

## “The ‘Give and Take’ of Congress’ Enumerated Powers after *NFIB v. Sebelius*”

- I. Background – Quick (2 minute summary of why *NFIB* got involved in the Healthcare case)
- II. Discussion of Congress’ Power Under Commerce and Necessary and Proper Clause
  - a. Commerce Clause power prior to *NFIB v. Sebelius*.
    - i. Two lines of cases: *Wickard/Raisch* ; *Lopez/Morrison*
    - ii. Good language in *NFIB v. Sebelius* regarding our federalist structure and reaffirmance that 10<sup>th</sup> amendment designed to protect individuals, not just states.
    - iii. Still have work to do regarding the scope of Congress’ power over intrastate commerce
  - b. Novel issue regarding compelled activity – *NFIB v. Sebelius* halted Congress from taking us off the “constitutional cliff”.
    - i. Now have at least one clear line that Congress can’t force you into a market; cannot compel activity under this power
    - ii. Significance of clear line
- III. Discussion of Congress’ Power to Tax – How *NFIB v. Sebelius* transformed this power
  - a. Congress has tremendous power to tax under *NFIB v. Sebelius*
    - i. Only limit appears to be whether taxing burden on the citizenry is so great as to take away any meaningful choice when it comes to compelled government activity
  - a. Congress has tremendous power to tax under *NFIB v. Sebelius*
    - a. Can compel activity by taxing failure to do what the government wants you

to do.

- b. Unclear whether any tax would be considered a direct tax after *NFIB v. Sebelius*
- c. Brief discussion as to why Plaintiffs didn't spend more time on the tax argument

#### IV. Roberts' Misapplication of the Constitutional Avoidance Doctrine

#### V. Conclusion

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