

## Why Obamacare As We Know It May Not Survive

By Eric Pianin  
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Harvard legal scholar Laurence H. Tribe warned Tuesday of a “very high risk” that a crucial aspect of Obamacare – its government subsidies provision – could fall victim to a major legal challenge being mounted by conservatives. That is why, he also said, that the Supreme Court will almost certainly get “a second bite of the apple” in determining the fate of President Obama’s signature health law, with uncertain consequences.

Tribe, 72, a prominent proponent of the Affordable Care Act – who taught both Obama and Supreme Court Chief Justice John Roberts as constitutional law students at Harvard Law School years ago – warned of the ACA’s prospects for surviving intact during an exclusive, hour-long interview in New York with editors of *The Fiscal Times*.

As early as this week, a three-judge panel of the U.S. Court of Appeals in Washington, D.C. may rule on a suit claiming that only those people who signed up for coverage through the 14-state insurance marketplaces are entitled to receive subsidies. *Halbig vs. Burwell* argues the subsidies can’t be provided to people in states that signed up for the 36 federal exchanges.

“It looks like the panel is quite divided over what to do with what might [have been] an inadvertent error in the legislation or might have been quite deliberate,” Tribe said. “But it’s very specific that only people that go onto a state exchange are eligible for the subsidies. And if that becomes the ultimate holding of the U.S. Supreme Court, where this is likely to end up – that’s going to have massive practical implications for the administrability of Obamacare.”

During the first six-month enrollment period, about 8 million people signed up for Obamacare through the state and federal exchanges, with most enrolling through federally operated exchanges. Eighty-seven percent of those who signed up for insurance on the federal exchanges received subsidies – or about 5.4 million people, according to analyses.

A definitive court ruling that subsidies provided through the federal exchanges are illegal would likely deliver a fatal blow to the insurance program – since it was designed to extend health coverage to millions of low-income people who couldn’t afford it without subsidies or tax credits. “I don’t have a crystal ball,” Tribe said in discussing the law’s chances should it reach the Supreme Court for yet another critical review. “But I wouldn’t bet the family farm on this coming out in a way that preserves Obamacare.”

Four cases, including *Halbig vs. Burwell*, have been brought by employers and individuals. The plaintiffs challenge the government's contention that Congress wanted individuals in both state and federally operated exchanges to qualify for subsidies. On March 25, a three-judge panel of the D.C. Circuit heard oral arguments in the *Halbig* case. Another panel in Richmond, Virginia, heard arguments in *King vs. Burwell* on May 14 and is expected to issue a ruling any time.

Michael Cannon of the Cato Institute and Jonathan Adler of Case Western Reserve University argued recently in *Health Affairs* that eligibility rules for Obamacare's premium-assistance tax credits "clearly say" eligibility "depends on the applicant being enrolled in a qualified health plan 'through an Exchange established by the State.'" But the administration and other defenders of the law say Congress and the administration never intended to distinguish between state-run marketplaces and federally facilitated marketplaces in this provision.

Tribe, whose new book, *Uncertain Justice*, takes a deep dive into the Roberts court, said the plaintiffs make a strong argument. The legislative language is clear, he said, that the subsidies apply to exchanges established by states. Yet in drafting the law, Tribe said the administration "assumed that state exchanges would be the norm and federal exchanges would be a marginal, fallback position" – though it didn't work out that way for a plethora of legal, administrative and political reasons.

"You could argue that as long as a state triggers it by asking the federal government to come in [and establish insurance exchanges] that it's a state-established exchange, even though it's a federally run exchange," Tribe added. That might give some of the justices who aren't strict constructionists some leeway in looking beyond the law's specific language, he said.

Tribe served in the Justice Department in 2010 while the ACA legislation was working its way through Congress. While many analysts thought the High Court would strike down the heart of the legislation in 2012, Tribe predicted that his former star student, Chief Justice Roberts, would side with the majority in upholding the law. "You can be deeply conservative and still believe that the Affordable Care Act is completely consistent with the United States Constitution," he said at the time.

By a 5-4 vote, the Supreme Court upheld the health law, with Roberts joining with Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan to conclude that the law's requirement that most Americans obtain insurance under the new system or pay a penalty was authorized by Congress's power to levy taxes. But the ruling was tempered by the finding that states were not obliged to partake in an expanded Medicaid program – which led officials in many red states to reject the offer.

Roberts incurred the wrath of many Republicans by siding against the court's three most conservative members, Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr., and Justice Anthony M. Kennedy, a swing vote. But many liberals hailed the Roberts decision as a profile in courage that salvaged a program designed to provide insurance coverage to millions.

Roberts now may be confronted with a reprise of the life-or-death legal struggle over the ACA. Only 14 states set up insurance marketplaces, while 36 others opted to let the federal government create and operate their exchanges. If subsidies are ruled illegal for the federal exchanges, the Affordable Care Act would essentially be torpedoed.

“It’s sort of phase two of the constitutional battle that a lot of people thought Roberts settled in phase one,” Tribe said, adding that he thought Chief Justice Roberts would be “hard pressed” to abruptly switch sides and back Scalia and the other conservatives.

Tribe described Roberts as “very principled” and someone unwilling to “bend the law” to achieve a preconceived result. “He would be asking himself the hard question: Is it so clear under existing law that it has to be construed in this literal and somewhat bizarre way . . . that subsidies or tax credits cannot be provided on the federal exchanges, or is it sufficiently ambiguous that it gives me the necessary legal wiggle room” [to side with the administration once again?]