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THE SAVING CONSTRUCTION AT FIVE YEARS

BY JOSH BLACKMAN

Thank you, it’s a pleasure to be here at St. Thomas. You’re very fortunate to have such fantastic speakers at this symposium. Nicole Huberfeld is the leading scholar in this area so you’ve gotten off to a great start. I don’t know how I’m going to follow it up but I will do my best. It’s hard to believe that the Obamacare decision is now 5 years old. My young legal career has more or less tracked the ACA. I was a law clerk as it was going through the courts. Shortly after the case was decided I started teaching. About a year later I published my first book on Obamacare, three years after that I published my second book on Obamacare, and here we are still talking about this case.

What I’d like to do today is walk you through not just what has happened in the five years since *NFIB v. Sebelius*, but also describe the beginning of the ACA and conclude with some thoughts of how the Court’s decision, in particular, the saving construction from Chief Justice John Roberts has aged. Professor Huberfeld talked at length about how the Medicaid expansion has not aged well. Neither has the saving construction. And indeed, if you’re interested to read more, pick up a copy of my first book, *Unprecedented: The Constitutional Challenge to Obamacare*.

The ACA is indeed a story of how all three branches of our government collided: the legislative branch, the Supreme Court, and the executive branch. And they collided over the meaning of the Constitution. But this is not merely a story of constitutional law. It is also a story of health care, economics, and

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1 Josh Blackman, Professor of Law, South Texas College of Law Houston. These remarks were given at the Spring 2017 symposium, “NFIB v. Sebelius at 5: The Affordable Care Act and the Role of the Federal Government in Healthcare Reform,” at the St. Thomas Sch. of Law (Apr. 4, 2017). A video of the presentation can be found at https://www.youtube.com/watch?v=_NB3L0MtZuM.
5 Nicole Huberfeld, Professor of Law and Assoc. Dean for Acad. Affairs, Univ. of Ky. Coll. of Law. These remarks were given at the Spring 2017 symposium, “NFIB v. Sebelius at 5: The Affordable Care Act and the Role of the Federal Government in Healthcare Reform,” at the St. Thomas Sch. of Law (Apr. 4, 2017).
how to provide health insurance to as large a number of people as feasible, while complying with the U.S. Constitution. I won’t go quite as far back as Professor Huberfeld did with her discussion of President Roosevelt’s health care initiatives, but I will go back to the Clintons.⁶

Now, most of you in this room are not old enough to remember this photo, though some of you may be. In 1993, President Clinton assigned First Lady Hillary Rodham Clinton to chair a taskforce to reform our health insurance system. The taskforce came up with a plan called the Health Security Act.⁷ It would have given virtually every American access to health insurance in one form or another.

This was, as Professor Huberfeld put it, a huge step forward from the old status quo.⁸ But as you all probably know, this bill went nowhere fast in large part due to a series of commercials known as the “Harry and Louise” Ads.⁹ People who are over the age of thirty are smiling, because you remember these commercials, which aired on TV nonstop. I remember watching them when I was young, in the 1993-1994 period. The setup was this: you had a mother and father sitting at home, Harry and Louise, and they were reading this voluminous health care plan.¹⁰

The couple explains, “I like my doctor, I like my insurance, I want to keep it. I don’t want the government getting between me and my health care.” These ads were devastatingly effective. If you look at the popularity of the Hillary Care, both before and after these commercials, it plummeted.¹¹ And in fact, President Clinton acknowledged that these commercials were a key driver in the downfall of the health care bill. Ultimately, the bill never even advanced and died in Congress.

But that was not the end of the push for health care reform. Indeed, many people learned their lessons from this. And, one of the lessons they learned is that if you want to reform health insurance, you have to promise people they can keep what they have. Whether or not you can actually keep that promise is a different story, but you have to make the promise to get across the goal line. But the project of reforming health insurance stalled throughout the Clinton administration. President George W. Bush expanded prescription

⁶ Id.
⁸ Huberfeld, supra note 2.
⁹ “Harry and Louise” Health Care Advertisements, YouTube (Jul. 20, 2009), https://www.youtube.com/watch?v=CwOX2P4s-Iw.
¹⁰ Id.
¹¹ Id.
drug coverage, but, national health care reform didn’t move too far until the inauguration of President Obama in 2009.

Some of you may recall that the candidates in the 2008 presidential election had very different views on health insurance reform. Candidate Hillary Clinton, she ran twice if you recall, proposed a health care plan that had a cornerstone known as the individual mandate. The individual mandate would require individuals to have insurance. If they fail to be covered, they have to pay a penalty of some sort. President Obama, during the campaign trail, opposed this. He said making people buy insurance is like making a homeless person buy a house.

Ultimately though after Obama secured the nomination, he changed his mind and said Clinton was right. Shortly after he entered office, his administration, which was mostly staffed by Clinton’s former policy experts, started pushing forward Clinton’s plan to reform health insurance along these lines with this individual mandate as the linchpin. And the bill became known as the Patient Protection and Affordable Care Act.

No one says Patient Protection anymore. That’s dwindled away. Now, it’s just Affordable Care Act, ACA, or affectionately Obamacare. And indeed, that name has become so instilled, one of my colleagues in 2012 said “don’t put the word Obamacare in the title of your book. No one will be calling it that in a couple years.” They still are.

The debate over health care policy I will leave to experts like Nicole and others. I won’t even touch that. My focus will be on the constitutionality of this bill. And, in particular, the law’s individual mandate. As the ACA was being debated throughout the summer of 2009—feels like a lifetime—ago, a movement began to rise. There was a group that opposed the ACA not merely on policy grounds but also on constitutional grounds. You may have forgotten about them, I haven’t. They are the Tea Party.

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15 Interview by Ellen DeGeneres with Barack Obama, Ellen DeGeneres Television Show (Feb. 28, 2008).
17 See Jeffrey Rosen, Radical Constitutionalism, N.Y. Times, Nov. 28, 2010, § MM (Magazine), at 34.
This was a very influential social movement at the time that railed against Obamacare not only because they thought it was bad policy but because they thought the law was a violation of individual liberty.

The notion of the government making you buy something was deemed odious to a huge, huge portion of the American populace. And the notion of expanding government’s role in health insurance through this mandate was considered illegitimate and an improper role of government.

It was not merely a question of how do we get health insurance to the most number of people. It’s how can that can be done consistent with certain values?

I was by chance in D.C. on March 23, 2010, seven years ago, and witnessed the massive Tea Party rally in our nation’s capital. They were chanting, “Kill the bill, kill the bill” and “Nancy, Nancy,” mocking House Speaker Nancy Pelosi? It was surreal seeing all these thousands of people. I’ll never forget, I saw this one sign, it said, “Overturn Wickard v. Filburn.” Tea Partier, probably didn’t go to law school. I couldn’t have told you what Wickard was before law school. “Overturn Wickard.”

There was a strong constitutional current among this movement that centered on the mandate. But, the protest was to no avail following the close election of Senator Al Franken. The people in this building could have switched the outcome of that race. It was that close. After Senator Franken’s election was settled, Senate Democrats had sixty votes and the decision was made, Republicans will not help us with this bill, so let’s go it alone. That was a fateful decision. On December 24th of 2009, the Senate Democrats voted on a version of the Patient Protection and Affordable Care Act. The bill was nearly twenty-seven hundred pages.

Did anyone except Professor Huberfeld actually read the entire thing? Probably not. In fact, Senator Max Baucus, the Chairman of the Finance Committee said, “I don’t read bills, I pay people to do that for me.” Thank you, Senator. But the bill was passed. This was not meant to be the final version of the bill. The idea was to pass a Senate bill, then they would pass a different House bill, then they’ll have a conference, and they’ll iron out all the details. That was not to be.

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After the death of Senator Ted Kennedy, Senator Scott Brown, a Massachusetts Republican was elected. The Democrats were in a tight spot. The conference between the Houses to iron out the kinks and make this as perfect a bill as can be would never happen. The House was more or less forced to pass the Senate bill with some slight modifications made through the budget reconciliation process. But, these changes on the scale of things were actually fairly small.

For example, Professor Huberfeld mentioned the ACA exchanges. Under the Senate bill, the states can create these marketplaces. Under the original House bill, there would be one federal marketplace. Most people thought the House bill would prevail, so that there would not have even been a role for states to have marketplaces.

No matter, because of Scott Brown, the Senate bill was what they had. So really the ACA, the bill we have, this vaunted bill, was a draft. It was not meant to be final. And if you want to have proof of that, look at the case of King v. Burwell. In any event, House Republicans could do nothing and the bill was passed.

The final bill was approved on March 23, 2010. I like focusing on this slide for a minute—which displays that zero Republicans voted for the bill, because this explains the ideological divide. The question was asked, how can it be that so many people oppose giving health care to people? There’s a philosophical divide. Not a single Republican supported this law and the thirty-four Democrats across the aisle voted against it. But for the huge majorities, you could say, of the Democrats in the House and the Senate, we would not have an ACA. If a couple more of you voted for Norm Coleman, we would not have an ACA. But indeed, this is how society goes. As we have been told, elections have consequences.

It goes to the President and he signs it. Shortly after he signed the law, President Obama said something to the effect of the battle over health care reform is over. Not even close, not even close, my friends. Within seven minutes, after President Obama signed the ACA into law, lawsuits were filed across the country challenging its constitutionality. The first was filed seven minutes later by the state of Florida. Another suit was filed by the state of Florida et al v. United States Department of Health and Human Services et al, No. 3:10-cv-91-RV/EMT, 2010 WL 2011620, at *1 (N.D. Fla. April 23, 2010).
Virginia. What did they allege? They alleged that the mandate was unconstitutional.

Let’s do a mini constitutional law lecture. I mentioned earlier the case of *Wickard v. Filburn*. This is a photograph of farmer Roscoe Filburn. He lived in Ohio. He grew wheat on his farm, some of which was not meant for shipment in interstate commerce. He grew this wheat for himself and his family. As a side note, he was probably lying. The amount of wheat he was growing was far more than any cows could actually eat. He was almost certainly selling on the black market, but let’s put that aside for now.

Those facts are not convenient to uphold the New Deal—Professor Huberfeld is nodding, right. The number of acres he was growing, he could not eat that if he tried. Let’s pretend this is a fact. I got Nicole nodding, good.

The Court said even though the wheat he was growing was not destined for an interstate marketplace, the fact is that economic activity had a substantial effect on interstate commerce. Thus, Congress could reach it with its commerce and necessary and proper powers. This was the opinion by Justice Jackson. Everyone knows Jackson’s concurring opinion in *Youngstown*. He wrote this one too. Not his finest moment, but the Court says you can regulate economic activity even if it’s purely intrastate if it has a substantial effect on interstate commerce. This is now black letter law.

Where does that leave the mandate? We have another case I want to talk about. This is Angel Raich, she was the lead plaintiff in a case called Gonzales against Raich. She suffered from advanced tumors and required the use of medicinal marijuana to treat herself. Under California law, medicinal marijuana is perfectly lawful. Under federal law it’s not. She sued the federal government.

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26 *Id.* at 114.
27 *Id.*
28 *Supra*, note 2.
29 *Id.* at 128-29.
30 *Id.* at 119, 123-24.
31 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
32 *Wickard*, 317 U.S. at 124.
33 *Gonzales v. Raich*, 545 U.S. 1 (2005).
37 *Raich*, 545 U.S. at 6-7.
This case was argued by Randy Barnett, who’s my co-author on a number of projects.\textsuperscript{38} This is a photograph of Angel on the phone learning that she lost the case.\textsuperscript{39} The Supreme Court ruled against her and said Congress has the power to regulate this economic activity of growing marijuana.\textsuperscript{40} Justice Scalia concurred, saying even if this is not an economic activity, there is a regulatory scheme concerning drug enforcement.\textsuperscript{41} As a necessary and proper incident to enforce that regulatory scheme, the government can reach her local conduct.\textsuperscript{42}

These are the two major precedents we have leading up to the \textit{NFIB} case. Virtually all law professors in the country thought the law was constitutional. I can count on maybe one hand the professors who disagree--they all write on the Volokh Conspiracy. But the consensus was of course Congress can regulate a marketplace that affects billions of dollars and hospitals and doctors and medicine.\textsuperscript{43} How is this not commerce? How is this any less commerce than growing marijuana? Or growing wheat?

Then came my least favorite piece of food. In fact, because of this case, true story I can’t eat broccoli anymore. When I look at broccoli, I think of \textit{NFIB} and I get this awful taste in my mouth. I’ve actually forsworn broccoli, I can’t eat it. You think I’m joking, I’m being entirely serious. I never liked it before, but now I have a reason not to like it. Me and George H. W. Bush.\textsuperscript{44} But the question became could Congress make you buy broccoli?

The argument was this: In all these other cases, \textit{Wickard}, \textit{Raich}, the Court spoke of classes of economic activity, whether it was growing wheat or growing weed. It was an economic activity, or a class of activity.

If you go and read those opinions, including Justice Scalia in \textit{Raich}, the word economic activity, classes of activity, appears over and over again.\textsuperscript{45} The insight was this: the Court’s precedents only discussed economic activity.\textsuperscript{46} What if at issue is not economic activity, but economic inactivity; that is, a decision not to buy something.

Once you buy something and you are in the stream of commerce, Congress can regulate the heck out of you. But can Congress shove you into that stream

\textsuperscript{38} Id. at 4.
\textsuperscript{39} Editorial note: referring to visual aids used in the presentation.
\textsuperscript{40} \textit{Raich}, 545 U.S. at 32.
\textsuperscript{41} Id. at 34 (Scalia, J., concurring).
\textsuperscript{42} Id. at 32.
\textsuperscript{43} \textit{Raich}, 545 U.S. at 25-26 (majority opinion).
\textsuperscript{45} 545 U.S. at 8-9, 16, 21-27, 34-39.
of commerce? Because once they put you in the stream of commerce, then
they can regulate you. That was the question in NFIB.\footnote{Id. at 552.} Could they make you
buy something and then regulate you? This was a question not addressed by
the previous precedents. Perhaps you think the distinction between economic
activity and inactivity is manufactured. Read the cases, it’s there. Read Raich,
it speaks of economic activity.\footnote{545 U.S. at 8-9, 16, 21-27.}

Can they make you do this? Can they make you buy a product? This was the
argument.\footnote{Nat’l Fed’n Indep. Buss., 567 U.S. at 546-47.} The case was litigated through the courts. The first lawsuit I’ll
talk about was filed by the Virginia Attorney General Ken Cuccinelli.\footnote{Virginia ex rel. Cuccinelli, 728 F.Supp.2d at 768.} The
federal court ruled in favor of Virginia finding that Congress lacked the
power to regulate inactivity.\footnote{Id. at 782.}

The second opinion, though, by Judge Vinson in Florida, was the big one. He
ruled that the mandate was unconstitutional as was the entire law.\footnote{Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services, 780 F.Supp.2d 1256, 1306
(N.D. Fla. 2011).} You
could not separate the mandate from this intricate regime. It was like a Swiss
watch, you can’t just take out one gear, the major gear, because the entire
thing will fall apart. Now you have two federal judges who adopt this theory
based on the distinction between economic activity and inactivity.

This case goes on to the court of appeals.\footnote{Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services, 648 F.3d 1235 (11th Cir.
2011).} You have a dueling battle between Neal Katyal who was President Obama’s Deputy Solicitor General and Paul
Clement, who was George W. Bush’s former Solicitor General.\footnote{Id. at 1239.} They argue
this case in three courts of appeals. The Sixth Circuit ruled in favor of the
government.\footnote{Thomas More Law Center v. Obama, 651 F.3d 529, 549 (6th Cir. 2011).} Judge Jeff Sutton, a conservative appointee by President
George W. Bush, had a funky opinion, which upheld the mandate.\footnote{Id. at 565-66.}

The next case up was the Eleventh Circuit Court of Appeals. This was the
Florida case. The Florida case— in a joint decision by Judge Dubina and Hull— ruled for the challengers.\footnote{Florida ex rel. Atty. Gen., 648 F.3d at 1312.} With this we had a circuit split.
The Fourth Circuit ruled for the Obama administration.\textsuperscript{58} In a quirk, one judge ruled that this is a tax.\textsuperscript{59} At this point, Solicitor General Verrilli had been appointed and the case will be argued before the D.C. Circuit. The D.C. Circuit ruled in favor of the government.\textsuperscript{60} Now we got three courts that ruled for the government and one court ruling against the government. This was a circuit split the Supreme Court had to take.

I want to pause for a moment and talk about Judge Kavanaugh on the D.C. Circuit. Judge Kavanaugh was a Bush appointee, a former Anthony Kennedy clerk, a former White House counsel. Judge Kavanaugh’s opinion was strange. It was based on the Tax Anti-Injunction Act.\textsuperscript{61} Okay, what is the Tax Anti-Injunction Act? Unfortunately, you came here for con-law, I’m going to give you tax law.

As I’m sure all of you know, April 15th—April 17th this year— is fast approaching. If you have a dispute over your taxes, you have one option: you pay your taxes and then you sue for a refund. You cannot go to court and challenge your taxes at the outset. If you did that, you could imagine people would never pay their taxes. They would just sue all the time. There’s an argument that the Affordable Care Act mandate was not actually a penalty premised on the Commerce Clause. Instead, the argument was this is a tax. But there’s a problem with this argument. If indeed the ACA’s mandate was enforced by a tax, it was not yet ripe. No one would’ve had to pay it until 2014.

Back then when the suit was brought, no one had paid the tax yet. The usual answer is there’s no jurisdiction under the Tax Anti-Injunction Act. The answer, under that argument, should have been : dismiss the case for lack of jurisdiction, come back in a couple years when someone actually pays this tax. Initially the Obama administration actually asserted this argument in court.\textsuperscript{62} They said these cases are not ripe, dismiss them, bring them back later.\textsuperscript{63} But there’s a problem with that argument.

I want you to think about this for a minute. What if Barack Obama did not win reelection and President Mitt Romney declined to defend its constitutionality. The Obama Administration needed to defend this in court back in 2012. But this argument created a bizarre inconsistency. If indeed it was a tax and which can be justified under the Constitution’s taxing power, the tax had not yet been enforced. And how can you challenge a tax that’s

\textsuperscript{58} Liberty University, Inc. v. Geithner, 671 F.3d 391, 397 (4th Cir. 2011).
\textsuperscript{59} Id. at 415 (Judge Wynn, concurring).
\textsuperscript{60} Seven-Sky v. Holder, 661 F.3d 1, 20 (D.C. Cir. 2011).
\textsuperscript{61} Anti-Injunction Act, 28 U.S.C. §§ 1341, 2283, 2284 (1948).
\textsuperscript{62} Florida ex rel. Bondi 780 F.Supp.2d at 1270.
\textsuperscript{63} Id.
not yet been collected? This argument my friends, was the seeds of Chief Justice John Roberts’ saving construction. And the person who planted those seeds most forcefully was Judge Brett Kavanaugh.

Judge Kavanaugh admitted that it’s not actually called a tax in the statute but if we could treat it as a tax and that would make it constitutional. This idea of treating it as a tax and changing a few words here and there is the premise of the constitutional avoidance doctrine that I’m sure many of you have studied in your con-law classes. This was a basis of how the mandate survived.

The case goes to the Supreme Court, and argued before the nine Justices. President Obama clashed with the Court early and often. You may recall that at the 2010 State of the Union Address, shortly after the Citizens United decision, President Obama said that the Supreme Court has overturned 100 years of precedents with Citizens United, opening up the floodgates for foreigners to spend in elections.64 Unfortunately, Justice Alito was sitting there with a camera on him saying, “Not true, not true.”65 For those of us with short memories, we’ve had presidents be pretty harsh to the Court in more direct forms. President Obama had already asserted that he would not cow to the Supreme Court.

The case was argued before the Supreme Court. As you know, there are no cameras allowed at the Supreme Court. The only way for the public to see the proceedings is to camp outside the court.66 For those have never done this before—I’ve done this several times—the sprinklers come on at three in the morning. It’s a very nice wake up call. In fact, the big problem now is paid line-waiters. This is actually a serious issue where fairly wealthy people pay homeless people to sleep outside and get them seats in the Court.67 It’s true. The Court has clamped down on this practice, but it still goes on quite a bit.

When NIFB was argued it was like a circus on the street outside the Supreme Court. If you’ve never been to the Court on argument day, you should

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consider going. The nine Justices would hear a modern-day record of three
days of oral arguments.

On day number one, the Supreme Court would hear arguments about the Tax
Anti-Injunction Act.\footnote{26 U.S.C. § 7421.} How could it be that a tax that’s not yet been collected,
can be challenged in court now?

On day number two, the Court would hear arguments about the Commerce
Clause. Could this mandate to buy insurance be justified under the
Commerce Clause?

Day number three was a double-header. In the morning, the question was, if
the mandate was unconstitutional, could it be severed from the rest of the
law? And in the afternoon, the Court focused on Professor Huberfeld’s
topic—which she addressed and I am going to skip because she did such a
good job—was about the Medicaid expansion.\footnote{Huberfeld, supra, note 2.}

Day number one, the government had a fairly strange position, and so follow
me here. The government argued, ready for this, there is no individual
Rather, there’s merely a tax on going uninsured. What’s the difference?
Follow me here. The government realized they were on pretty shifty grounds
because there’s never been a purchase mandate before. But instead, there
have been lots of taxes on people who did absolutely nothing. So, indeed
there was precedent to say, you could tax inactivity.

That was okay, but the problem that arose is, if indeed it’s a tax, how can we
challenge it now in Court under the Anti-Injunction Act? So here is, I think
the genius of Solicitor General Verrilli and the Obama administration. Chief
Justice Roberts didn’t make this argument up, he simply adopted it from the
government. Solicitor General Verrilli argued that purposes of the Tax Anti-
Injunction Act, it’s not a tax, it’s a penalty. But for purposes of the
Constitution, it’s a tax and not a penalty.\footnote{Id. at 52:16.} I’ll do it one more time. For
purposes of the statute, it’s not a tax. And for purposes of the Constitution, it
is a tax. The same provision, the exact same provision—depending how you
look at it—is and is not a tax.

This is not an insane position.. From a statutory perspective, Congress can
characterize their bills however they want. But from a constitutional
perspective, it’s for the Courts to decide what it is, and this was the premise of the argument. This was Chief Justice John Roberts’ saving construction: the notion that the exact same provision could be both a tax and not a tax at the same time. And this was how the Court saved the law.

By the way, moot court tip for all of you: do not drink water before you start making an argument. Donald Verrilli, the U.S. Solicitor General, took a sip of water before he went up. It went down the wrong pipe. So, he was up there choking, literally and figuratively, as he was beginning his argument. In fact, the RNC made this fairly misleading commercial where they doctored the audio to make it seem like was choking a little bit longer, but there was like a six-second gap where it’s like, “Mr. Chief Justice may it—[feigning choking sounds] please the—.”\footnote{Grace Wyler & Robert Libetti, \textit{Listen: Obama’s Lawyer Had A Meltdown Just 25 Seconds Into His Supreme Court Argument Today}, Business Insider, Mar. 27, 2012, \url{http://www.businessinsider.com/donald-vericilli-coughing-supreme-court-obamacare-meltdown-2012-3}.} Not quite that, but that’s the idea. So, don’t drink before you argue.

So, Verrilli had a pretty rough go with respect to the Commerce Clause. The Court did not seem to be buying his argument, but the taxing power argument really, for him, saved the day. So, let me move forward, and of course Justice Scalia asked about the broccoli horror. Can Congress make you buy broccoli? Another reason why I cannot eat the damn thing. But we move forward to the very end.

After the case was argued, everyone thought that Justice Kennedy would be our swing vote, but indeed it was Chief Justice Roberts. Chief Justice Roberts breaks my heart every June without fail. I didn’t know yet how he would break my heart, this was the first time. But ultimately, the Supreme Court ruled in June 2012, and the Chief gave us saving construction.\footnote{The decision was announced on June 28, 2012. \textit{See NFIB}, 567 U.S. 519.}

The general idea is that even though Congress did not actually enact this law as an exercise of its commerce power, to save the law we will treat it as if Congress had enacted a law pursuant to its taxing power. We will save the law. For the Anti-Injunction Act, it’s a penalty. For the Constitution, it’s a tax. For the rule of law, it’s a sham.

The difficulty with the Chief’s opinion—and I’m going to focus on something that most people don’t care about but actually matters quite a bit to me—is what does it mean to be a tax? Congress has fairly specific authority over taxing. This is a question going back to the 1790’s. First, this is not an income tax. Second, you can have certain types of excise taxes like...
on whiskey.\textsuperscript{74} This is not really a tax on buying something. You can have something called a direct tax, but those have to be apportioned by population.\textsuperscript{75}

The Constitution has fairly strict rules over how taxes are imposed on people. So, what kind of tax is this? Is it an excise tax? Is it an income tax? Is it a direct tax? This is a major constitutional question—a question the Chief Justice ignored. So, in his zealous attempt to avoid the constitutional question concerning the commerce clause, he basically made something up. My friend Ilya Shapiro calls this the unicorn tax.\textsuperscript{76} It’s a tax never before seen, that’ll never before seen again.

So, my antagonism to Chief Justice Roberts’ saving construction is not even about the Anti-Injunction Act—I’ve gotten over that part. I still can’t get over the taxing power of the Constitution. You made it up, Chief Justice John Roberts, admit it. The Solicitor General put like three or four sentences in his brief on this point and basically said, yeah, it’s a hard point.\textsuperscript{77}

The entire opinion is a sham. You don’t avoid one constitutional problem by creating another. That’s not how it works. You don’t read a statute in the least plausible way such that it raises a very serious constitutional issue that’s plagued us since the Hylton case in 1796.\textsuperscript{78} This was an old question that Chief Justice Roberts, with a lick and prayer, dismissed.

That’s not constitutional law. And I think the way to understand the Chief’s opinion, we really have to go a couple years later to the King v. Burwell decision which I talk about in my second book, Unraveled.\textsuperscript{79}

The Chief Justice in King v. Burwell upheld the reading of the statute that the government wanted—I won’t get into the details.\textsuperscript{80} But the Chief said that


\textsuperscript{76} Ilya Shapiro is editor-in-chief of the Cato Supreme Court Review and a senior fellow in constitutional studies at the Cato Institute. See Cato Institute, https://www.cato.org/people/ilya-shapiro (last visited Sep. 29, 2017).


\textsuperscript{78} \textit{Hylton v. United States}, 3 U.S. 171 (1796).

\textsuperscript{79} \textit{Burwell}, 135 U.S. 2480; Josh Blackman, Unraveled (Cambridge University Press, 2016).

\textsuperscript{80} 135 U.S. 2480, at 2496.
the purpose of the ACA is to improve health insurance, not to destroy it, and we will read the statute in that fashion.\footnote{Id. ("Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.")}

Statutes are complicated. They don’t have single purposes. They have lots of purposes, federalism among others, right. The dissent by Justice Scalia—which would be his last dissent delivered from the bench—criticized the Chief Justice, and you could tell a lot of the Scalia oomph from \textit{NFIB} spilled over into the \textit{King} dissent.\footnote{\textit{NFIB}, 567 U.S. at 561 (Scalia, J., dissenting); \textit{Burwell}, 135 U.S. at 2496 (Scalia, J., dissenting).} And, he said, “This Court has now twice saved this law. We should perhaps not call it not Obamacare, but SCOTUScare.”\footnote{Id. at 2507. (“This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So, it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare. Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft-Hartley Act; perhaps not.”)} And, Scalia wrote about the Chief’s opinion, It seems that we are now applying a special set of rules for this new law and perhaps one day this law will achieve the status of perhaps the Social Security Act, or the Taft-Hartley Act, or others.\footnote{Id.}

It was only five-years-old at the time. But for now, the guiding principle of the ACA is that the law must be saved and that the Chief Justice has decided—for whatever reasons and you can ask about it during Q and A—that this law must be saved.

So, after five years, the saving construction, my friends, has not aged well. There’s been no effort to defend it. I haven’t seen anyone actually agree with it as a matter of constitutional interpretation that reconciles the taxing power. And it, I think, shakes the Chief’s commitment to being this neutral arbiter. I think his concern for legitimacy and institutionalism trumps his own commitment to the Constitution, and for that, we are all much worse off. Thank you very much for your attention.