Los Angeles Times

Supreme Court to weigh key constitutional issues with healthcare law

Legal scholars on the right and left agree the case, which comes before the court in a week, is momentous. Justices will decide on what limit the Constitution places on Congress' power.

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March 18, 2012 7:43 p.m.

Reporting from Washington—
When the Supreme Court hears arguments on President Obama's healthcare law, what will be at stake is not just whether Americans can be required to have health insurance, but whether the Constitution puts any limit on Congress' power to regulate the economy.

Since 1936, the justices have not struck down a major federal regulatory law on the grounds that Congress went too far. The court's forbearance on matters touching Congress' authority to regulate commerce has allowed Washington's power to grow, to protect civil rights and the environment, to ensure safer automobiles and drugs, and to help boost the wages and benefits of workers.

All the while, however, conservatives and business groups have insisted there must be a limit. Otherwise, they say, an all-powerful federal government would be free to write its own rules.

Such a limit — if the Constitution indeed sets one — is at the heart of the healthcare case that comes before the court March 26.

Legal scholars on the right and the left see the case as momentous.

"It goes to who we are as a people and what kind of government we have," said Ilya Shapiro of the libertarianCato Institute.

The court "is at a crossroads," said Doug Kendall, president of the progressive Constitutional Accountability Center. If the court "strikes down the law, we're back to the New Deal era with a progressive president at war with a conservative court."

To President Obama and the Democrats in Congress, the need for the Patient Protection and Affordable Care Act was obvious. Nearly 50 million Americans lack health insurance. When they go to a hospital, the costs are borne by others, including the taxpayers. And all face a loss of insurance if they lose a job or have a serious illness or other preexisting condition.

The only way to prevent those problems was to bring everyone into the system, Obama argued, guaranteeing coverage for all, prohibiting insurance companies from excluding people they didn't want to cover and requiring, in exchange, that everyone get insurance. Those who could not pay the full cost would be offered subsidies.

Critics, however, say the "government mandate" to buy insurance goes too far. It crosses a line, they say, from reasonable regulation of commerce to a dictate from Washington to engage in commerce.

"This reaches into the living room of a guy who is healthy and doesn't want to buy health insurance," said Paul D. Clement, the former George W. Bush administration solicitor general, who represents Republican officials from 26 states. He will try to persuade a conservative-leaning high court that it should break with decades of precedent and void the entire law.

The Supreme Court, signaling the extraordinary nature of the case, agreed to hear six hours of arguments over three days, rather than the usual single hour. The court agreed to also consider Clement's claim that Congress exceeded the Constitution when it pressed the states to expand theMedicaid program.

Progressives, not surprisingly, see the court's intervention as ominous. They say the Constitution created a national government to "promote the general welfare." It did not authorize the court to veto laws that regulate business and commerce in the public interest, they say.

The issue also poses a dilemma for the court's conservative majority: Just what type of conservative are they? Do they seek to reimpose conservative principles on the two elected branches of government or do they hew to the idea of a limited, restrained role for the courts?

Since at least the Ronald Reagan era, conservatives have argued that elected lawmakers, not unelected judges, should decide the major issues of government. Chief Justice John G. Roberts Jr.echoed this theme when he told senators during his confirmation hearings that he saw a modest role for judges, more like an "umpire calling balls and strikes" than a star player.

As conservative Judge Laurence H. Silberman of the D.C. Circuit Court of Appeals wrote in upholding the healthcare law in November, the Constitution left Congress "free to forge national solutions to national problems."

Several other well-known judicial conservatives have taken the same position, including J. Harvie Wilkinson III of the U.S. 4th Circuit Court of Appeals in Richmond, Va., who wrote in a recent op-ed article that it was "tempting to shout states' rights when deeply flawed federal legislation is enacted, but the momentary satisfactions of that exercise carry long-term constitutional costs."

Other conservatives argue, however, that deference to the elected branches of government has gone too far, allowing Congress and successive presidents to enlarge the federal role far beyond what the Constitution intended.

The last time there was such a confrontation over congressional power was in President Franklin D. Roosevelt's first term, when the court struck down a series of New Deal laws. It ruled, for example, that the government could not require employers to pay minimum wages or recognize unions.

In 1937, however, the court famously switched directions and backed off. A year later, the justices signaled they would look favorably on laws that regulate commerce, but would view more skeptically laws that infringe on individual or civil rights. That consensus has held since then, through both liberal and conservative eras.

But Justices Anthony M. Kennedy and Antonin Scalia said they agreed with the post-New Deal view that Congress had very broad power to regulate markets and commerce. They joined a 6-3 ruling in 2005 in a California medical marijuanacase and said the federal authority to control the market in illegal drugs reached into the home of Angel Raich. She was growing marijuana for personal use to relieve her pain.

Scalia wrote that "Congress may regulate even non-economic local activity if [it] is a necessary part of a more general regulation of interstate commerce." Obama's lawyers cite Scalia's words to defend the mandate to buy health insurance. They say it is a "necessary part" of regulating the market in health insurance and guaranteeing coverage even to those who are seriously ill.

Most legal experts believed from the start — and still do — that the high court is likely to uphold the Affordable Care Act because of its long tradition of deferring to Congress on economic regulation.

The four Democratic appointees — Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — are almost certain to uphold the law.

Chief Justice Roberts is likely to play the leading role, befitting his position.

If Kennedy and Scalia shift away from the stance they took in the marijuana case, Roberts could join with them and the court's two other conservatives, Justices Clarence Thomasand Samuel A. Alito Jr., to strike down the law.

Or Roberts could join with Kennedy and possibly Scalia and the four Democrats to uphold the statute.

A third option is open as well. If the justices are split, they could opt to put off a ruling until after 2014, when the first taxpayers pay a penalty for their failure to buy insurance.

Yale law professor Akhil Amar says the justices should let the voters decide which side is right in November.

"They should say, 'If you don't like this, vote the bums out,' " he said.

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At times, the court has drawn a line. It struck down a mostly symbolic federal law in 1995 that banned guns in school zones, and said gun possession did not involve a regulation of commerce.