

## UNRAVELED

Six years after its enactment, Obamacare remains one of the most controversial, divisive, and enduring political issues in America. In this much-anticipated follow-up to his critically acclaimed *Unprecedented: The Constitutional Challenge to Obamacare* (2013), Professor Blackman argues that, to implement the law, President Obama has broken promises about cancelled insurance policies, exceeded the traditional bounds of executive power, and infringed on religious liberty. At the same time, conservative opponents have stopped at nothing to unravel Obamacare, including a three-week government shutdown, four Supreme Court cases, and fifty repeal votes. This legal thriller provides the definitive account of the battle to stop Obamacare from being “woven into the fabric of America.” *Unraveled* is essential reading to understand the future of the Affordable Care Act in our gridlocked government in 2016, and beyond.

Josh Blackman is a constitutional law professor at the South Texas College of Law, Houston. He is the author of *Unprecedented: The Constitutional Challenge to Obamacare* (2013). Professor Blackman regularly provides public commentary on constitutional matters, and his work has appeared in the *New York Times*, *Wall Street Journal*, *Washington Post*, *USA Today*, *L.A. Times*, and other national publications.

# Unraveled

OBAMACARE, RELIGIOUS LIBERTY,  
AND EXECUTIVE POWER

JOSH BLACKMAN



**CAMBRIDGE**  
UNIVERSITY PRESS

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107169012](http://www.cambridge.org/9781107169012)

© Josh Blackman 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

Printed in the United States of America by Sheridan Books, Inc. in 2016

*A catalogue record for this publication is available from the British Library.*

ISBN 978-1-107-16901-2 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press  
978-1-107-16901-2 — Unraveled  
Josh Blackman  
Frontmatter  
[More Information](#)

---

*For my parents, Iris and Jaimie,  
who are my inspiration and motivation*

“It seems so cynical to want to take coverage away from millions of people; to take care away from people who need it the most; to punish millions with higher costs of care and unravel what’s now been woven into the fabric of America. And that kind of cynicism flies in the face of our history ... So five years in, what we are talking about it is no longer just a law. It’s no longer just a theory. This isn’t even just about the Affordable Care Act or Obamacare ... This is now part of the fabric of how we care for one another.”

– President Barack Obama

“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.”

– Chief Justice John G. Roberts, Jr.

“Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved ... We should start calling this law SCOTUScare.”

– Justice Antonin Scalia

Contents

<i>About the Author</i>	<i>page xi</i>
<i>Author’s Note</i>	<i>xiii</i>
<i>Prologue</i>	<i>xvii</i>
 PART I THE PROMISE OF OBAMACARE (JANUARY 20, 2009–JUNE 28, 2012)	
1 “If You Like Your Insurance, You Can Keep Your Insurance”	3
2 Federal and State Exchanges	17
3 Life and Religious Liberty	30
 PART II CONSCIENCE AND CONTRACEPTION (JUNE 29, 2012–MAY 1, 2013)	
4 The Contraceptive Mandate	53
5 Election Slowdown	70
6 Faith in the Courts	85
 PART III SHUTDOWN (MAY 2, 2013–SEPTEMBER 30, 2013)	
7 Exchanges “Established by the State”	101
8 Tea Party Summer	120
9 “Train Wreck”	132
10 Filibuster	143

PART IV OBAMACARE UNRAVELS  
(OCTOBER 1, 2013–DECEMBER 30, 2013)

11	Lights Out	165
12	Cancelled	184
13	Government by Blog Post	203
14	Crashing into the Deadline	227

PART V RELIGIOUS LIBERTY  
(DECEMBER 31, 2013–JULY 21, 2014)

15	New Year’s Resolution	241
16	Substantial Burden	252
17	“Glitch”	268
18	Between Two Ferns	282
19	Corporate Prayer	290
20	Notorious RBG	304

PART VI NUCLEAR FALLOUT  
(JULY 22, 2014–NOVEMBER 21, 2014)

21	Circuit Split	321
22	Dueling Petitions	329
23	“So Sue Me”	342

PART VII SUBSIDIZING OBAMACARE  
(NOVEMBER 22, 2014–JUNE 26, 2015)

24	#GruberGate	371
25	<i>King v. Burwell</i>	386
26	Gridlock	403
27	“Unravel What’s Now Been Woven into the Fabric of America”	420
28	“Improve Health Care Markets, Not Destroy Them”	436

Cambridge University Press  
978-1-107-16901-2 — Unraveled  
Josh Blackman  
Frontmatter  
[More Information](#)

Contents ix

PART VIII THE NUNS (JUNE 26, 2015–MAY 16, 2016)

29	Make Health Care Great Again	455
30	Short-Handed Court	477
31	“Hijacked”	501
32	“Accommodation”	520
	<i>Epilogue</i>	537
	<i>Acknowledgments</i>	561
	<i>Index</i>	563



## About the Author

Josh Blackman is Associate Professor of Law at the South Texas College of Law in Houston, where he specializes in constitutional law, the Supreme Court, and the intersection of law and technology. He authored the critically acclaimed *Unprecedented: The Constitutional Challenge to Obamacare* (2013).

Blackman has published three dozen law review articles, and his commentary has appeared in the *New York Times*, the *Wall Street Journal*, the *Washington Post*, *USA Today*, the *L.A. Times*, and other national publications. He is President of the Harlan Institute, the founder of FantasySCOTUS – the Internet’s premier Supreme Court Fantasy League – and blogs at JoshBlackman.com. Josh serves as an adjunct scholar at the Cato Institute, and was selected by *Forbes Magazine* for the “30 Under 30” in Law and Policy.

## Author's Note

By fate or design, my young career has tracked the trajectory of the Affordable Care Act. In September 2009, when I served as a law clerk after graduating from law school, I launched a blog to focus on constitutional and other legal issues. On my fourth day of blogging, I covered this new bill called Obamacare, and discussed whether the individual mandate could force someone to buy insurance. In November 2009, I was by chance present at a meeting where the legal strategy to challenge the individual mandate was hatched. In March 2010, I was unceremoniously asked to cut short my visit to the new Capitol Visitor Center; President Obama was about to enter, and give a final rallying call to House Democrats to vote for the Affordable Care Act (ACA). I emerged from the building to thousands of Tea Parties chantings “Kill the Bill.”

After constitutional challenges to Obamacare were filed, my best friends and colleagues served as the attorneys and scholars developing the groundwork to attack the individual mandate. Throughout 2010 and 2011 while clerking, I continued to blog from a distance, based on closely following the case and on insights I gained from key players. In November 2011, shortly after the Supreme Court accepted review of the ACA cases, I was hired as a law professor at the South Texas College of Law in Houston. It was around that time that I decided to write a book about the legal challenges to Obamacare. I didn't quite know how the case would be resolved, but I knew there was an important story to be preserved for history.

Leading up to the Supreme Court's June 2012 decision in *NFIB v. Sebelius*, I assembled the chronology of how the challenge began and how it wound its way through the courts. The only uncertainty was how the book would end. To expedite the publishing process, I wrote two alternate endings: one in which the Supreme Court upheld the mandate on a 5–4 vote, with Justice Kennedy casting the decisive vote, and another in which the Court invalidated

the mandate on a 5–4 vote, also with Justice Kennedy casting the decisive vote. Needless to say, neither happened, and I had to write the final ending, with the chief justice saving the law. In September 2013, I published my first book, *Unprecedented: The Constitutional Challenge to Obamacare*. The inexplicable and unexpected ending of *NFIB v. Sebelius* injected a strong political element into the legal thriller, and made the case unlike any other in modern times. But it also left the story of Obamacare unfinished.

Until 2013, I largely remained an interested observer, the *Rosencrantz and Guildenstern* of Obamacare – there at all the right moments, talking to all the key actors, but not doing anything of actual importance. But since 2013, I have become an active participant. I have submitted amicus briefs supporting the challengers in two Supreme Court cases: *King v. Burwell* (2015) and *Zubik v. Burwell* (2016). The briefs were filed on behalf of the Cato Institute, a libertarian think tank, where I am an adjunct scholar (an unpaid position). I have lectured nationwide, and authored more than two dozen articles about Obamacare. Details of these speeches and publications can be found at [JoshBlackman.com/blog/c-v/](http://JoshBlackman.com/blog/c-v/). My impact on the Obamacare saga became clear when I mailed copies of *Unprecedented* to each of the nine justices. One wrote back, “I read your blog often.” During my interview with a senior Justice Department attorney about *King v. Burwell*, he told me that he had read my blogging on the case, but was not persuaded. I am no longer just an interested observer.

I offer these disclosures not as a humblebrag, but to provide readers with the appropriate basis to assess my writing. With *Unraveled*, I attempted to bring the same neutral tone that I brought to *Unprecedented*, but I concede that my predispositions on *Hobby Lobby*, *King*, and *Zubik* were far stronger than with *NFIB v. Sebelius*. Despite my criticism of the ACA’s legality and implementation, I have remained largely agnostic on the underlying questions of public health policy, and do not offer suggestions for future reform.

The most difficult aspect of writing a book that chronicles the ACA from 2013 through 2016 is coverage: what to cover, what not to cover, and when to cover it. Inherently, this is a very subjective decision. The inclusion of certain topics, exclusion of others, and presentation in a specific order are all essential to telling this compelling story. My goal was to use a bird’s-eye view for most of this period, and to swoop down to a ground-level perspective for the major events. The choice of where to stay at a 30,000-foot perspective, and where to go granular, was an editorial decision I made.

It was impossible to tell the story purely chronologically, because political actors and judges alike do not always do things in sequences that make

sense. To that end, sometimes the book will discuss an event with a date that does not fit in with the current timeframe. Additionally, the format of Supreme Court oral arguments – where each attorney is asked questions separately for thirty minutes – is not easy to follow along. My goal in discussing court cases is to blend the arguments together to create a faithful narrative that flows, rather than leaving it to the readers to pick out what was important from both sides. (This is the intractable task of the dedicated journalists who follow the Court every day.) All of the quotations, however, are reproduced from the transcripts, with slight editing for continuity and comprehensibility.

Finally, this book contains information from private conversations I had with attorneys for the challengers, government officials, and other Court watchers on “background.” That means that I could not attribute specific quotations to them. These remarks have been reconstructed, from memory or notes, in as close-to-accurate form as I could without betraying confidences. I corroborated any accounts by cross-referencing their claims with others familiar with the situation.

I sincerely hope you enjoy reading this story as much as I enjoyed writing it.

Josh Blackman  
Houston, Texas  
July 2016

## Prologue

During his first State of the Union address in February 2009, President Obama announced that “health care reform cannot wait, it must not wait, and it will not wait another year.” At that instant in time, no one could have anticipated how the Affordable Care Act would fundamentally transform our polity. Eight years later, Obamacare remains one of the most controversial, divisive, and enduring political issues in America. I do not use *Obamacare* as a pejorative, but as a descriptor of the Affordable Care Act’s divisive political valence. The partisan battle around health care reform, separate from the law’s costs and benefits – and there are both – has taken on a life of its own. All three branches of government, and the body politic itself, have balkanized over Obamacare.

To its supporters, the Affordable Care Act (ACA) has expanded access to health insurance for twenty million Americans, moving the United States closer to universal coverage. To its opponents, the law amounts to an unconstitutional federal takeover of health care that accelerates us along the road to socialized medicine. Conservatives have stopped at nothing to destroy Obamacare, including a three-week government shutdown, four Supreme Court cases, and fifty-plus repeal votes. To defend the law, the White House injected new fissures into the already fragmented relationship between church and state, and pushed the bounds of executive power to suspend the law’s onerous mandates. As its challengers fought to unravel Obamacare, the president derided those who would “unravel what has now been woven into the fabric of America.”

*Unraveled* chronicles the story of how Obamacare has rippled throughout, and forever altered, our nation’s political, cultural, and legal fault lines. This saga unfolds in eight parts.

PART I: THE PROMISE OF OBAMACARE  
(JANUARY 20, 2009–JUNE 28, 2012)

From Obamacare’s inception, the president sought to avoid the paradox of Hillarycare, the Clintons’ ill-fated effort to reform health care two decades earlier. Americans overwhelmingly favored health care reform but simultaneously favored their own coverage. To change the health care system for some, the law had to change the health care system for all. This dilemma was resolved through an unkeepable promise: “If you like your health care plan, you can keep your health care plan.” With this assurance in place, the president championed the law to the American people, extolling its guarantees, subsidization, and expansion of coverage.

Conceived as a compromise – it was based on a proposal from the conservative Heritage Foundation – the ACA nonetheless disappointed both sides of the aisle. Democrats vigorously advocated for a plan that would go further to ensure universal coverage. Republicans fiercely opposed the plan that went too far centralizing our health care system. In the end, recognizing the historical potential for the law, progressives rallied around the ACA. The bill was narrowly approved in the Senate, with sixty Democrats overcoming a unified Republican filibuster. The bill cleared the House of Representatives on a straight party-line vote. No other major social legislation had ever been enacted without some bipartisan support.

From its birth, Obamacare was mired in lawfare. Minutes after the triumphant president signed the bill, twenty-six states challenged the constitutionality of the law’s individual mandate. This two-year legal battle culminated in the Supreme Court’s decision upholding the ACA. But with its first judicial approval, the realities of health care reform would now meet the realities of political gridlock.

PART II: CONSCIENCE AND CONTRACEPTION  
(JUNE 29, 2012–MAY 1, 2013)

During the legislative debates over the Affordable Care Act, pro-life Democrats at first resisted the bill, fearing that it would fund abortions. To assuage these concerns, on the eve of the House of Representative’s vote, President Obama issued an executive order that reaffirmed long-standing prohibitions on federal payments for abortions. But this “signing statement on steroids” completely missed what would become the Affordable Care Act’s major cultural clash. The Women’s Health Amendment required employer-sponsored insurance to provide “preventive care” for women, without any copayments. Its

sponsor refused to define in the amendment what “preventive care” entailed, but insisted that it would not include “abortion services.” With that assurance, pro-life Democrats supported the Women’s Health Amendment, and it became part of the ACA.

The Department of Health and Human Services (HHS) later determined that the Women’s Health Amendment required employers to pay for the full range of FDA-approved contraceptives. This included emergency contraceptives, such as Plan B, which some religions view as abortifacients. The ACA did not have *any* conscience clause that would exclude religious employers from the contraceptive mandate. As a result, the Obama administration turned to executive action to issue a series of workarounds to the mandate – none of which fully relieved faith-based objections.

Initially, only houses of worship were exempted from the mandate. Religious charities that helped those outside the faith – such as the Little Sisters of the Poor, an order of nuns that cares for the elderly – were still required to pay for the contraception. The Conference of Bishops wrote that “even Jesus would not qualify” because he served people of different beliefs. After widespread outrage, the administration created a second accommodation. Insurance companies would now pay for contraceptive coverage under the auspices of the nonprofit’s plan. The nonprofits objected to this workaround, which they said “hijacked” their plans. The lawfulness of this accommodation would not be considered by the Supreme Court until 2016. First, the federal courts would have to decide whether for-profit corporations could even exercise religion. Leading the charge against the mandate was Hobby Lobby, a national chain of craft stores, whose “faith was woven into their business.” Their case would wind up before the Supreme Court in 2014.

### PART III: SHUTDOWN (MAY 21, 2013–SEPTEMBER 30, 2013)

After President Obama defeated former governor Mitt Romney – whose “Romneycare” served as a basis for Obamacare – the White House began the process of implementing the ACA. But many in the White House worried about the administration’s readiness for the challenge. The president’s top advisers urged him to appoint a “health reform ‘czar’” who could oversee the massive undertaking of establishing a federal exchange. The marketplace would allow people to purchase subsidized policies online. Those warnings went unheeded, and the management structure to build HealthCare.gov was undisciplined, unaccountable, and unprepared. President Obama promised that the website would make getting covered as easy as ordering “a TV on Amazon.” It was more like a “train wreck.”

Perhaps the only saving grace for Obamacare in its early days was that on the same day the exchange opened, the federal government closed. In a final effort to halt Obamacare before it went into effect, conservatives urged Congress to block any budget that funded the health care law. This movement culminated in Senator Ted Cruz's twenty-one-hour speech on the Senate floor, urging Americans to #MakeDCListen. Though not a filibuster – it could not delay a scheduled funding vote – Cruz's advocacy rallied the Republican-controlled House to defund Obamacare. The president and Senate Democrats refused to negotiate on any aspects of the ACA, and House Republicans refused to fund the law. With no budget in place, the shutdown began on October 1. Ultimately, after three weeks of park closures and federal furloughs, Republicans capitulated. Obamacare was fully funded, and the shutdown ended. Now, all eyes turned back to HealthCare.gov.

PART IV: OBAMACARE UNRAVELS  
(OCTOBER 1, 2013–DECEMBER 30, 2013)

The period from October 1 through December 30 was a roller-coaster ride for Obamacare. When HealthCare.gov launched on October 1, 2013, the web site completely crashed, and only six people were able to register that day. Soon the president realized that the federal exchange, which he later called a “well-documented disaster,” jeopardized the entire health care law. Now all eyes turned to the so-called “tech surge.” This small group of Silicon Valley engineers was charged with salvaging the federal exchange, and the health care reform itself. Slowly but steadily the website improved, but the next crisis emerged.

During the fall of 2013, millions of Americans received insurance cancellation notices because their policies were no longer compliant with the ACA's mandates. The Obama administration had issued regulations making it even harder to grandfather old plans. After widespread outrage, the president apologized to those who relied on his promise that they could keep the policies they like. “I am sorry that they are finding themselves in this situation,” he said. Politifact rated Obama's oft-repeated assurance the “lie of the year.” To salvage the rollout, the president took a series of executive actions to delay, suspend, and modify the ACA's mandates. In a short span of time, the White House put the employer mandate on hold, waived the individual mandate, and grandfathered old plans that were not compliant with the ACA. Each of these short-term measures threatened the long-term viability of the exchanges. These actions also tested the bounds of executive power, and were challenged in court.

Despite the awful launch, and political fallout from the cancellations, the federal exchange had a remarkable turnaround. By the end of December 2013,



more than one million customers had enrolled on the marketplace. After the final deadline in April 2014, the ranks swelled to eight million enrollees – an inconceivable number only two months earlier. There was a new reality: the ACA had an unmistakable impact on millions of Americans through its expansion of Medicaid, guarantee of coverage for all, and subsidized policies on the insurance exchanges. Republicans who sought to repeal the law now confronted the burden of taking away coverage from those who liked Obamacare, and wanted to keep it.

PART V: RELIGIOUS LIBERTY (DECEMBER 31,  
2013–JULY 21, 2014)

When the Affordable Care Act would go live on January 1, 2014, so too would the contraceptive mandate. By that time, most of the religious nonprofits had already received temporary court orders, putting the mandate on hold. But not the Little Sisters of the Poor. On New Year's Eve, the order of nuns filed a last-minute appeal with the Supreme Court. Hours before she dropped the ball in Times Square, Justice Sotomayor answered their prayer for relief. The contraceptive mandate would be put on hold for the nonprofit as their case was appealed. But for-profit corporations, such as Hobby Lobby, would have their day in Court much sooner.

On the heels of the *Citizens United* decision, which recognized that corporations have rights of free speech, Hobby Lobby urged the Court to protect the corporation's right of free exercise. The craft store argued that the ACA imposed a substantial burden on its religious identity by mandating payment for certain contraceptives. The Obama administration countered that a corporation cannot exercise religion, and even if it could, paying for someone else's birth control doesn't burden faith. Granting an exemption to these employers, the government contended, would harm female employees, and deny them the ACA's benefits.

In a 5–4 decision, the Court ruled for Hobby Lobby, finding that certain closely-held corporations could establish a religious identity. However, Justice Kennedy's concurring opinion left open the possibility that the burden on female employees could trump the religious objection. Justice Ruth Bader Ginsburg, a.k.a. "The Notorious RBG," wrote a fierce dissent that made her a social media sensation. She later suggested that her five male colleagues in the majority suffered from a "blind spot." The question of conscience and contraception would come back to the Court two years later. But first, the justices would have to wrangle with the federal exchanges.

PART VI: NUCLEAR FALLOUT (JULY 22, 2014–  
NOVEMBER 21, 2014)

To counter rising health care costs, the Affordable Care Act allowed states to sell federally subsidized insurance policies through online exchanges. If a state declined to establish an exchange – it could not be forced to act – the federal HealthCare.gov would operate as a backup exchange. The Obama administration treated the federal exchange as equivalent to the state exchange, so the same level of subsidies would be available on HealthCare.gov to reduce premiums. But then a benefits lawyer from South Carolina named Tom Christina read the 3,000-page law. To his surprise, he observed that subsidies were limited to customers “enrolled in through an Exchange *established by the State*.” In December 2010, Christina presented his findings that the subsidies were available only on the state exchanges, and not on the federal exchange.

ACA opponents recognized the significance of Christina’s finding and opened a new two-front attack on the ACA. First, states were urged not to establish exchanges. Second, legal challenges were filed to halt the payments of subsidies in the three-dozen states that did not establish exchanges. The effect of this “second wave” was the same: render the federal exchange, without subsidies, inoperable. If successful, Obamacare would unravel. On July 22, 2014, two federal courts of appeal divided on whether HealthCare.gov could provide subsidized insurance. Shortly after the circuit split formed, the Supreme Court accepted review of its third Obamacare case in four years.

PART VII: SUBSIDIZING OBAMACARE  
(NOVEMBER 22, 2014–JUNE 26, 2015)

*King v. Burwell* would decide whether the Affordable Care Act permits the payment of subsidies on the federal exchanges. Although this case turned on fairly mundane principles of statutory interpretation, the import of the case was critical. If the Court ruled that federal exchange could not provide subsidies, ACA policies in those states would be unaffordable. Ultimately, the burden would fall to the legislative branch to provide the payments. During oral arguments, Justice Scalia asked Solicitor General Donald Verrilli whether Congress could so amend the ACA. He answered, sarcastically, “This Congress?” President Obama insisted he would only sign a one-sentence bill that provided the subsidies, and do nothing else. Republicans saw *King v. Burwell* as a “mulligan,” an opportunity to build a “bridge away from Obamacare.” A compromise in our gridlocked government seemed unlikely.

After oral arguments in March 2015, once again all eyes turned to Chief Justice Roberts. Three years earlier, the chief had voted to save the Affordable Care Act's individual mandate. As he did three years earlier, President Obama spoke publicly about the pending case. "It seems so cynical to want to take coverage away from millions of people," the president said. He could not understand why anyone would want to "*unravel* what's now been woven into the fabric of America."

The chief justice would agree. His majority opinion for six justices ruled that subsidies could be paid on the federal exchange. "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them," Roberts wrote. "If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter." In a blistering dissent – the last he would read from the bench – Justice Scalia charged that "the normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved." Nino quipped, "We should start calling this law SCOTUScare." Shortly after his victory, President Obama declared, "Five years in, this is no longer about a law . . . This is not about the Affordable Care Act as legislation, or Obamacare as a political football. This is health care in America." The battle was not over. Not by a long shot.

#### PART VIII: THE NUNS (JUNE 26, 2015–MAY 16, 2016)

On July 16, 2015, the face of the Republican Party was forever altered – and he arrived on a gilded escalator in midtown Manhattan. Although all of the GOP presidential candidates promised to repeal and replace Obamacare, Donald J. Trump had been a long-time champion of universal health care. No longer. He promised to "repeal and replace [Obamacare] with something terrific." On the Democratic side, former secretary of state Hillary Clinton and Senator Bernie Sanders debated about the future direction of the ACA. Sanders proposed universal coverage through Medicaid for all. Clinton countered that his proposal was "naïve" and pledged to improve the ACA. Soon, the Supreme Court and the presidential election would collide.

On February 13, 2016, Justice Antonin Scalia passed away suddenly and unexpectedly at the age of seventy-nine. Within hours of his death, President Obama promised to fulfill his "constitutional responsibilities to nominate a successor in due time." Republicans countered that no hearings would be held, regardless of the nominee, until after the election. The Court was down to eight justices for its fourth Obamacare case in five years.

On March 23, 2016 – the ACA’s sixth anniversary – the Supreme Court would hear the appeal of the Little Sisters of the Poor and other religious nonprofits. They sought to be exempted from the contraceptive mandate, arguing that the government’s accommodation still made them complicit in sin. The government countered that under the accommodation, the insurance companies – and not the nonprofits – paid for the contraceptives. This work-around, the Obama administration explained, did not impose a substantial burden on their free exercise, and it was the only way to “seamlessly” provide female employees with contraceptive coverage.

The justices were called on to resolve this conflict between traditional values of conscience and modern access to contraception. They couldn’t. In an unprecedented order, eight justices proposed yet another accommodation – which satisfied neither side – and asked the lower courts to consider it. The short-handed Court, unable to reach a decision, instead punted the case to return when the bench was full. The gridlock between Congress and the president had spilled over into the judiciary.

\* \* \*

The ACA has endured attacks from all directions. During its first act, from 2009 to 2012, the law survived the primary constitutional challenge to its mandate. During its second act, from 2012 to 2016, Obamacare limped through its implementation, and was wounded by several court defeats, but endured. For its third act, in 2017 and beyond, Obamacare must stand on its own. That will prove to be its most formidable challenge. The future of the Affordable Care Act is yet unwritten. This book offers an early attempt to study its past.