



NFIB v. Sebelius: Notes for Teachers and Facilitator

Key Points:

- The Commerce, Taxing and Spending, and Necessary and Proper clauses are the main sources of the federal government's power to legislate, Each was involved in the case arising from the adoption of the Affordable Health Care Act or, as it is sometimes referred to as Obamacare and its mandate that all persons must have health insurance or be penalized.
- The law also sought to expand the availability of Medicaid. This raised issues involving federalism and the division of powers between the federal and state governments.

Additional Resources:

- [Oyez: NFIB v. Sebelius](#)

Instructions for the Students:

Start with the BRAINSTORMING SHEET & ARGUMENT SHEET. Review the case, then work through the SHEETS which will help the group prepare their arguments. During the discussion period you will need to select representatives (2-4) who will act as the advocates during the moot court. Students (Advocates) from each side will present a brief argument that reflects their group's strongest points for an affirmative or negative response to the question posed. Afterwards the mock Supreme Court will decide the outcome of the case. Students will be instructed that all students on each side can raise their hand to answer questions posed by the Justices of the Court if their advocates need assistance or do not have a satisfactory answer. Advocates will only have 15 minutes to present their arguments to the Supreme Court. The government may reserve up to five (5) minutes for rebuttal which must be done at the start of their oral argument (kindly remind the government to reserve time if he or she forgets as a rebuttal is a powerful tool during oral arguments). The rebuttal should focus on responding to issues that NFIB raised during their oral argument. You will also need to craft responses to any questions the Supreme Court might ask. The ARGUMENT SHEET is an excellent way to organize your group's thoughts.

BRAINSTORMING SHEET

Which side do you represent?

Your Group's Arguments (Rank from best to worst):

Opposition's Arguments (Rank from best to worst):

Counter-Arguments To Opposition's Arguments:

Possible Supreme Court Questions:

Responses To Supreme Court Questions:



Background and Facts

Background:

In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA). The goal of this law was to increase the number of Americans covered by health insurance and to reduce the high cost of health care. The Act contained 1) an individual mandate and 2) a Medicaid expansion provision.

- 1) The individual mandate required individuals (except those who were exempt or received health insurance through their employer or a government program) to purchase a minimum level of health insurance from a private company. If they failed to do so, they would have to pay a penalty to the IRS when they paid their normal taxes.

- 2) The Medicaid provision required states to accept its expansion in their state in order to continue receiving federal funds for Medicaid. The expansion broadened the scope of the Medicaid program and increased the number of people that the states must cover. If the state failed to accept the expansion, they could lose their existing federal funding for Medicaid. For most states, these funds constitute over 10% of a state's total revenue.

The Named Parties:

NFIB: The National Federation of Independent Business is the largest small business association in the U.S. It is a non-profit that works to defend the right of small business owners to own and operate their businesses without undue government interference.

Sebelius: Kathleen Sebelius was the U.S. Secretary of Health and Human Services. In her role, she was instrumental in overseeing the implementation of the ACA

Procedure:

Shortly after the ACA was passed, a handful of states sued in the District Court for the Northern District of Florida, seeking a declaration that the ACA was unconstitutional. Later, the states were joined by additional states, the National Federation of Independent Business, and a few individual plaintiffs.

The District Court ruled that the individual mandate was unconstitutional, and thus the entire Act was invalid because the mandate could not be severed from the other provisions. On the issue of the Medicaid expansion, the court ruled in favor of the government, finding that there was insufficient evidence that the expansion was unconstitutionally coercive and violated the sovereignty of the several states.

The case was appealed to the Eleventh Circuit, which affirmed that the individual mandate was unconstitutional and that the Medicaid expansion was not unconstitutional. However, it reversed the District Court's finding about severability, and they held that the mandate *could* be severed without invalidating the remainder of the ACA.

Commerce Clause

Article 1, Section 8, Clause 3 of the U.S. Constitution authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Basically, it allows Congress to pass laws that “regulate commerce” amongst the states. There has been debate over what “commerce” and “among the several States” means.

What do you think of when you hear “commerce”? Money? Business? What about healthcare? Does this include action, inaction, or both?

Taxing and Spending Clause

Article I, Section 8, Clause 1 provides that “The Congress shall have Power To lay and collect Taxes. . . to pay the Debts and provide for the common Defence and general Welfare of the United States.”..

Enumerated Powers of Congress

Congress may exercise the powers that the Constitution grants it, subject to the individual rights listed in the Bill of Rights. In addition to the specifically delegated powers given Congress, Article I, Section 8 provides that “The Congress shall have Power. . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . .”

Federalism

Federalism or division of powers is one of the most important and innovative concepts in the U.S. Constitution, although the word federalism never appears. It asserts that both the federal government and the state governments are sovereign. Federalism is the sharing of power between national and state governments. Americans still debate the proper role of the national government versus the states. Consider whether or not the federal government wields too much power when it conditions state funding on a way the states must run their Medicaid programs.

Key Issue

- 1) Is the individual mandate constitutional? If so, does Congress get its power from the Commerce Clause or the Taxing and Spending Clause?
- 2) Is the Medicaid expansion constitutional? Can the federal government force the states to expand the availability of Medicare?

Are we ready to form arguments?

Before you do make sure that you understand:

- What is interstate commerce?
- What is a tax?
- What is federalism?
- What are the goals of the Affordable Care Act?



Our Mission in this Moot Court

Our moot court begins at the point that the United States Supreme Court has agreed to resolve the issue of whether the two provisions in the ACA are unconstitutional.

Brainstorming

Break into three groups:

Group 1: Attorneys representing NFIB

Group 2: Attorneys representing Sebelius (the Secretary of Health and Human Services)

Group 3: Justices who will ask probing questions and decide the case.

Each side will have 15 minutes to present its arguments. Those representing NFIB will go first and may reserve 5 minutes for rebuttal. Justices who will hear the case will have engaged in brainstorming and will interrupt the arguments with questions.

Hints for attorneys representing NFIB: You are arguing that the ACA is unconstitutional. Specifically, you should argue that the individual mandate is unconstitutional, that the federal government does not have the power to force a person to buy a service or product, that neither the Commerce Clause nor the Taxing and Spending Clause gives government this power. Also, you should argue that the Medicaid expansion was unconstitutionally coercive. You should speak to the principle of federalism, and argue that the expansion was not just a simple adjustment to the program, but rather a new program that violates the sovereignty of the states, making them simply the servants of the federal government. As the side bringing the case, remember that you can reserve five minutes for rebuttal. That means you can have the last word to counter what the other side says.

Hints for attorneys representing Sebelius: You will contend that the ACA is constitutional that the individual mandate is constitutional. You could argue that Congress had the powers to enact it either under the Commerce Clause or the Taxing and Spending Clause or both. Also, you must argue that the Medicaid expansion was constitutional. You should persuade the justices that this was simply an expansion of the existing program, and Congress had the right to make changes as they saw fit. Also, you should argue that the states *did* have a choice either to accept the funds and make the change or reject the funds and to pay for the program on their own.

Hints for Justices: Your job is to think about both sides of the case and develop questions for each side. Good questions will dig deeper into the arguments made and help clarify both sides.

Summary of tasks:

1. Engage in general brainstorming of arguments for your side or if you are a justice of questions to ask.
2. As part of that brainstorming, review and consider the arguments on the Argument Sheet. Also consider arguments you thought of yourself.
3. Attorneys: Write out a bullet point list of the arguments you want to make and begin with the most persuasive. Use the Attorney Worksheet.
4. Attorneys: Think of counters to those arguments and develop answers. Do the same with the arguments you think the other side will develop.
5. Justices: Fill out the Justice worksheet
6. Attorneys: Designate the person to make the argument (but all attorneys can answer questions posed by the Justices)
7. Attorneys for NFIB: Remember to reserve 5 minutes for rebuttal if you wish.

Attorneys making the argument: Introduce yourself by saying, "May it please the Court, my name is _____ and I represent _____ in this matter."



Arguments

Look over these arguments. Note whether they help NFIB, Sebelius, both sides or neither side. For the individual mandate, does the argument make it look like interstate commerce, a tax, both, or neither? Can our case be distinguished or aligned in some other way?

The Individual Mandate

1. _____ Because Congress characterized the individual mandate as a penalty, saying it is a tax would basically be the same as rewriting the statute. Congress, not courts, should be the one to write the laws.
2. _____ The Commerce Clause allows Congress to *regulate* commerce, but cannot *compel* individuals to participate in commerce. Meaning, Congress cannot regulate *inactivity*.
3. _____ The individual mandate is *not* regulating inactivity. Everyone receives medical care in some way, and thus everyone is engaged in “activity” in the healthcare marketplace.
4. _____ The Commerce Clause authorizes Congress to regulate those who are self-insured because of the way it increases health insurance costs for everyone else in society.
5. _____ In *Wickard v. Fillburn*, the Court upheld a penalty, enacted under the commerce clause, on a farmer who grew more wheat than permitted by law. The Court rejected the argument that he was growing the wheat for his own consumption, and not for sale in the open market. Wheat intended for home consumption, the Court noted, allows the farmer not to buy wheat on the open market and, therefore, affects wheat prices on open market.
6. _____ The mandate should be considered a tax because it is not so high that there is really no choice but to buy health insurance; the payment is not limited to willful violations, as penalties for unlawful acts often are; and the payment is collected solely by the IRS through the normal means of taxation.
7. _____ The president and Congress refused to “frame” it as a tax, and “our cases establish a clear line between a tax and a penalty.” So, the mandate is a penalty and *not* a tax.
8. _____ The Taxing and Spending Clause gives Congress *broad* power to tax for the general welfare, and it may tax behavior that it wants to discourage, such as going without health insurance.

9. _____ There is a significant cost-shifting problem in the health care market. Everyone will eventually need health care at some point, and they will not always be able to predict when they need it. If they do not have insurance, they are often unable to pay for this health care. However, laws require hospitals to provide a certain degree of care to individuals, regardless if they can pay. So, in order to avoid major losses, hospitals pass on this cost to insurers through higher rates, and insurers then pass on the cost to policy holders in the form of higher premiums. Congress estimates the cost of uncompensated care raises family health insurance premiums by an average of \$1,000 per year.

10. _____ Health care is different from buying a car or food or clothes – under the law, you will be guaranteed access to health care (thus raising costs for others if you are uninsured) but the same cannot be said for the other things.

11. _____ There have been examples of “taxes” that were authorized under Congress’s power to tax but were not called such. For example, in the *License Tax Cases*, the Court has held that federal licenses to sell liquor and lottery tickets, for which the licensee had to pay a fee could be allowed as exercises of the taxing power.

The Medicaid Expansion

1. _____ A basic principle is that the federal government may not compel the States to enact or administer a federal regulatory program.

2. _____ Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State’s Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it.

3. _____ The Court has long held that Congress may use its spending power (“to provide for the...general Welfare of the United States”) to grant federal funds to the States, and may condition such a grant upon the States’ taking certain actions that Congress could not require them to take.

4. _____ When Congress uses its spending power to pressure states to the point of obligation, that legislation runs contrary to federalism.

5. _____ The Medicaid expansion is simply a modification of the existing program, and the states agreed that Congress could change the terms of Medicaid when they signed on in the first place.

6. _____ The Medicaid expansion transformed the program into a new one that meets the health care needs of an entirely new population of people (nonelderly with income below 133% of the poverty level).

7. _____ States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept the funds on Congress’s terms.

Attorney Worksheet

Remember that you will begin by stating: “May it please the Court. My name is _____. I represent _____.” If you are representing the National Federation of Independent Business and wish to reserve five minutes for rebuttal, state that now.

List your key arguments below so you can rely on this sheet in arguing to the Court.

What will the other side argue? What are your counters to those arguments?



Justice Worksheet

You are a Supreme Court Justice hearing *NFIB v. Sebelius*. Please answer the following questions. Be sure to reference the facts and the relevant cases on the argument sheet.

1. Pretend that you are listening to the oral arguments of the attorneys representing NFIB. What two questions would you ask?
 - A.
 - B.
2. Pretend that you are listening to the oral arguments of the attorneys representing the Sebelius. What two questions would you ask?
 - A.
 - B.
4. At the conclusion of hearing the case, you have to write a court opinion ruling either in favor of NFIB or Sebelius. Remember, you can decide the individual mandate and the Medicaid expansion issues differently – meaning you can rule in favor for one party on one issue, and rule in favor for the other party for the other issue. If you rule that the individual mandate is constitutional, under which authority does Congress have to pass that as law?

_____ NFIB

_____ Sebelius

4. Prepare a bullet point list of your reasons. Include why you rejected the losing side's arguments.



Supreme Court Decision: *NFIB v. Sibelius*, 567 U.S. 519 (2012)

Chief Justice John Roberts wrote the opinion of the Court upholding the individual mandate, but striking down the expansion of Medicaid. Along with six other justices, Roberts found that provision unconstitutionally coercive of the states. As to the mandate, Roberts and four justices found that neither the commerce nor necessary and proper clause gave Congress the power to mandate that individuals buy insurance, but joining with the other four justices he found a constitutional basis for the individual mandate in the tax and spending clause.