

## FEAR AND LOATHING AT ONE FIRST STREET

AN UNPRECEDENTED BOOK REVIEW<sup>1</sup> OF:

UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO  
OBAMACARE. Josh Blackman. PublicAffairs, 2013. 352 pages.  
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1. If you want a conventional, fully done-before, definitely *precedented* book review that just gives you a summary of the book and enough information to decide whether you want to read it—which you should—*see infra* note 21 and accompanying text.

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I woke up and had no idea where I was. Tampa, Toledo, Tucson, Tulsa, Tuscaloosa—all the Sheratons look alike. The nation’s unquenchable thirst for Obamacare debates, combined with my loyalty to the Starwood brand, had put me in some Kafkaesque Groundhog Day, except that I was neither a giant bug nor Bill Murray, but rather a simple constitutional lawyer—and an immigrant at that, doing a job most Americans won’t: defending the Constitution. I wasn’t sure whether I was arguing against the regulation of little shampoo bottles traveling in interstate commerce or ensuring that my platinum Preferred Guest account wouldn’t be severed if Medicaid was expanded. As Josh Blackman noted 17,000 times (or three) in his unprecedented *Unprecedented*, I had crisscrossed the country for more than two years to debate this case—all of constitutional law in a nutshell—more than 100 times. And still I wonder sometimes whether someone had given me some bad drugs, had perhaps roofied my Bulleit Rye Old Fashioned while I turned to talk to the leggy blonde at the next barstool (this would’ve been before I met my wife, of course). Because all that foofaraw regarding *National Federation of Independent Business v. Sebelius*<sup>2</sup>—call it the *Health Care Cases*, or the big Obamacare litigation that ended up with John Roberts pulling a giraffe out of a cowboy boot<sup>3</sup>—had, with apologies to the late Gabriel Garcia Marquez, to be lived to be told. And indeed told to be written down, and written down to be believed, and even then might not be believed. It was a long, strange trip.<sup>4</sup>

#### I. BUY THE TICKET, TAKE THE RIDE

It all started what seems like a lifetime ago, or at least a career. Let’s go back not quite to the beginning of the world, or Bismarck’s welfare state, or the switch in time that saved nine but doomed the country, or even the immediate progenitors of the individual-mandate debate: the liberal dream of government-

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2. 132 S. Ct. 2566 (2012).

3. Cf. Andrew M. Grossman, *City of Arlington v. FCC: Justice Scalia’s Triumph*, 2012–2013 CATO SUP. CT. REV. 331, 331 (2013) (likening that case to “pulling a trout out of a pencil-case”).

4. See, e.g., Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA. INT’L L. REV. 29 (2010).

provided universal coverage, Hillarycare, the Heritage Foundation's mandate-lite—designed without legal consultation and later repudiated, but politically damaging nonetheless—Romneycare, and the primary-campaign clash between Hillary Clinton and Barack Obama. (Clinton would've included a full mandate, which Obama opposed because, "I believe the problem is not that folks are trying to avoid getting health care. The problem is they can't afford it."<sup>5</sup>) Instead, let's recall an important meeting at the Mayflower Hotel in November 2009. This had nothing to do with Eliot Spitzer, mind you, even if during the course of this journey he had me on his short-lived CNN show to debate broccoli mandates with Dahlia Lithwick—and ended up accusing me of wanting a *Hunger Games* world, except more cruel to children.<sup>6</sup> No, this meeting, which my buddy Josh<sup>7</sup> dubbed the "Mayflower Compact," took place during the Federalist Society's national lawyers convention in November 2009.<sup>8</sup> Not in the evening during the annual dinner, which is sort of like the Oscars for conservative lawyers—"Oh look, there's former Deputy Assistant Attorney General So-and-So, who's wearing Brooks Brothers and wingtips . . . and Judge Such-and-Such, in a stunning pantsuit"—but in the grand hotel concourse during business hours.

While many attendees were taking in a panel on "Bailouts and

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5. *Obama Flip-Flops on Requiring People to Buy Health Care*, POLITIFACT (July 20, 2009), <http://www.politifact.com/truth-o-meter/statements/2009/jul/20/barack-obama/obama-flip-flops-requiring-people-buy-health-care> [http://perma.cc/V3NT-YAFV].

6. Transcript, *Parker Spitzer*, CNN.COM (Dec. 17, 2010), <http://edition.cnn.com/TRANSCRIPTS/1012/17/ps.01.html> [http://perma.cc/FBD6-ZX6C].

7. How's that for a "full disclosure"? Yes, I've known Josh for a while and have even co-authored with him a number of times. See, e.g., *infra* note 11; Josh Blackman & Ilya Shapiro, *Hawaii Should Walk Away from Steven Tyler Act*, USA TODAY, Feb. 16, 2013, <http://www.usatoday.com/story/opinion/2013/02/15/steven-tyler-act/1923611/> [http://perma.cc/R4RU-RRV7]; Blackman & Shapiro, *Supreme Court Opens Door to More Liberty*, DETROIT NEWS, July 5, 2010, available at <http://www.cato.org/publications/commentary/supreme-court-opens-door-more-liberty> [http://perma.cc/CN2X-WV4V]; Blackman & Shapiro, *Is Justice Scalia Abandoning Originalism?*, WASH. EXAMINER, Mar. 8, 2010, <http://washingtonexaminer.com/josh-blackman-and-ilya-shapiro-is-justice-scalia-abandoning-originalism/article/32701> [http://perma.cc/X6HX-8EBF]; Shapiro & Blackman, *Using Guns to Protect Liberty*, WASH. TIMES, Feb. 23, 2010, <http://www.washingtontimes.com/news/2010/feb/23/using-guns-to-protect-liberty> [http://perma.cc/W3GS-2EPA]. I think he's a great guy, and he apparently reciprocates because he thanks me on the first page of his acknowledgments. Also, because of my role in the litigation, I have seven entries across two lines in the book's index (for those of you who do the "Washington read"). So there, be advised of my myriad biases.

8. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 39–45 (2013).

Government as Insurer of Last Resort,” a few “usual suspects” stepped out to catch up and strategize. It was like a college-dorm bull session, except the participants were sober, wore suits, and knew something about the subject of conversation: Todd Gaziano, head of Heritage’s legal shop; Nelson Lund, a law professor at George Mason; Andrew Grossman, a law school classmate of Josh’s now in private practice who’s done work for both Heritage and Cato; and some other observers. (Josh and I sidled up soon after the group formed.) In the midst of speculating about constitutional defects in the pending health care bill, Todd began throwing out various hypotheticals. If the government could make you to buy health insurance as a means of regulating interstate commerce, could it force someone to buy a GM car to help out the U.S. auto industry? Could it require you to join a gym in order to reduce health care costs? (As Josh notes, this “was perhaps the first precursor to the broccoli horrible.”<sup>9</sup>)

Randy Barnett, the Georgetown law professor who would come to be known as the “intellectual godfather” of the Obamacare litigation, arrived late to the ball. When Todd asked for his views on the mandate, Randy candidly replied, “You know, I really haven’t given it much thought.”<sup>10</sup> In fact, Randy was still spending most of his time on *McDonald v. Chicago*, the case that would not only extend the right to keep and bear arms to the states but revive the Privileges or Immunities Clause.<sup>11</sup> But Randy ended up doing some quick thinking, and less than a month later published, with Todd and Nathaniel Stewart, a young D.C. lawyer who did most of the legwork, a Heritage Foundation report arguing that the mandate was not only “unconstitutional” but “unprecedented.”<sup>12</sup>

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9. *Id.* at 42.

10. *Id.* at 43.

11. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058–59 (2010) (Thomas, J., concurring in the judgment and thus providing the fifth vote to strike down Chicago’s handgun ban, without joining the plurality’s substantive-due-process analysis). *See also* Alan Gura, Ilya Shapiro & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause, 2009–2010 CATO SUP. CT. REV.* 163 (2010); Blackman & Shapiro, *Keeping Pandora’s Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL’Y 1 (2010).

12. Randy Barnett, Nathaniel Stewart & Todd F. Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 49, Dec. 9, 2009, available at <http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional> [<http://perma.cc/BHB8-U73P>].

While Josh would end up joking about the “Randy Barnett ‘Unprecedented’ Individual Mandate Drinking Game,” the use of the word “unprecedented” became not just a staple of Randy’s commentary and scholarship, but a key part of the strategy behind the legal challenge.<sup>13</sup> Not because any government action that’s unprecedented is automatically unconstitutional, but because if the government had the awesome power to make people buy things and didn’t use it during a time of crisis—in the Great Depression to gin up economic demand, say, or war bonds during the Civil War or World War Two—there has to be a strong *presumption* of unconstitutionality. As broad as federal regulatory authority had grown, from the 1942 wheat case of *Wickard v. Filburn*<sup>14</sup> to the 2005 weed case of *Gonzales v. Raich*,<sup>15</sup> (which Randy argued), that power has never been used to compel commerce—or any activity—as opposed to regulating or prohibiting it. As we now know, the Supreme Court agreed, and in much clearer terms than any of the lower-court opinions that favored the challengers.

## II. TOO WEIRD TO LIVE, TOO RARE TO DIE

On December 9, 2009, Heritage hosted the first public event examining the constitutionality of Obamacare, in conjunction with the release of the Barnett-Gaziano-Stewart paper. (Perhaps all this was a sort of penance for the role that Stuart Butler played two decades earlier, against the advice of Cato’s Ed Crane, in conjuring the individual mandate’s ancestor. The think tank would go on to file its first-ever amicus brief to address the awkwardness; the lawyers threw the policy scholars under the bus.) Senator Orrin Hatch, who would take the lead on bringing constitutional points of order during the congressional debate, spoke there. Then Randy debated an unlikely opponent: UCLA law professor Eugene Volokh. A leading legal scholar whose views tended to skew libertarian, Eugene was nonetheless skeptical of the constitutional case

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13. Josh Blackman, *Take a Shot for Liberty—The Randy Barnett ‘Unprecedented’ Individual Mandate Drinking Game*, JOSH BLACKMAN’S BLOG (Aug. 2, 2010), <http://joshblackman.com/blog/2010/08/02/take-a-shot-for-liberty-the-randy-barnett-unprecedented-individual-mandate-drinking-game> [<http://perma.cc/HK54-V9CK>]. To Josh’s discredit, he apparently failed to insist that his publisher include “unprecedented” as a term in the book’s index.

14. 317 U.S. 111 (1942).

15. 545 U.S. 1 (2005).

against Obamacare. Curiously, his remarks at this event would constitute the whole of his contribution to the *Health Care Cases* debate—even as Randy and four other “co-conspirators” at the eponymous *Volokh Conspiracy* blogged up a storm.<sup>16</sup>

Of course, Senator Ensign’s point of order, which would be joined by all present Republican senators, would be overruled. The health care legislation passed the Senate 60–40 on a strict party-line vote in the wee hours of December 24 (which Josh notes was the first time the Senate had met on Christmas Eve since 1895).<sup>17</sup> But the Senate’s version differed from what the House had passed the previous month—meaning the bills would have to be “conferenced” and voted on again—and the Democrats lost their filibuster-proof majority on January 19 when Republican Scott Brown incredibly won a special election for what had been Ted Kennedy’s seat. (I was in Boston the seventy-two hours leading up to that election, providing legal assistance in my personal capacity—I saw none of the city except the Park Plaza hotel, where the “legal war room” was located and the victory was celebrated—and that night we thought we had stopped Obamacare in its tracks.) Speaker Nancy Pelosi had toyed with the idea of “deeming” the Senate bill passed by only voting on the Reconciliation Act, but this “demon pass” maneuver was determined to be one shenanigan too far. Instead, the House Democrats decided to pass not just the Senate bill, which they considered to be flawed, but also an amendment, the Health Care and Education Reconciliation Act, which they controversially got through the Senate in a “reconciliation” process that wasn’t subject to filibuster. President Obama signed the bills on March 23 and 30, respectively.<sup>18</sup>

And that’s how we got the Patient Protection and Affordable Care Act—and what an Orwellian name, given that patients are more vulnerable and health care costs have increased!<sup>19</sup> Even its

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16. RANDY E. BARNETT ET AL., *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE* (Trevor Burrus ed., 2013). That isn’t to say that Eugene purposely decided to stay away from Obamacare or contemporary controversies altogether. He is front-and-center on the “contraceptives mandate” cases that the Supreme Court has taken up this term, which are much more in his First Amendment wheelhouse than any of the *NFIB v. Sebelius* litigation was. See EUGENE VOLOKH, *SEBELIUS V. HOBBY LOBBY: CORPORATE RIGHTS AND RELIGIOUS LIBERTIES* (2014).

17. BLACKMAN, *supra* note 9, at 57–58.

18. Josh livens up his chapter on this period with subheadings such as “Master of the House” and “One Day More.” *Id.* at 69, 71. What miserable punnery.

19. See, e.g., Jim Angle, *Survey Shows Obamacare Sending Premiums Rising at Fastest Clip in Decades*, FOXNEWS.COM (Apr. 14, 2014), <http://www.foxnews.com/politics/>

acronym was unwieldy, however, so the legislation quickly became known as “Obamacare.” I don’t know who coined that term—it emerged sporadically during the 2008 campaign before there was any legislation of which to speak—but I use it because that’s the colloquial name and it’s much easier to say than “PPACA,” “Affordable Care Act,” or anything else. While thought in some quarters to be pejorative, I’ve never understood how that can be. Is “Bush tax cuts” pejorative? Is “Reaganomics” (as opposed to “trickle-down economics”) pejorative? Even the leading academic supporters of Obamacare’s constitutionality, such as Yale law professors Akhil Amar and Jack Balkin (who both make *Unprecedented* appearances) use the phrase, and Obama himself eventually endorsed it.<sup>20</sup> The one semi-accurate criticism I’ve heard is that the law was mostly written by Congress, not the executive branch. But that just means it would be better to call it Pelosi-Reid-care, which is presumably no more or less pejorative. In any event, that ship has long sailed.

### III. THERE’S NOTHING LIKE A JOB WELL DONE

Now hold up. This is a book review and you’ve come here to read about my buddy Josh’s book. Maybe a handful of you even want to read my particular take on the book. Some of you might even be amused by this tale I’m telling—or at least tolerate it because it’s something different than what you typically see in a law review, aside perhaps from *The Green Bag: The Entertaining Journal of Law* (peace be upon its bobbleheads)—but still want to find some sort of summary of *Unprecedented* or reason to read it rather than some other book on your Amazon wishlist. I get it. We’re all busy, and who has time to read all those worthy tomes we hear about from email lists and magazines and talking heads and your political-junkie uncle when you asked for his riff on pajama-boy’s request that we talk about health care over the holidays?

Well okay, if that’s what you’re looking for, I can do that. But

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2014/04/14/survey-shows-obamacare-sending-premiums-rising-at-fastest-clip-in-decades/  
[<http://perma.cc/9R9R-Z9DG>].

20. See, e.g., *Transcript and Audio: First Obama-Romney Debate*, NAT’L PUB. RADIO (Oct. 3, 2012), <http://www.npr.org/2012/10/03/162258551/transcript-first-obama-romney-presidential-debate>; Tom Howell Jr., *Obama to Charles Barkley: I’m Cool with the Term ‘Obamacare,’* WASH. TIMES, Feb. 17, 2014, <http://www.washingtontimes.com/news/2014/feb/17/obama-to-charles-barkley-im-cool-term-obamacare> [http://perma.cc/MXW6-ZXEM].

only on condition that you promise to still read *Unprecedented*. Here's what I would (and did) write if this were a conventional book review:

In 2012, the U.S. Supreme Court became the center of the political world. In a dramatic and unexpected 5–4 decision, Chief Justice John Roberts voted to save the Affordable Care Act, commonly known as Obamacare. Josh Blackman's magisterial *Unprecedented* tells the inside story of how this constitutional challenge raced across all three branches of government and narrowly avoided a collision between the Supreme Court and President Obama.

The book offers unrivaled inside access to the key decision makers in Washington, based on interviews with over 100 of the people who lived this journey—including the academics who began the challenge, the lawyers who litigated the case at all levels, and the Obama administration attorneys who defended the law. It reads like a political thriller, providing the definitive account of how the Supreme Court almost struck down the president's "unprecedented" law. It also explains what this decision means for the future of the Constitution, the limits on federal power, and the Supreme Court.

*Unprecedented* is not a legal book, in the sense that it's not a "treatise" by which to teach law students about health care law or even the jurisprudence surrounding the Commerce Clause, Congress's constitutional power to regulate interstate commerce. There's plenty of doctrinal explanation, to be sure, tracing the development of modern federal authority to regulate the economy. But fundamentally this book is a story about a lawsuit and how a group of legal activists, intellectuals, and practitioners conceived and executed a stunning attack on the Obama administration's signature legislative achievement.

As with Thurgood Marshall and the legal heroes of the civil rights era, Georgetown professor Randy Barnett (who wrote the book's foreword) and other scholars developed theories that snowballed into judicial victories that could not be ignored by the national media and political classes. What had appeared at first to be "off the wall" libertarian thought experiments moved "on the wall" as they were picked up by the attorneys general of Virginia and Florida and operationalized by leading appellate advocates like Paul Clement and Michael Carvin. On the other side, Neal Katyal and then Don Verrilli pressed the government's defense, ultimately losing their central arguments but salvaging Obamacare.

At this point I should mention that I was no neutral observer of this tale. The Cato Institute, the libertarian think tank where I hang my hat, played a central role in supporting the



Obamacare challenge. . . . I definitely had a dog in this fight!

And yet I too was gobsmacked as I sat in the courtroom the morning of June 28, 2012, and heard the chief justice hand the government a bottom-line victory while not expanding federal regulatory authority. What had I (and everyone else) missed? The possibility that the case would be decided based on something other than competing legal theories. That is, eight justices decided *NFIB v. Sebelius* on the law—four finding that the Constitution limits federal power, four that constitutional structure must yield to “Congress’ capacity to meet the new problems arising constantly in our ever-developing modern economy”—and one had other concerns on his mind.

We won’t know for some time, if ever, what exactly caused John Roberts to do what he did. *Unprecedented* doesn’t provide that answer—sorry to disappoint you—but it does give us a great sense of the personal, political, and other atmospheric factors swirling around the Supreme Court justices as they considered this case.

Josh Blackman . . . has done a tremendous job in compiling, synthesizing, and explaining all that we can possibly know about this subject. *NFIB v. Sebelius* is truly the case of a generation—and *Unprecedented* is the definitive book on that case.<sup>21</sup>

Got that?

#### IV. NOT A GOOD TOWN FOR PSYCHEDELIC DRUGS

Now it’s time to ratchet up the story, to add some grist to the litigation mill, some spice to the mulled wine of legal strategy. The same day that President Obama signed his hallmark bill into law—within minutes of the ceremony—the attorneys general of Florida and Virginia electronically raced to the courthouse to file lawsuits. Florida was joined by 12 other states (and eventually 13 more), while Virginia’s Ken Cuccinelli went alone. (Oklahoma would later file its own suit, bringing the total number of states arrayed against the federal government to an unprecedented 28, all represented by Republican attorneys general or governors—except that Louisiana’s AG Buddy Caldwell was a Democrat who switched parties in February 2011.) Judge Henry Hudson of the federal district court in Richmond was the first to rule, denying

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21. Ilya Shapiro, *FDL Book Salon Welcomes Josh Blackman*, *Unprecedented: The Constitutional Challenge to Obamacare*, FDL BOOK SALON (Oct. 6, 2013), <http://fdlbooksalon.com/2013/10/06/fdl-book-salon-welcomes-josh-blackman> [http://perma.cc/4LQZ-QSSS].

the government's motion to dismiss. "Your argument is officially not frivolous," Jack Balkin wrote to Randy Barnett.<sup>22</sup> Not to be outdone, Judge Roger Vinson of the federal district court in Pensacola became the first to grant summary judgment to the plaintiffs, throwing out the entire law.

After that it was Katy (or Kathleen Sebelius) bar the door, with rulings coming in steady drips in the plethora of lawsuits that had been filed across the nation. Other than a couple of the government lawyers, Randy Barnett and I were the only people in America to attend all of the appellate arguments. In Richmond, we had fine steaks at Morton's. In Cincinnati, we visited Salmon P. Chase's grave and took turns fielding media calls on the drive back to the airport. In Atlanta, we waited in line for the courthouse in 94-degree heat, for which I had prepared by wearing my lightest seersucker suit (and was photographed in it by AARP magazine).<sup>23</sup> And in D.C.—an anticlimax, given that for me this "trip" involved walking five blocks and that cert petitions were already being filed in the 26-states case—well, the gallery felt like a class reunion of sorts. We joked that we should've made "Obamacare Tour 2010–2012" t-shirts.

Josh had me doing so many shots after the Eleventh Circuit struck down the individual mandate—but left the rest of the law standing, the fourth different way in which lower courts siding with challengers resolved the question of how much of the rest of Obamacare survived—that I wasn't sure which side I was supporting. And indeed, the cert posture in the Florida-originated case alone was hard to follow: the private plaintiffs (NFIB and two individuals) had split from the states on appeal, and each, along with the government had asked the high court to review a different part of the case. The Supreme Court ended up granting all these cert petitions and ordering unprecedented separate briefing and argument on four issues: whether the challenge was barred in the first place by a Reconstruction-era law called the Anti-Injunction Act (which prohibits lawsuits against taxes before they're assessed); whether the federal power had power to require people to buy health insurance; to what extent was the individual mandate "severable" from the rest of the law; and whether the government could condition all federal

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22. BLACKMAN, *supra* note 9, at 88.

23. Presumably, tan seersucker is marginally cooler than blue seersucker.

Medicaid funds on state acceptance of (and payment for) an expanded Medicaid program. The Court also appointed two special counsel to argue positions on the AIA and severability, respectively, that neither side took. More than 150 amicus briefs were filed in total—Cato was the only group to file on all four issues, so clearly we’re the best “friend of the court”—resulting in the most billable hours spent on one case since the O.J. Simpson trial. The Court scheduled six-and-a-half hours of oral argument over three days<sup>24</sup>—incredible but not quite unprecedented, though in the modern era the only parallel is with obscure cases like *Brown v. Board of Education* and *Roe v. Wade*.

On March 26, 2012, almost exactly two years since the law’s enactment, *Constitution v. Obamacare* arrived at the Supreme Court. “After two years of litigation, political wrangling, and punditry from the ivory tower to the beltway to the Tea Party,” Josh explains, “the case had finally reached its crescendo before the nine justices.”<sup>25</sup> Although the first day was devoted solely to that dry AIA issue—even if no lower court had ruled that the ancient statute barred suit—the scene at One First Street was a circus like no other. Camera crews, activists, tourists, and commercial opportunists all mingled on and across from the Supreme Court plaza. While some hearty souls camped out every night to score coveted seats to the sold-out show, others paid line-standers; the rate had apparently gone up to \$50/hour and more. When I walked in on each of those cold mornings—thanks to interns from Cato and the *Daily Caller* (whose “Supreme Court correspondent” I was that week) who camped out all three nights<sup>26</sup>—I felt like I was walking into history.

#### V. NO SYMPATHY FOR THE DEVIL

For a law nerd and Supreme Court junkie like myself, who treats oral argument like free theater—by cosmic coincidence, I live halfway between my office and the marble palace—attending the Obamacare hearings was zambofrious.<sup>27</sup> The *Unprecedented*

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24. Dino Grandoni, *Six Hours of Oral Arguments Over Obamacare Are the Longest in 45 Years*, THE WIRE, Mar. 26, 2012, <http://www.thewire.com/national/2012/03/6-hours-oral-arguments-over-obamacare-are-longest-45-years/50331/> [http://perma.cc/79ZN-B9EJ].

25. BLACKMAN, *supra* note 9, at 174.

26. Immeasurable thanks go to Kathleen Hunker and eight other interns (three per night) whose names have been lost to the mists of time. I hope that yeoman duty has given them great stories to tell friends, employers, and potential paramours.

27. See bemusedly Ilya Shapiro, *Fear and Loathing in the District of Columbia*,

book, however, is a different kind of treat: It really is the case that Josh Blackman has written what will surely be considered the definitive account of a once-in-a-lifetime case, the constitutional challenge to Obamacare. Not the definitive academic treatment on the Supreme Court's ruling, let alone its implications for health care policy, but the inside story on a legal and political tug-of-war that embroiled all three branches of government. The book, which the *Wall Street Journal* called "excellent,"<sup>28</sup> offers unrivaled access to the key decision makers based on interviews with over 100 people who lived the case.

As of this writing, nearly two years have passed since Chief Justice John Roberts made Obamacare's individual mandate a tax. I was in the courtroom that fateful June day—the day after my 35th birthday—and my emotions quickly cycled through shock, denial, anger, and later depression, before settling into the "bargaining" stage of the Kübler-Ross model of grieving, where I remain to this day.

To be sure, the decision was a constitutional win in at least four ways:

(1) It's now clear that the government can't compel activity in order to regulate it;

(2) Legislation that's "necessary" may still be unconstitutional if it isn't "proper";

(3) The narrow tax power ruling allows the government only to levy small taxes on non-purchases, but Congress won't ever use this power because it can achieve the same economic goal by offering (politically easier) tax credits; and

(4) For the first time, the Court—by a 7–2 vote!—found that the federal government can't coerce the states by attaching too many strings onto federal funding.

Still, by letting Obamacare survive in such a dubious manner—I've called it a "unicorn tax," a creature of no known constitutional provenance that will never be seen again—Roberts undermined the trust people have that courts are impartial arbiters rather than political actors.<sup>29</sup> I never thought I could feel

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DOUBLETHINK ONLINE (July 24, 2005), <http://americasfuture.org/fear-and-loathing-in-the-district-of-columbia/> [<http://perma.cc/VD8Y-WRH4>] (coining this completely made-up word but not defining it).

28. George Melloan, *Book Review: 'Unprecedented' by Josh Blackman & 'The Last Line of Defense' by Ken Cuccinelli*, WALL ST. J., Sept. 11, 2013, available at <http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-324676/>.

29. For my fuller doctrinal analysis of the strengths and weaknesses of *NFIB v.*

so hollow (still!) after having Court majorities offer such ringing endorsements of Ilya's (either one) theories on constitutional law.<sup>30</sup>

What bothers me isn't that Roberts changed his vote—it's not over till the slip-opinion printer hums—but instead that his tax section is laughably implausible. Roberts's opinion "construing" the mandate as a tax is unconvincing, to say the least—even the liberal justices weren't so enthusiastic about it, though they were happy to go along with any ratification of federal power—but it's now apparent that he was simply grasping at any way to uphold Obamacare while not expanding federal power. He succeeded in squaring that circle, but we're left with a suspect ruling based on a rewritten piece of legislation no Congress would ever have passed.

The sad thing is that the chief didn't have to do what he did to preserve the Court's popular legitimacy (or any such "atmospheric" consideration). For one thing, Obamacare has always been unpopular—particularly its individual mandate, which even a majority of Democrats in a national poll thought was unconstitutional on the eve of the ruling.<sup>31</sup> For another, he only damaged his own reputation by making this move after warnings from pundits and politicians that striking down the law would be conservative "judicial activism."<sup>32</sup>

Most importantly, the whole reason we care about the Court's independence is so it can make the tough legal calls without regards to politics.<sup>33</sup> Had Roberts voted to strike down Obamacare, it would have been just the sort of thing for which the Court needs all that accrued respect. Instead, we have a strategic decision dressed up in legal robes.

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*Sebelius*, see Ilya Shapiro, *Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 TEX. REV. L. & POL. 1 (2012). Evidently the editors of this august publication liked that essay enough to have invited me back. What you see in this repeat appearance shouldn't be taken as proof of my not wanting to get invited back a third time. See also Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)*, 65 FLA. L. REV. 1331 (2013).

30. See generally JOSH BLACKMAN'S BLOG, <http://joshblackman.com/blog/category/ilyas> [<http://perma.cc/F7B2-DX3D>] (collecting incidents of "Ilya confusion").

31. Frank Newport et al., *Gallup Editors: Americans' Views on the Healthcare Law*, GALLUP (June 22, 2012), <http://www.gallup.com/poll/155300/gallup-editors-americans-views-healthcare-law.aspx> [<http://perma.cc/9Q88-PVRN>].

32. *Obama: Court Striking Down Obamacare Would Be Judicial Activism*, REALCLEARPOLITICS (Apr. 2, 2012), [http://www.realclearpolitics.com/video/2012/04/02/obama\\_supreme\\_court\\_striking\\_down\\_obamacare\\_would\\_be\\_judicial\\_activism.html](http://www.realclearpolitics.com/video/2012/04/02/obama_supreme_court_striking_down_obamacare_would_be_judicial_activism.html) [<http://perma.cc/38EB-BZZH>].

33. See most obviously THE FEDERALIST NO. 78 (Alexander Hamilton).

I'm reminded of the Oscar-winning 1966 film *A Man for All Seasons*, in which an ambitious young lawyer named Richard Rich perjures himself so that the Crown can secure Sir Thomas More's conviction for treason. (More was the 16th-century Lord Chancellor of England who refused to sign a letter asking Pope Clement VII to annul King Henry VIII's marriage to Catherine of Aragon. He resigned rather than taking an oath that declared the king to be the head of the Church of England.) Rich is promoted to Attorney General of Wales as a reward. Upon learning of Rich's connivance, More plaintively asks, "Why Richard, it profits a man nothing to give his soul for the whole world . . . but for Wales?"

So it is with John Roberts, who, like his namesake Justice Owen Roberts, changed his vote on Obamacare in service to political will. (That's actually unfair to Owen Roberts because his so-called "switch in time that saved nine," which provided the decisive vote to uphold the New Deal after years of reversals, came before FDR announced his Court-packing scheme). There are many theories on why he did this—I don't think it's because Jeffrey Rosen wrote an op-ed,<sup>34</sup> or even because President Obama and Senator Pat Leahy (D-VT) made speeches—but they mainly boil down to the idea of wanting to preserve the Supreme Court's reputation as an institution that doesn't get involved in highly charged political disputes during a presidential election year.

Now, let's set aside the issue of whether Roberts's split-the-baby opinion actually helps the Court's institutional integrity—polls show a decline in approval for the Court from what was already a near-historic low<sup>35</sup>—and consider *why* this sort of reputation-preservation matters and whether it's worth torturing the law to accomplish it. The way I see it, the federal judiciary is our system of government's premier counter-majoritarian institution, holding the political branches' feet to the constitutional fire. Courts are supposed to decide the law and let the political chips fall where they may. Implicit in the Constitution's careful separation of powers—and made

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34. Rosen is now head of the National Constitution Center, for which I seem to be serving as the "house libertarian"—not to be confused with the Shabbos goy—of late.

35. *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> [<http://perma.cc/G2GZ-UHEW>] (last visited May 24, 2014).

explicit in the foundational case of *Marbury v. Madison*<sup>36</sup>—is the idea of judicial review. Under this concept, federal courts have an obligation to review government actions that are claimed to exceed enumerated federal powers or violate protected rights—and to strike down those that do.

That’s why it’s so important that courts be free from political pressure. Particularly with regard to major controversies that polarize the nation, courts—and especially the Supreme Court—need to apply dispassionate and independent legal reasoning so that their often unpopular opinions are followed and respected, rather than engendering resistance and revolution.

The *Health Care Cases* presented nothing if not one such singular moment. People across the country anxiously awaited a ruling and would have accepted (if bitterly) a 5–4 decision on Commerce Clause grounds. Upholding the mandate, and with it the rest of Obamacare, on that ground would have been wrong—and unpopular—and would have removed any remaining limits on federal power. Striking it down would similarly have provoked a heated response, albeit only from a declining minority of Americans (but a majority of legal and media elites). In either event, the Court’s decision would have “simply” been a very high-profile legal ruling, just the sort of thing for which the Court needs all that accrued institutional gravitas.

What we have instead, however, is a political decision dressed up in legal robes, judicially enacting a law Congress did not pass, all to “save” the Court to live to fight another day. But what is that other day? I just don’t understand what Roberts is saving the Court for if not the sort of big, tough case that Obamacare exemplified. In refraining from making that hard balls-and-strikes call he discussed at his confirmation hearings, John Roberts sold out the law for less than Wales—thereby showing why we don’t want our judges making political calculations.

#### VI. MY HEART FEELS LIKE AN ALLIGATOR

Josh generally agrees with my analysis of the case outcome, though he’s more sanguine about the consequences for the legal system—buying the idea that John Roberts “saved Obamacare so

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36. 5 U.S. 137 (1803).

he could fight another day”<sup>37</sup>—if not the country. He says that this whole imbroglio is “a lesson for any future president—don’t try to change the nation when 49 percent of Congress [and a clear majority of the public, he could’ve added] opposes it.”<sup>38</sup> Moreover, Barack Obama and his congressional allies have deliberately put the country through a public policy trauma whose end is not yet in sight. The president was reelected *despite* Obamacare—and because the Republican nominee was perhaps the worst possible candidate for this particular election (though Mitt Romney was the only A-lister who ran)—not because of it. I do share Josh’s fervent hope, however, that “the constitutional clash from 2009 to 2012 remains *unprecedented* and is never repeated.”<sup>39</sup> It’s not healthy for a constitutional system when the government can’t define a limit to its power and doesn’t think it necessary to do so because the underlying policy is just too important. As Josh writes in his introduction, Obamacare “is now the supreme law of the land. However, the battle over Obamacare, health care reform in America, and competing visions of our Constitution is far from over.”<sup>40</sup>

A more interesting part of the narrative that Josh spins—and certainly a new insight even for those of us who were immersed in the litigation—concerns the ebb and flow of the government’s strategy in defending the individual mandate. Solicitor General Don Verrilli was pilloried for his performance during oral argument, having literally choked on his opening words during the individual mandate argument, but ultimately secured a win for his client. The less charitable interpretation is that the government won *regardless* of the arguments it put forward, but it’s incontrovertible that Verrilli spent more briefing pages on the taxing power than had acting solicitor general Neal Katyal in the lower courts. Moreover, while Katyal had a close connection to the left-wing professoriate that got things so wrong regarding the *Health Care Cases*,<sup>41</sup> Verrilli had long been a practitioner and thus departed from the losing academic-influenced arguments that had previously driven the government’s case.

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37. BLACKMAN, *supra* note 9, at 279.

38. *Id.* at 284.

39. *Id.* at 302.

40. *Id.* at xxv.

41. See, e.g., David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, ILL. L. REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2224364](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224364) [<http://perma.cc/4J33-8BMR>].



In any event, I'm still not over *NFIB v. Sebelius*—and still haunted by a woman who paced the Supreme Court plaza the week of oral argument, chanting, “follow the law, just follow the law” (whatever that meant)—but Josh Blackman has provided me with some *Unprecedented* therapy.<sup>42</sup> Four years after the law was enacted and nearly two years after the Supreme Court ruling—with untold damage to the American economy and health care system—as Obamacare's smoldering remains litter the intersection of hope and change, I wonder: Was it all a dream?

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42. By now you probably agree with me that South Texas College of Law professor Josh Blackman—legal public-intellectual super-tasker by day, legal public-intellectual super-tasker by night—is awesome. Not only is he a colleague of the very cool Charles W. “Rocky” Rhodes (one of three people who have ever published an unsolicited article in the *Cato Supreme Court Review*), but he founded and runs FantasySCOTUS.net, the Internet's premier Supreme Court fantasy league. He also posts an average of 87.3 blog entries per day. Most importantly, Josh was recently named one of *Forbes* magazine's Top 30 Under 30 for law and public policy.