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Editors' Foreword

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SYMPOSIUM

HEALTH CARE AND THE CONSTITUTION: A FORUM ON THE SUPREME COURT'S AFFORDABLE CARE ACT DECISION

Editors' Foreword

On October 4, 2012, the *Fordham Law Review* hosted a Symposium entitled *Health Care and the Constitution: A Forum on the Supreme Court's Affordable Care Act Decision*. The daylong Symposium unpacked the constitutional, political, and social ramifications of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*¹ (*NFIB*) from a variety of perspectives. The Symposium consisted of four panels, each exploring a different aspect of *NFIB*'s impact.

The first panel focused on the heart of the political controversy: the individual mandate. The panel featured Gary Lawson, Gillian Metzger, Trevor Morrison, Linda Sugin, and Benjamin Zipursky. Panelists examined the taxation and Commerce Clause elements of the decision, as well as *NFIB*'s future implications. Professor Lawson discussed the good, the bad, and the ugly of *NFIB*.² He argued that the Court's interpretation of the Necessary and Proper Clause (née the Sweeping Clause³) was an important step in the right direction, while he found the Court's handling of the Commerce Clause and its interpretation of the "zombie" constitution more troubling. Professors Metzger and Morrison agreed with Chief Justice Roberts's use of the constitutional avoidance canon but argued that he should have had a more "forthright engagement with statutory interpretation" organized around the presumption of constitutionality.⁴ Professors Sugin and Zipursky depicted the mandate as a tax aimed at incentivizing certain conduct more than raising revenue and observed that such taxes are routinely subjected to low levels of constitutional scrutiny, consistent with Chief Justice Roberts's opinion.

1. 132 S. Ct. 2642 (2012).

2. Gary Lawson, *Night of the Living Dead Hand: The Individual Mandate and the Zombie Constitution*, 81 *FORDHAM L. REV.* 1699 (2013).

3. Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *DUKE L.J.* 267, 270 (1993).

4. Gililan E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 *FORDHAM L. REV.* 1715, 1716 (2013).

The second panel featured Dr. Ezekiel J. Emanuel and Richard Kirsch. They both explored the Affordable Care Act⁵ (ACA) in its political and social context, including discussions on the development, enactment, and implementation of the ACA. Mr. Kirsch, a Senior Fellow at the Roosevelt Institute, looked at the lessons learned from previous efforts to reform health care over the last century,⁶ while Dr. Emanuel, one of the architects of the ACA, focused his remarks on the development and implementation of the Act.

On the third panel, James Blumstein discussed the amicus brief⁷ he had filed with the Supreme Court, as well as his recent scholarship⁸ on the parts of *NFIB* that grappled with the coercive effects of the ACA's Medicaid mandate. Professor Abbe Gluck contributed an Essay discussing what *NFIB* could mean for congressional efforts to invite state participation in the implementation of federal statutes.⁹

The day concluded with remarks by Akhil Reed Amar. Building from two of his own articles¹⁰ that, in different ways, anticipated the *NFIB* decision, Professor Amar constructed a novel argument for the right to medical care framed around the Thirteenth and Fourteenth Amendments' guarantees of freedom and equality. Within this framework, Amar argued, the ACA can be seen to extend civil rights protection to those deemed unequal by the health care system and made "slaves" to their preexisting conditions.¹¹

5. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (codified as amended in scattered sections of the U.S. Code).

6. Richard Kirsch, *The Politics of Obamacare: Health Care, Money, and Ideology*, 81 FORDHAM L. REV. 1737 (2013); see also RICHARD KIRSCH, FIGHTING FOR OUR HEALTH (2011).

7. Brief of James F. Blumstein, As Amicus Curiae in Support of Petitioners (Medicaid Issue), *Florida v. U.S. Dep't of Health & Human Servs.*, No. 11-400 (U.S. Jan. 17, 2012).

8. Professor Blumstein explored these topics in the *Cato Supreme Court Review*. See James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011-2012 CATO SUP. CT. REV. 67.

9. Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013).

10. Akhil Amar, *The Lawfulness of Health-Care Reform* (Yale Law Sch., Pub. Law Working Paper No. 228, June 1, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856506; Akhil Reed Amar, *How To Defend Obamacare*, SLATE (March 29, 2012, 4:07 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/supreme_court_and_obamacare_what_donald_verrilli_should_have_said_to_the_court_s_conservative_justices_.html.

11. Akhil Reed Amar, Remarks at the Fordham Law Review's Symposium on Health Care and the Constitution 29-32 (Oct. 4, 2012) (transcript on file with the Fordham Law Review).