Obamacare Battle Will Be a Proxy Fight of Divisions in American Politics

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President Barack Obama signs the Health Insurance Reform Bill as Marcelas Owens, 11, watches during a ceremony in the East Room of the White House, in Washington, March 23, 2010. (Photo: Luke Sharrett / The New York Times)

On Monday, March 26, when the U.S. Supreme Court begins three days of hearings on the centerpiece of President Obama's new federal healthcare law, the requirement that all U.S. citizens and residents have health insurance, it is not just the fate of a historic reform affecting one-sixth of the nation's economy and everyone's access to care that will be at stake, but the role and scope of government for years to come.

The Affordable Care Act, called Obamacare, is a vast effort to redistribute how Americans receive and pay for healthcare. It starts by ending barriers that have kept tens of millions of Americans uninsured by forcing private insurance companies, businesses, states and individuals to play a more communitarian role in improving access to care and controlling costs. Opponents—Republican political leaders, "free market" and religious conservatives and business lobbyists—see the law as a terrible example of government overreach, increased spending and liberal policy, even if it would cover an additional 32 million Americans by 2019, according to Congressional Budget Office estimates. (Universal coverage is not on the table.)

In other words, the Obamacare battle that will come before the Supreme Court in the longest hearings in nearly a half-century is a proxy fight between the seemingly irreconcilable differences in American politics. On one side are centrist Democrats, who, like Obama, believe that the social safety net needs mending and that the private sector and all citizens have obligations to support

that effort. On the other side are Republican opponents who do not want to see federal government do much beyond waging wars, and who do not even want their states to pay for current obligations—whether as health programs, pensions or education—and amazingly, do not even offer an alternative but instead posture behind their survival-of-the-fittest, let-the-market-fix-it ideology.

While it is anyone's guess what the Court will do, there are a range of options, including the possibility that it is premature for the Court to rule on the individual mandate because it has not yet taken effect. On the other extreme is concern the Court could throw out the entire law over a drafting omission—because the law does not contain a severability clause, meaning that even if parts of the law are found unconstitutional than the rest of it remains.

What follows is a breakdown of the policy and legal issues that will emerge next week.

1. American healthcare is as amazing as it is dysfunctional. As a noted economist told NPR this week, nobody in America would want to pay what they paid for healthcare three decades ago if that meant only getting the treatments that were available in 1982. Americans want the best possible care, want access to the doctors they need, but don't want to lose their life savings if hospitalized, or see any increase in their wages eaten up by much larger hikes in insurance premiums.

According to the federal government's filings before the Court, healthcare spending accounted for 17.6 percent of the national economy in 2009, with 156.2 million non-elderly people (59 percent) covered through their employers and 13.8 million (5 percent) through non-group policies. In 2009, 50 million people were uninsured. Their unpaid medical bills totaled $43 billion, which insurers recaptured by adding $1,000 to every family's yearly policy, based on hospitals overcharging for everything from aspirin to high-tech diagnoses.

2. Obamacare: Rearrange the health care chessboard. The Affordable Care Act took a multi-year approach to rearranging the way healthcare is accessed and paid for. It did not seek to remake the patient-doctor relationship, although its critics are quick to say it does anytime you meddle with how they are paid. It did not, as progressives wanted, eliminate the insurance industry and create a singular national system. Instead, it seeks to expand and shrink key sectors of the present system, including expanding coverage to young adults soon after its passage in 2010 to phasing out the so-called donut hole in Medicare, which vastly increased prescription costs.

Politically, most of the reforms do not kick in until 2014, giving opponents an opening to distort and negatively frame it because most people actually have yet to see its impact.

The law does scores of things. Its highlights include expanding access for low-income people by opening up eligibility to Medicaid (a state-run program) to anyone earning less than 133 percent of the federal poverty line—including single adults with no children. It creates state-based health insurance exchanges where working- and middle-class adults can buy into group policies, starting in 2014, and offers tax breaks for anyone buying insurance through the exchanges whose income are up to four times the poverty level. The law also gives tax credits for small businesses to offer coverage at rates given to much larger companies.

The law also regulates insurers. It bans insurers from rejecting people if they have pre-existing health conditions (as everyone in middle age does), but does not regulate what insurers charge. It also regulates what share of premiums must be spent on patient care. However, the overall approach is still primarily market-driven. For low-income people, government programs are expanded. For the middle class, it expands access and lowers costs by creating the efficiencies of large groups negotiating prices with providers.

Perhaps the most overtly controversial aspect of the law—and one of the issues to come before the Supreme Court next week—is that it requires that every adult, starting in 2014 buy a health insurance policy (like many European countries) or pay an annual penalty on his or her federal income tax forms. That penalty is $695 per year up to a maximum of three times that amount or 2.5 percent of household income, to be phased in starting in 2014. The rationale behind the insurance mandate and penalty is to stop shifting costs from emergency room visits of uninsured people to everyone else's premiums, and to prompt sick people to go to doctors sooner, which should lower medical costs.

These presumptions—that Congress can impose a mandate to force individuals to buy insurance, that it can penalize those who do not act and impose a fine assessed on their taxes, and that Congress has the authority to do so because the law will affect interstate commerce—are the broad contours of the contested legal issues appearing before the Supreme Court next week.

3. The opening legal issues before the Court are not complex. Pushing aside the politics, this case is just like any other before an appellate court. On the first day, the Court will hear arguments on whether it is too soon to review the contested issues, because the key provisions that critics say are unconstitutional—the coverage mandate and tax penalty—have not taken effect.

The opponents—and the Obama administration—want the Supreme Court to hear the case, because otherwise it may be years before legal challenges work their way back to the Court. That delay creates tremendous uncertainties surrounding its implementation. The Court will take up the ripeness issue by hearing arguments on an 1867 law called the Anti-Injunction Act, which essentially says a person has to pay the tax before they can sue. For such a significant case, this is not a legal fireworks beginning.

Then the Court will hear arguments about two constitutional issues. The first concerns the Constitution's Commerce Clause, which says Congress can regulate interstate business. The second concerns the Constitution's Necessary and Proper Clause, which says that Congress can enact laws to achieve federal policy goals. The opponents do not contest Congress' authority to regulate healthcare financing; they contend that the minimum insurance requirement and penalty for not complying go beyond its legal authority.

4. The opposition is ideological, not pragmatic. The Cato Institute's brief, signed by 333 state legislators from 17 states, calls the law "the federal government's most egregious attempt to exceed constitutional authority since at least the Second World War."

Echoing other opponents' briefs, Cato attacks the federal basis for the reform law, saying the "individual mandate exceeds Congress's power to regulate interstate commerce under existing doctrine... Nor can Congress compel someone to engage in commerce... It is not a blank check permitting Congress to ignore constitutional limits by manufacturing necessities and commandeering citizens to do its bidding."

The opponents, including 14 red states that have passed so-called "healthcare freedom laws" saying their residents do not have to follow the insurance mandate, say it violates state sovereignty and regulatory authority. As Cato says, the issue "is not really about our healthcare system at all. It is principally about our federalist system and it raises very important issues regarding the Constitutional role of the federal government."

Another opponent, the right-wing American Legislative Exchange Council, claims the coverage mandate "will disrupt or displace an array of... market-based, cost-effective solutions." And the states of Virginia and Utah say it will force them to spend millions on expanding Medicaid (even though the federal government will pay 100 percent of the new recipient costs in 2014 and that will fall to 90 percent after 2020).

Finally, opponents argue that the tax penalty for not complying does not fall under the Commerce Clause because doing nothing is not an activity, and therefore there is nothing to penalize—rendering that part of the law unconstitutional.

5. The just-say-no politics are nothing new. Each of these assertions is remarkable and shows how out of touch GOP ideologues are with ordinary Americans. To suggest that the reform is "manufacturing necessities and commandeering citizens" is essentially saying that there is no problem associated with 50 million uninsured people, and out-of-control costs for the remaining 170 million other Americans or businesses who pay monthly premiums—including a $1,000 annual surcharge to cover the costs of emergency care for the uninsured.

To suggest that this is a problem best left to state-based solutions and that it does not affect interstate commerce when it involves 17 percent of the economy is absurd. Further, to say that Congress does not have the power to tax healthcare spending—when employers and employees now do not pay income taxes on health benefits—also stretches credulity.

At least the Republican leadership in states like Virginia and Utah were honest in saying that they do not want to spend more on Medicaid, as the reform would require. However, what is most notable in the opponents' briefs is they care more about federalism—the separation and distribution of power between state and federal government—than about helping their states' residents get better healthcare.

Drew Altman, president and CEO of the Henry J. Kaiser Family Foundation, one of the nation's leading health policy institutes, recently wrote that the Supreme Court review of Obamacare comes at a precarious time for America's healthcare system. Many states are cutting their Medicaid budgets even as Obamacare is directing them to plan to expand it by 2014. Meanwhile, the biggest factor driving people into poverty "was their out-of-pocket health costs." To Altman, the biggest impact of the Supreme Court's impending ruling may be its impact on the law's momentum in the states.

"What's unusual about 2012 is how many programs, issues, and changes are in play all at once," he said. Indeed, this chart—look at slide 7—shows there are 18 states where about half the uninsured adults are below 133 percent of the poverty line. The Affordable Care Act would extend coverage to these people—a sizeable portion of the 32 million people that the Congressional Budget Office estimates would be newly covered by 2019. These states include many of the red states where Republicans in the majority have rewritten state constitutions guaranteeing, as ALEC's brief says, the "fundamental freedom not to be commandeered into purchasing a private insurance product known as a 'health plan.'"

In other words, GOP ideologues are trying to prevent their own states' most medically at-risk populations from being part of a framework to help them get care at a cheaper cost—and slow the growth of insurance costs for everyone else. The law does not cap what any private insurer can charge—a major, pro-market, pro-corporate concession by Obama. One wonders if a Republican president shepherded the same law if there would be a constitutional challenge at all.

There is also a gender-based element to the GOP criticism, as most of the good-paying jobs in delivering healthcare are held by women with advanced training; just as most of the jobs in the yesteryear's American manufacturing sector were held by men. Needless to say, many of those jobs are also unionized.

6. Nobody knows what the Supreme Court will do. Predicting what the Supreme Court will do has been a cottage industry in Washington and legal circles for decades. But nobody other than the justices themselves and their clerks, who are bound by confidentiality, have any idea what will emerge this June, when the Court is expected to issue a decision. There are nine justices on the court; four are liberals. That means one of the typically conservative justices has to be swayed to support the law.

Legal reporters look for clues in past Supreme Court decisions or unexpected rulings in the lower court rulings that come before the high Court. For example, in a 2005 case, Gonzales v. Raich, which concerned whether a California women who grew pot for her own use could be regulated under the Commerce Clause, Justice Scalia said yes, she could, because the pot "is never more than an instant from the interstate market."

Analysts have said Obamacare's opponents can argue that their state's residents have the right not to buy health insurance; however once those uninsured people get sick they are "never more than an instant" from going to an emergency room, contributing to the cost spiral everyone else absorbs in their premiums and medical bills. They suggest the Commerce Clause objections will be overcome.

Another optimistic guess is based on the recent opinion of Judge Jeffrey Sutton, a former Scalia clerk who now sits on the U.S. Court of Appeals for the 6th Circuit. He upheld the law's individual insurance mandate in June 2011, writing that Congress had the power to regulate healthcare finances this way. That ruling is seen as telling because Sutton is well-regarded in conservative circles. Indeed, some briefs opposing the law urged the high court to disregard Sutton's reasoning.
On the other hand, this report suggests that in the hasty drafting of the bill, Congress omitted a key feature, known as a severability clause, which allows part of a law to be struck down and the rest to remain standing. That omission theoretically could let the Court invalidate the entire law in one swipe.

However, it is equally likely that the Court could simply decide it is too early to hear the constitutional challenges, because those features of the law have not yet taken effect. That issue will first be heard Monday in several hours of hearings, suggesting that it matters to the justices.

That outcome would not be what either the Obama administration or its critics want, but it could give the court "a way to lower its profile," ScotusBlog's Lyle Denniston wrote, offering "an entirely respectable way to put off the searing constitutional controversy over the individual mandate."