sebelius
A Case for the Ages

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For health law, ethics, and public policy, *NFIB v. Sebelius* is a once-in-a-generation decision—perhaps even once in a lifetime. No case before it has had such monumental importance for how health care is financed and delivered in the United States, and it is hard to imagine when another case of this magnitude might arise. At stake was the entire Patient Protection and Affordable Care Act of 2010 (ACA, or Affordable Care Act, for short). The core of this massive law can be boiled down to the following central elements, each designed to make almost every American eligible for affordable coverage:

- *Medicaid expansion.* The federal-state program for the poor expands to cover all citizens below 138 percent of the federal poverty level rather than restricting eligibility to categories of need such as disabled, elderly, or single parents.
- *No medical underwriting.* Private health insurers may not refuse applicants or limit coverage based on actual or predicted health conditions. Also, insurers may not vary their rates based on prior or predicted use of services, other than a partial (but not full) adjustment for age.
- *Employer "play or pay."* Larger employers (more than 50 workers) pay a tax if they do not offer health insurance.
- *Subsidized insurance.* Middle- and lower-income people who do not qualify for Medicaid or for employer-sponsored insurance will receive substantial government subsidies to buy private insurance through new "exchanges."
- *Individual mandate.* Everyone who has an affordable health insurance option (one costing less than 8 percent of household income) must sign up for at least minimum coverage or pay a modest tax penalty.

At issue in *Sebelius* were the first and the last of these key elements. If they fell, so too would all of its other provisions. In particular, the individual mandate (also known as the "minimum coverage" requirement) is the lynchpin of the ACA's regulation of private health insurers. Without this mandate, requiring insurers to accept all applicants at average community

rates might cause the market to collapse because, otherwise, people would not buy insurance until they expected to use it, forcing insurance prices much higher and possibly spiraling out of reach.

This all goes beyond just the functioning of the insurance market, however. This case also raised the fundamental scope of federal power over economic and social policy. Congress based the individual mandate on its constitutional power to regulate interstate commerce, which Congress had never before used to require the unconditional purchase of a regulated product. (Other purchase mandates were always premised on engaging in some voluntary activity.) This case offered advocates of smaller government a prime opportunity to cabin the expansive federal commerce power.

Sebelius also posed a fundamental challenge to Congress's "spending power"—its broad discretion to promote social welfare as it sees fit simply through financial appropriations. This power becomes constitutionally controversial when federal funds flow to states with significant strings attached that limit states' own policy prerogatives. Previous attempts had always failed to limit the conditions that Congress can attach to state funds, so many observers were surprised when the Court also chose to consider that basic question, as applied to the ACA's Medicaid expansion.

Heightening anticipation about the Court's decision was the spate of litigation that preceded it. Over two-dozen challenges had been filed, including by half the states, starting barely an hour after President Obama inked his signature on the new law. Four circuit courts of appeal and a dozen or so district courts issued decisions that revealed a deep ideological split, with all but one Democratic judicial appointee favoring the law and most (but not all) Republican-appointed judges striking down the individual mandate.

The Court signaled its recognition of the case's importance by scheduling an extraordinary three days of oral arguments—the most time allocated in several decades. Lines of hopeful attendees camped out in subfreezing weather the day before, and placard-wielding protesters and supporters swarmed at the foot of the building's imposing steps. Bloggers and reporters scrutinized every nuance of each justice's questions and inflection during oral arguments, in news coverage that continued throughout the several months leading to the ultimate decision, which the Court issued on the last possible day of its term.

The decision lived up to this extraordinary hype. The Court upheld the ACA, but just barely—a knife-edge of a ruling, split 5–4 on key points, that seriously weakened two of the ACA's core provisions, but allowed it survive, wounded but intact. In brief, the Court ruled that the individual mandate is valid as a tax but not as a regulation. And, it ruled that Congress may expand Medicaid funding, but it cannot threaten to withhold all Medicaid funds if states refuse to accept the expansion.

The legal import is that both people and states have an option. People who do not purchase affordable insurance must still pay the tax penalty, but noncompliance is not a legal violation. The mandate simply becomes a

"play or pay" option, similar to the option that larger employers have, to decide whether one prefers to pay an extra tax or to sign up for insurance. Similarly, states may opt to keep the Medicaid program they have and refuse any expansion.

Court observers and legal experts were startled by this outcome. A 5–4 result was not surprising, considering the Court's ideological composition. But few people expected Chief Justice Roberts to be the sole swing vote, and almost no one expected seven justices to agree that Congress lacks constitutional authority to require states to expand Medicaid. Also surprising was the dissent by the other four conservative justices. They signed their opinion jointly, rather than following the normal practice of designating a primary author, and they styled the opinion starkly as a dissent even though the these four repeated, sometimes almost verbatim, many of the key points about the Commerce Clause that Roberts made in his lead opinion.

This idiosyncratic lineup led many observers to speculate—so far without refutation—that Roberts changed his vote late in the course of deliberations and opinion writing. According to this speculation, he was satisfied to set conservative precedent that limited federal powers under both the Commerce Clause and the Spending Clause, and so he did not feel the need to strike the entire law when it was possible to save it based on tax law technicalities (summarized below). According to some, Roberts was Solomonic. Others harken to Judas.

As surprising as these vote alignments, though, are the particular substantive bases for the decision. Despite all the preceding litigation, not a single lower-court judge had found a flaw in the Medicaid expansion, and only one of the many judges below had reached the same conclusion about the mandate, that it is invalid as a regulation but legal as a tax. Clearly, then, the Court's reasoning merits close attention. The full decision occupies almost two hundred pages in the official reporter, but we mercifully edit it to capture the major elements (see appendix), including the full assortment of fascinating philosophical and conceptual issues explored throughout this book. Here, we briefly summarize the decision's key points.

First, the Court had to resolve whether it was premature to rule on the individual mandate's tax penalty. A long-standing statute, known inartfully as the Anti-Injunction Act, forbids challenges to taxes until taxes are due. Under the ACA, that would not be until 2015, and no one wanted to wait that long, so in a masterful feat of legal jujitsu, the majority of five (Roberts plus the four more liberal justices) concluded that the mandate's tax penalty is not a tax for purposes of this jurisdictional statute, even though it is a tax under the Constitution.

Roberts accomplished this judicial wizardry by reading the Anti-Injunction Act in a highly formalist or technical fashion while at the same time reading the Constitutional authority "to lay and collect taxes" in functionalist fashion. Formalism asks whether Congress called the provision a tax. Functionalism asks only whether the provision acts like a tax.

By switching its focus from how the duck talks to how the duck walks, the Court was able to thread the tax needle in the only way possible that would both allow it to decide the case now and to provide Roberts grounds on which he was willing to join the more liberal four in upholding the minimum coverage requirement as a tax.

Walking this fine line was critical because, in a more conventional 5–4 alignment, the Court's conservative majority ruled that the individual mandate cannot be based on the constitutional grounds that Congress had actually invoked: the power to regulate interstate commerce. Health insurance, naturally, is part of interstate commerce and is heavily regulated as such, but Roberts and his conservative brethren agreed that the commerce power can be deployed only when a person chooses to enter commerce, and cannot be deployed to force people into commerce. Here is where the infamous broccoli hypothetical reared its head. If Congress could mandate the purchase of health insurance, why not anything else—even broccoli—that might produce health or other social benefits? And, if there is no logical stopping point, then the commerce power would unduly threaten individual liberty.

The conservative five refused to embrace any of the distinguishing features of health insurance offered by the government and accepted by Ginsburg's dissent, claiming that these features either are not unique to health insurance or are not sufficient to justify invoking the commerce power. These five also refused to frame the mandate as a necessary part of a larger set of otherwise-valid insurance regulations, or to view people as moving into and out of the insurance market over time, or to their being engaged in commerce when they seek health *care* regardless of having health *insurance*.

In drawing and refusing to draw the conceptual boundaries, Roberts was much more concerned about basic principles of constitutional order than about health care social policy. His opinion begins with a 1500-word civics lesson about the limited nature of federal powers. Ginsburg's dissent, in contrast, devotes 2700 words at the outset to explaining the economic problems with the existing health insurance market and how the ACA's provisions aim to solve them.

Differences in judicial style and in basic conceptualization carry forward into the analysis of Medicaid expansion. According to a supermajority of seven (the conservative five plus Justices Breyer and Kagan), it is unconstitutionally compulsive to threaten states with losing all Medicaid funding if they do not accept the ACA's Medicaid expansion, even though the federal government will pay for 90 percent of the expansion cost. It matters not how sweet is the carrot if coupled with too heavy a stick. Ginsburg objects that such distinctions are not readily justiciable, nor is it correct to think of Medicaid as two separate programs, with the new leveraged on the old. Instead, Medicaid has been expanded many times in the past and each time presented as an all-or-nothing option, with no constitutional objection. To the other seven justices, however, the ACA's expansion differs from the past in kind rather than degree because it eliminates the categories of poverty that

previously defined Medicaid. This, plus the amount of money that states in theory might lose in current Medicaid funding, makes the ACA's expansion a "gun to the head" of states that would like to keep Medicaid as it was.

In sum, *Sebelius* merits the attention we give it not only because of its importance for both health care public policy and constitutional law. This remarkable decision is also an object lesson in competing styles of judicial analysis (formalism vs. functionalism, public policy vs. doctrinal). And, it explores a collection of conceptual puzzles (action/inaction, coercion, issue framing) that fascinate philosophers, lawyers, and public policy analysts alike.

* * *

This volume comprises twenty chapters that explore various dimensions of *Sebelius*. The contributors come from myriad disciplinary backgrounds, with philosophy and law being the two principal concentrations. Political science is also represented, as are religious studies and bioethics. By assimilating a highly interdisciplinary cast, the volume offers broad coverage while, at the same time, offering analytic rigor within its composite fields. Our ambition is therefore decidedly pluralistic, aiming to elucidate features of the decision from a variety of approaches.

Building on this introduction's overview of the case, the first unit explores context and background in fuller detail. The introductory chapter by Glenn Reynolds and Brannon Denning analogizes *Sebelius* to other seminal decisions, including *Marbury v. Madison*. By contrast, Josh Blackman argues that the case is largely unprecedented in legal history, particularly given its upshot in social movements and popular constitutionalism. Brian Butler considers the decision as an "anti-precedent," casting the case on par with the ill-received *Lochner v. New York*. In the final chapter of the first unit, Jane Marriott and Jamie Fletcher situate the American health care debate within a global context, drawing comparisons and contrasts with the United Kingdom and Brazil.

The second unit then turns to the texts of the decisions themselves. Caleb Mason reflects on the number of justices that signed on to various lines of reasoning, noting that, curiously, the limiting interpretation of the Commerce Clause was not formally joined by a majority of the justices. Does this case therefore actually portend a restriction of Commerce Clause jurisprudence? Less skeptically, Tonja Jacobi considers ways in which Chief Justice Roberts's opinion limits federal legislative power and the ways in which these limitations will have profound consequences. Paul Gowder defends the principal conclusion of the majority, namely that the ACA can be understood as affecting taxes and therefore can be authorized under the Taxing and Spending Clause rather than under the Commerce Clause. The Court proposes a distinction between activity and inactivity that becomes central to its holding, and this distinction is reviewed and evaluated by Nathan Stout.

A core question in the litigation is the coverage mandate's implications for liberty, which provides the focus of the third unit. J. B. Coleman queries how the mandate restricts individual liberty, particularly the liberty not to have health care. These restrictions on liberty do not just attach to individuals but rather to employers as well; Jessica Flanigan discusses this dynamic. In successive chapters, Jacob Affolter and R. Mary Hayden Lemmons discuss the ACA and its implications for individual conscience. Affolter pays attention to the broad issue of conscience and federal authority, whereas Lemmons focuses on the more narrow issue of contraception exemptions for employers, an issue that has become highly litigated following *Sebelius*.

The fourth unit considers another core question in the litigation that pertains to the ACA's expansion of Medicaid, a provision that the Court struck down. Alex Rajczi uses the holding as a case study to explore broader questions about public spending and access to health care, access that must be paid for somehow. Ishani Maitra and Brian Weatherson coauthor a chapter that defends Medicaid expansion, despite the Court's holding to the contrary. Alexander Guerrero also disagrees with the Court, arguing that its holding trades on a misunderstanding of coercion, particularly the ways in which the legislation would have forced states to expand Medicaid coverage or lose federal funding. The Court's conception of coercion is further criticized by I. Glenn Cohen, who argues that a more philosophically rigorous conception would have elucidated the analysis.

The final unit considers the future implications of the *Sebelius* decision, not narrowly tailored to health care, but rather as it will more expansively inform other doctrinal inquiries. Mitchell Berman looks at how the case bears on benefits that government is not constitutionally required to provide. Future Commerce Clause jurisprudence is explored by Marcus Schulzke and Amanda Cortney Carroll, as well as how this affects federal authority more generally. Christopher Boom proposes that the decision undermines the rule of law in the United States and situates it within a broader pattern under which, according to him, fidelity to the rule of law is fading. The final chapter, by Jill Hernandez, discusses how the *Sebelius* decision intersects with the Court's holdings on Arizona's immigration legislation and speaks to the rights of marginalized populations.

It was a privilege to work with contributors who were so receptive to feedback—often very lengthy—and who worked to produce such high-quality chapters. We hope that their work catalyzes thought on the philosophical and legal implications of Sebelius and provides a basis for further research. Also, we thank Nate Stout for editorial assistance and Julian Kisner for preparing the index. Lastly, we thank Felisa Salvago-Keyes and Margo Irvin for commissioning this volume and Denise File for her preparation of the manuscript.

As a final introductory note, the version of the opinion that appears as an appendix was edited to shorten it while, at the same time, capture the main ideas. Though we encourage reading of the entire opinion, this abridged version provides enough to get started. Thank you for picking up this volume, and please enjoy its contents.