Editors’ Foreword

Editors

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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. Sebelius1 (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.

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The second panel featured Dr. Ezekiel J. Emanuel and Richard Kirsch. They both explored the Affordable Care Act (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, 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 brief he had filed with the Supreme Court, as well as his recent scholarship 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.

The day concluded with remarks by Akhil Reed Amar. Building from two of his own articles 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.

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