

OBAMACARE & MAN AT YALE

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After the most significant Supreme Court oral argument of the Roberts Court, elite law professors were stuck sitting on the sidelines at the Hogwarts-esque castle that is Yale Law School, mystified at how they were likely headed towards an unprecedented defeat. Rather than accepting the validity of the arguments against Obamacare, leading academics directed their ire towards the Solicitor General, characterizing him as recalcitrant, shunning academics (unlike his predecessor), and putting forth losing arguments in Court. Further, the professors blamed the media (the New York Times in particular), which gave a “false equivalence” to libertarian law professors and made their arguments legitimate.

In writing Unprecedented: The Constitutional Challenge to Obamacare, Josh Blackman conducted over one hundred interviews with the lawyers, journalists, professors, and politicians involved on both sides of the case. These insights shed light on the question Professor David Hyman seeks to answer in his important and timely new article: “Why Did Law Professors Misunderestimate the Lawsuits against PPACA?” For this contribution to a symposium of replies in the University of Illinois Law Review, Blackman highlights how the sentiments at this Ivy-League confab served as a fitting testament to the law professors’ “misunderestimation” of NFIB v. Sebelius.

TABLE OF CONTENTS

I.	INTRODUCTION	1242
II.	MISUNDERESTIMATION	1243
III.	THE GENERAL AND THE ACADEMY	1244
IV.	THE FALSE EQUIVALENCY	1247
V.	CONCLUSION	1250

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I. INTRODUCTION

On April 27-28, 2012, one month after the three-day oral argument marathon in *NFIB v. Sebelius*,¹ a group of the most distinguished constitutional law scholars assembled in the ivory towers of New Haven in honor of the publication of Yale Law Professor Jack Balkin's new book, *Living Originalism*.² Much of the discussion focused on the substance of Balkin's insightful book, with panels ranging from "Living Originalism: A Contradiction in Terms?" to "Comparative and Historical Perspectives on Living Originalism."³ But minds seemed to be elsewhere, as the overwhelming tenor of the conference bordered on that thin line between frustration and panic. Or, in the words of George Mason Law Professor Michale Greve, who presented at the conference, there was a "near-clinical obsession with, and hysteria over, the possible invalidation of the ACA's individual mandate."⁴

After the most significant Supreme Court oral argument of the Roberts Court, elite law professors were stuck sitting on the sidelines, mystified how they were likely headed towards an unprecedented defeat. Enconced in the Hogwarts-esque castle that is Yale Law School, leading academics commiserated, and expressed frustration at how a "frivolous" argument they laughed at seemed to have been accepted by five Justices. "What went wrong?" they pondered. Was it the recalcitrant Solicitor General, who, unlike his predecessor, shunned academics, and put forth losing arguments in Court? How could everyone else have been led so far astray? Was it the media that gave a "false equivalence" to a rogue gang of libertarian law professors, and made their arguments legitimate? Was it right-wing judges that adopted crazy ideas for purely political reasons? Was it the Tea Party that infected our collective consciousness, and made Americans fear being force-fed broccoli by the President? Certainly, it could not have been the validity of the constitutional arguments against the mandate. What could it have been?

In writing *Unprecedented: The Constitutional Challenge to Obamacare*, I conducted over one hundred interviews with the lawyers, journalists, professors, and politicians involved on both sides of the case.⁵ These insights shed light on the question Professor David Hyman seeks to answer in his important and timely new article: *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*⁶ For this contribution to a symposium of replies in the *University of Illinois Law Review*, I high-

1. 132 S. Ct. 2566 (2012).

2. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

3. *Constitutional Interpretation and Change: A Conference on Jack Balkin's Living Originalism*, YALE L. SCH., available at http://www.law.yale.edu/intellectuallife/constinterp12_agenda.htm (last visited Apr. 1, 2014).

4. Michael S. Greve, *Yale and the ACA*, LIBERTY L. BLOG (Apr. 30, 2012), <http://libertylawsite.org/2012/04/30/yale-and-the-aca/>.

5. JOSH BLACKMAN, *UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE* (2013).

6. David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805.

light how the sentiments at this Ivy League shindig served as a fitting testament to the law professors' "misunderestimation" of *NFIB v. Sebelius*.

First, I summarize Hyman's arguments about why law professors missed the boat with Obamacare. Second, I focus on the academic reaction to both the challengers' arguments and the government's defense of the law. This supreme litigation highlights an undesired asymmetry for the professors. The lawyers representing the challengers regularly consulted with scholars on the right—though they did not always accept their ideas. However, Solicitor General Donald Verrilli, unlike his predecessor Acting Solicitor General Neal Katyal, cut off access for the professoriate, much to the consternation of the Monday-morning-quarterbacking academy. Stuck on the sidelines, the professors blamed the government lawyer for failing to make their case to the justices.

Third, I recount how the professors faulted the media (*The New York Times* in particular) and chastised reporters for giving the challengers a "false equivalency." By affording equal weight to the obviously correct answer that the law is constitutional and the obviously incorrect answer that it is not, the media legitimized a frivolous argument and gave it "legs."

While blaming the government and the media, the professors continued to *misunderestimate* the lawsuit against the ACA.

II. MISUNDERESTIMATION

In *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, Professor David Hyman chronicles how the legal academy consistently scoffed at the prospect that the Supreme Court would invalidate the Patient Protection and Affordable Care Act, commonly known as the ACA or Obamacare.⁷ After regaling his readers with a meticulous account of every statement made by nearly every academic on the topic of the constitutionality of the ACA—and how they consistently "misunderestimated" the challenge—Hyman identifies five factors that may help explain why the academy missed the boat.⁸

First, law professors had insufficient practice experience.⁹ This practical background would have allowed them to appreciate the merits of the arguments against the law, as well as the weaknesses of the defenses, and understand how judges may accept them.

Second, the professors were the victims of motivated reasoning within the ivory tower echo chamber, and tended to "focus on information confirming their prior view."¹⁰ In other words, when everyone they knew thought Obamacare was obviously constitutional, only a crazy

7. *Id.*

8. *Id.* at 820–33; 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).

9. Hyman, *supra* note 6, at 821.

10. *Id.* at 824.

person could think it was unconstitutional—similar to the oft-quoted, “How could Nixon have won? Nobody I know voted for him.”

Third, constitutional law professors’ preferred mode of reasoning consists of developing “grand theory rules” and “explain[ing] why the author’s preferred policies are constitutionally required.”¹¹ Hyman notes that these are “not the kind of circumstances that are likely to lead to cautious and limited predictive judgments.”¹² In other words, the bold theories that are the coin of the realm in academia lack the same purchase in courts.

Fourth, the “law of small numbers,” that is, the experts who believe “that small samples mirror the population from which they are drawn,” explains why law professors “were so willing to make sweeping predictions.”¹³

Finally, Hyman concludes by focusing on the conduct of the constitutional law professors after oral arguments. He charges that “[r]ather than admit error, or rethink their original assessment of the probabilities, many of the nation’s law professors participated in an extraordinary campaign threatening the Supreme Court (more specifically, threatening Justices Kennedy and Roberts, the plausible swing justices), with delegitimization if they didn’t rule the ‘right’ way.”¹⁴

III. THE GENERAL AND THE ACADEMY

During her last five months as Solicitor General, without any explanation, Elena Kagan made the decision to wall herself off from the ACA litigation.¹⁵ On this case of “singular importance,” Kagan delegated all duties to the Principal Deputy Solicitor General, Neal Katyal.¹⁶ Katyal was a constitutional law professor at the Georgetown University Law Center, and had argued *Hamdan v. Rumsfeld*¹⁷ and *Northwest Austin Municipal Utility District v. Holder*,¹⁸ among others, before the Court.

11. *Id.* at 829.

12. *Id.*

13. *Id.* at 830. Elsewhere, I have discussed how expert predictions from former Supreme Court clerks and law professors about the outcomes of the Supreme Court are less accurate than the crowdsourced predictions made on the Supreme Court prediction market I operate at FantasySCOTUS.net. See Josh Blackman et al., *FantasySCOTUS: Crowdsourcing a Prediction Market for the Supreme Court*, 10 NW. J. TECH. & INTELL. PROP. 125 (2012).

14. Hyman, *supra* note 6, at 831; see also, Randy E. Barnett, *Foreword to JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE*, ix, xi (2013) (“After this case was submitted to the Supreme Court, many on the left—from President Obama to Patrick Leahy, the chairman of the Senate Judiciary Committee, to journalists such as Maureen Dowd, E. J. Dionne, and Jeffrey Rosen—vociferously waged what I called a ‘campaign of disdain’ against the conservative justices in general, and Chief Justice Roberts in particular, in an effort to influence and even intimidate one or more of the justices to capitulate.”).

15. Josh Blackman, *The Question No One Asked at Justice Kagan’s Confirmation Hearing: Why Did She Wall Herself off from the Obamacare Litigation*, JOSH BLACKMAN’S BLOG (Sept. 8, 2013), <http://joshblackman.com/blog/2013/09/08/the-question-no-one-asked-at-justice-kagans-confirmation-hearing-why-did-she-wall-herself-off-from-the-obamacare-litigation/>.

16. *Id.*

17. 548 U.S. 557 (2006).

18. 557 U.S. 193 (2009).

After Kagan's appointment to the Supreme Court in May 2010, Katyal would serve as the Acting Solicitor General until the confirmation of his successor, Donald J. Verrilli, in June 2011.

During this time, Katyal formulated the government's appellate strategy, and argued the ACA cases before the Fourth, Sixth, and Eleventh Circuits.¹⁹ Katyal, whose academic bona fides were strong, had offered great access to the professoriate in soliciting advice and helping to devise the government's strategy. Specifically, Katyal looked to the work of Professors Neal Siegel and Robert Cooter, whose theory of collective-action federalism offered a limiting principle to the Congress' commerce powers—Congress could exercise the power here to solve the national problem of skyrocketing healthcare costs that no single state could solve.²⁰ In the words of one attendee at the Yale conference, Katyal had a “footing with the academy.”

After the appointment of Verrilli, however, the access of the academy to the Solicitor General's office was clamped down. In preparing the case before the Supreme Court, Verrilli, after careful consideration, rejected many of the arguments of leading academics. In particular, much to the disappointment of many professors, Verrilli deviated from the limiting principle Katyal had argued in the lower courts.²¹

In contrast, on the other side of the challenge, conservative and libertarian law professors were closely involved with the challenge. Georgetown Law Professor Randy Barnett, dubbed by *The New York Times* as the “intellectual godfather” of the challenge, served as an adviser to the National Federation of Independent Business, represented by Jones Day.²² Barnett was also influential to the arguments advanced by Paul Clement for the twenty-six state attorneys general.²³ Many other academics and think-tankers on the right were integral in shaping the challengers' case until the very end—and even after the case was submitted.²⁴

This asymmetry was not lost on professors at the Yale Law School conference. Many academics felt “frustrated” and “cut out” because the Solicitor General did not allow their participation at all. One attendee told me that the perception was that “Verrilli had cut them off at the knees,” and forced them to “write angry op-eds” second-guessing his

19. See, e.g., *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1239 (11th Cir. 2011) (listing Katyal as attorney for U.S. HHS); see also Blackman, *supra* note 15.

20. See Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29 (2011).

21. BLACKMAN, *supra* note 5, at 192–94.

22. Kat Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES (Dec. 19, 2010), <http://www.nytimes.com/2010/12/20/us/politics/20states.html>. Although, Michael Carvin, lead attorney for NFIB, told me that Barnett's “insights were important, [at] the end of the day, our brief was no different than if Randy had not been involved.” Barnett acknowledged that the NFIB brief was “Jones Day's brief,” not his.

23. See BLACKMAN, *supra* note 5, at 118–19, 142–43.

24. See generally RANDY E. BARNETT ET AL., *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE* (2013).

performance.²⁵ There was a palpable “deep sense of betrayal.” Another attendee relayed a sentiment that the “administration had cut them out of the challenge” while “academics on the right were getting fully aired.”

Further, the professors also were not happy with Verrilli’s strategy. One participant said that Verrilli was leaving the best possible arguments “on the table,” while the conservatives brought their “A-game.” The narrative quickly became, “it was Don’s fault. If someone decent had argued the case,” it would have been much better. Or more precisely, “If Don would have just listened to us, he wouldn’t have messed up.”

In conversations with senior DOJ attorneys, I learned that the Solicitor General apparently did not “lose any sleep” over discounting the professors’ opinions. Many of their arguments, especially those based on rifle mandates for militiamen in early America,²⁶ were, I was told, at best, “footnote material.”

Specifically, with respect to the limiting principle, after “careful consideration,” Verrilli determined Katyal’s argument “ultimately [was] not going to be helpful as a limiting principle.”²⁷ The “rock-solid” limits that Katyal located in *United States v. Lopez*²⁸ and *United States v. Morrison*²⁹ “wouldn’t seem robust enough [as] a limiting principle under these circumstances.”³⁰ If *Lopez* and *Morrison* represented the outer bounds of government power, the government could impose *any* economic mandate that addressed a national problem, pursuant to the collective-action federalism theory. If the government drew the line at these cases, the Justices, potentially worried that the government could do too much, might not buy the argument. The fact that Verrilli was unwilling to adopt these popular limiting principles is evidence that the leading arguments from academics were not nearly as airtight and conclusive as many argued. A lawyer who served in the administration and later returned to academia told me that Verrilli’s choice “was spot on and was absolutely right.”

In the end, Justices Scalia, Kennedy, Thomas, and Alito obliterated the argument advanced in the lower courts, writing that the Constitution does not give Congress the “whatever-it-takes-to-solve-a-national-problem power.”³¹ Notwithstanding the Necessary and Proper Clause,

25. For one example of a piece challenging Verrilli’s efforts, see Akhil Reed Amar, *How to Defend Obamacare*, SLATE (Mar. 29, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/supreme_court_and_obamacare_what_donald_verrilli_should_have_said_to_the_court_s_conservative_justices_.html.

26. Einer Elhauge, *If Health Insurance Mandates are Unconstitutional, Why Did the Founding Fathers Back Them?*, NEW REPUBLIC (Apr. 13, 2012), <http://www.newrepublic.com/article/politics/102620/individual-mandate-history-affordable-care-act>.

27. Josh Blackman, *The Strategy in NFIB v. Sebelius, Part II: The Commerce Clause Limiting Principle*, THE VOLOKH CONSPIRACY (Sept. 4, 2013, 4:27 PM), <http://www.volokh.com/2013/09/04/strategy-nfib-v-sebelius-part-ii-commerce-clause-limiting-principle/>.

28. 514 U.S. 549 (1995).

29. 529 U.S. 598 (2000).

30. Blackman, *supra* note 27.

31. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2650 (2012) (opinion of Scalia, Thomas, Kennedy & Alito, JJ., dissenting).

the mere fact that a national problem—such as health care—exists does not grant Congress additional powers. Chief Justice Roberts’s opinion on the Commerce Clause concurred with this view.³² After the case was decided, a government lawyer told me that this section in the joint opinion, also cited by the Chief Justice, validated the decision not to continue with Katyal’s argument. It did not persuade a single conservative Justice, let alone result in five votes.

But not all the blame was reserved for the Solicitor General. Also at fault was the media’s coverage of the case.

IV. THE FALSE EQUIVALENCY

On the second day of oral arguments in *NFIB v. Sebelius*, the *New York Times* ran on the front page a glowing profile of Randy Barnett featuring a photo of the grinning professor in front of the Supreme Court.³³ Titled “Vindication for Challenger of Health Care Law,” the profile was a tribute to Barnett’s leadership in advancing this case from a mere idea to the Supreme Court.³⁴ Over the two preceding years, “through his prolific writings, speaking engagements and television appearances, Professor Barnett has helped drive the question of the health care law’s constitutionality from the fringes of academia into the mainstream of American legal debate and right onto the agenda of the U.S. Supreme Court.”³⁵ Previously, the *Times* had referred to Barnett as the “intellectual godfather” of the case.³⁶ The profile concluded that Barnett, “more than any other legal academic,” was associated with the challenge.³⁷

The profile also drew attention to many who doubted the merit of this argument. When Barnett first began challenging the health care law, “[m]any of his colleagues, on both the left and the right, dismissed the idea as ridiculous—and still do.”³⁸ Typifying this dismissiveness was University of Virginia law professor Douglas Laycock, who deemed Barnett’s challenge frivolous: “He’s gotten an amazing amount of attention for an argument that he created out of whole cloth.”³⁹ Laycock wondered why anyone was even paying attention to Barnett: “Under ex-

32. *Id.* at 2593 (“Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a ‘necessary and proper’ component of the insurance reforms. The commerce power thus does not authorize the mandate. Accord, *post*, at 2644–2650 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).”).

33. Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES (Mar. 26, 2012), <http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html>.

34. *Id.*

35. *Id.*

36. Zernike, *supra* note 22.

37. Stolberg & Savage, *supra* note 33.

38. *Id.*

39. BLACKMAN, *supra* note 5, at 185.

isting case law this is a very easy case; this is obviously constitutional. I think he's going to lose eight to one."⁴⁰

Many supporters of the ACA sneered at *The New York Times* profile of Barnett. They claimed that the newspaper gave gushing treatment to what they deemed to be a frivolous argument, and improperly feted him. Instead, they argued, the *Times* should have focused on the conservative judges who struck down the law and who, in their opinion, had acted politically rather than apply any constitutional doctrine.

Kevin Sack, who covered the ACA litigation for the *New York Times* during the early stages, "related that, at first, most progressives were dismissive and told him the case was 'preposterous,' no doubt hoping the press would agree."⁴¹ As favorable rulings came in, however, ACA supporters "started to talk more seriously" as "it became clear this was going to be a legitimate legal argument."⁴²

There is something of a chicken-and-egg problem with the academy's early rejection of the challenge. Were they dismissing the argument as frivolous in the hope that no one, including the media, would take it seriously? Or, because no one they knew took it seriously, did they have to dismiss it as frivolous? There may also have been an element of jealousy. One Supreme Court reporter relayed that those at Yale complained that they "didn't get heard," and wondered why no one was quoting them (I should note that the honorary of the conference, Jack Balkin, was one of the few academics who took the lawsuits to the ACA seriously, and was a leading voice on the left throughout the challenge.).

Linda Greenhouse, the Pulitzer Prize-winning reporter who covered the Supreme Court for the *Times* from 1978 to 2007, was not pleased with the coverage of the case in the paper of record. Greenhouse, who now writes in the *Times* opinion section and lectures at Yale Law School, appeared on a panel titled "Journalism and the Constitution outside the Courts," along with Emily Bazelon (*Slate*), Charlie Savage (the *New York Times*), and Adam Liptak (the *New York Times*). Liptak was Greenhouse's successor for the Supreme Court beat at the *Times*. Greenhouse asserted that Liptak and others at the *Times*, by giving the challengers so much attention, created a "false equivalency." She claimed that Liptak validated Barnett and his frivolous ideas. Many other professors in attendance shared this concern. Michael Greve remarked that the sentiment was that "Randy Barnett is a creature of *The New York Times* and its addiction to a false neutrality."⁴³

Liptak emphatically rejected Greenhouse's "false equivalence" allegation. At the conference, he quipped, "Do I sense some hostility?" Later, Liptak would tell me that he was "taken aback by what I perceived to be harsh and heartfelt criticism from people I respect at my al-

40. *Id.*

41. *Id.* at 187.

42. *Id.*

43. Greve, *supra* note 4.

ma mater” (Yale Law School). He added that at the conference “[t]here was something like a consensus that the press in general and perhaps *The New York Times* in particular had fallen down on the job by unduly dignifying the arguments in support of the Commerce Clause challenge to the Affordable Care Act.” Liptak, however, felt that he had “present[ed] both sides of the argument.” Courts are a “poor place to make the ‘false equivalency’ criticism,” Liptak explained. “The critique is weaker still when the arguments on one side were made by a majority of the states and had divided the lower courts.”⁴⁴

The members of the Supreme Court press corps, a close group of colleagues who have been covering the beat for a long time, largely disagreed with the assertion of a “false equivalency.” Joan Biskupic, legal affairs reporter for *Reuters*, told me that, as a journalist, the “false equivalency” argument did not make sense to her. She had to “treat the argument as if it was legitimate because the courts were treating it as legitimate.”⁴⁵ Robert Barnes, Supreme Court correspondent for the *Washington Post*, told me the challengers made “compelling arguments” that struck him as “certainly plausible” and that warranted attention. He was “surprised by how others dismissed the challenge.” The challengers’ initial legal victories received prominent front-page coverage not because of contrived neutrality, but because “they really made people think differently” about the ACA.⁴⁶

David Savage, of the *Los Angeles Times*, also disputed the allegations of a “false equivalency.” From the outset, the challengers “had the makings of a reasonable argument,” as the government was “crossing a line” by telling people they had to buy a product. Savage added that it is “wrong to start with the premise that there is no argument on the other side.” The job of journalists “is to explain and lay out the arguments on both sides, not to say one side is baloney.”⁴⁷ After the case was decided, a reporter in attendance at the conference noted that it may have been a “nothing argument at Yale Law School,” but it “won five votes.” “What should the media report,” she asked rhetorically? That the “Justices don’t know what they are doing?”

Charlie Savage, coauthor of the *New York Times* Barnett profile, told me the story was simply “one of many articles about the biggest D.C. news event of the moment.” The editors at the *Times* “decided to commission” it not to prop up a false sense of equivalence, but “to add some human interest to the mix. It was a moment of major drama, and [Barnett] was a driving force behind it, so he merited the scrutiny.” With respect to the incredulous professors, Savage remarked, “[t]he Supreme Court took the case, and five Justices turned out to be friendly to the arguments, so contra the crowd at that event, it is hard to say that those ar-

44. BLACKMAN, *supra* note 5, at 185–87.

45. *Id.* at 187.

46. *Id.*

47. *Id.*

guments fell into the ‘flat earth’ category.” Savage added “I think it is sometimes awkward for legal academics, who are professional theoreticians, to confront the theory-destroying realpolitik at the heart of constitutional law: if there are five votes for a proposition on the Supreme Court, the proposition is ‘true.’”

After the case was decided, Liptak remarked, “as it turned out, there was reason to present fairly an argument that would end up capturing five votes on the Supreme Court”—contrary to the “consensus in the legal academy that the Commerce Clause argument was frivolous and would be rejected by a lopsided vote.” A journalist who follows the Court closely told me that Greenhouse would “not have treated it that way as a *New York Times* reporter. She has a different role now.” Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute, who was in close contact with the media throughout the litigation, told me that this case signaled the “changing of the guard. Greenhouse out, Liptak in.”⁴⁸

Until the bitter end, many continued to insist the challenge was ludicrous.

V. CONCLUSION

Alas, in the final analysis, we were all wrong. Even though five justices found that Congress lacks the power under the Commerce and Necessary and Proper Clauses to implement the mandate, the Supreme Court upheld the ACA by rewriting the individual mandate as a tax on not having health insurance. Who could have seen that coming?⁴⁹ It seems we all underestimated Chief Justice Roberts.

48. *Id.*

49. Harvard Law Professor Larry Tribe was one of the few who predicted that the Court, and the Chief Justice in particular, was amenable to rewriting the statute to save it. *Id.* at 183–84 (“Tribe nailed it less than twenty-four hours after the arguments concluded and before the justices even met at the pivotal conference.”).