

Supreme Court vs. Obamacare II:

Decision Time

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By David Johnson



The “Thrilla in Manila” in 1975 was Mohammad Ali and Joe Frazier’s second championship fight. In 1967, Ali refused conscription as a conscientious objector. He was convicted of draft evasion, imprisoned and stripped of his heavyweight championship title. Frazier became champion while Ali was in jail. The Supreme Court overturned Ali’s conviction. This led to Frazier and Ali’s “Fight of the Century” in 1971 – an unprecedented battle between undefeated heavyweight champions. Frazier won by unanimous decision.

Obamacare’s second confrontation with the Supreme Court has the look, feel and drama of that “Manila Thrilla”: powerful combatants; political intrigue and huge stakes. The highly controversial Affordable Care Act is President Obama’s signature legislative accomplishment. In 2012, the Court’s conservative justices thought they had the votes to overturn the law when one of their own, Chief Justice John Roberts, changed sides. Writing for the 5-4 majority, Roberts affirmed the law’s constitutionality, but negated the Federal government’s ability to expand Medicaid coverage without state approvals.

Much had changed for Frazier and Ali since their epic “Fight of the Century”. Frazier lost his title in 1973 to the seemingly invincible George Foreman. Ali became champ again by defeating Foreman using a risky “rope-a-dope” strategy (leaning on the ropes while opponents tire themselves punching away). Frazier hungered to reclaim the championship title, so he kept fighting and beating other contenders. This set the stage for the Thrilla in Manila. Boxing in oppressive heat before a worldwide audience, Ali and Frazier pummeled one another for fourteen rounds. When rope-a-dope didn’t work, Ali changed tactics and prevailed by using his superior height to pound Frazier’s head. It was a brutal fight. Frazier’s face was so swollen he couldn’t see. Ali claimed it was the closest he’d ever come to dying.

After the Supreme Court’s 2012 ruling, most believed the ACA was established law. Surprisingly the Court agreed last November to hear *King vs. Burwell*, a lawsuit challenging Obamacare subsidies. This sets the stage for Supreme Court-Obamacare II. Oral arguments occurred in early March with a decision expected shortly.

If the Court rules against the government, a recent Rand study projects 9.6 million low-income Americans will lose subsidies to purchase health insurance. The study also

estimates health insurance premiums for ACA-compliant policies will increase forty-seven percent.

Storm clouds hover above Obamacare. A negative outcome will damage the ACA, but won’t derail healthcare transformation. Obamacare and health reform are not synonymous. While overturning the ACA’s subsidy provisions will disrupt health insurance provision, it will not slow the pace of value-based innovation and market-driven improvement in healthcare delivery.

Roberts’ Rules of Order



Obamacare’s future rests on the Court’s interpretation of ACA language authorizing subsidies for low-income Americans. The law clearly expresses Congress’ intent to offer subsidies broadly, but grants specific authority to provide subsidies only through state-run exchanges. Sixteen states and Washington, D.C. run their own exchanges. Consequently, thirty-four

states confront the real possibility of losing subsidies for their low-income citizens.

In ancient times (the 1990s), Congress routinely fixed technical glitches. Former Senate Majority Leader Trent Lott confirmed this in a Modern Healthcare interview. He urged his former colleagues to fix the ACA language and take the courts out of the process. Current Majority Leader Mitch McConnell has all but eliminated this possibility. McConnell uses “mulligan” to describe how a Supreme Court “overturn” could lead to “a major do-over of the whole thing.”

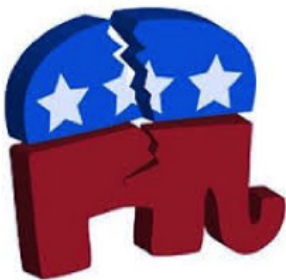
The Court hears roughly a hundred cases annually from thousands submitted. Disagreement at the Appellate Court level is almost always a prerequisite for the Court taking a case. That’s not true here. Two Appellate Court rulings (*King vs. Burwell* and *Halbig vs. Burwell*) affirmed the government’s right to offer subsidies through Federally-run exchanges.

In essence, the Court is choosing to settle law where there is no appellate disagreement. It takes four votes to hear a case. Some speculate that the four dissenting justices in the 2012 Obamacare decision (Scalia, Thomas, Alito and Kennedy) agreed to hear *King vs. Burwell* to put Chief Justice Roberts on the hot seat.

1. Congress: Republican leaders have three options: 1. Surrender and let Obamacare continue intact; 2. Do nothing and “let Obamacare burn”; or 3. Negotiate (e.g. continue subsidies but eliminate the employer mandate). We can hope for a logical “win-win” deal, but oddsmakers favor gridlock.
2. Blue States: States, like Illinois, that favor Obamacare will design exchanges that comply with current ACA language. There may be short-term disruption, but their low-income residents will receive health insurance subsidies.
3. Red States: Most will let Obamacare subsidies wither. Moreover, twenty-three red states have failed to expand Medicaid under Obamacare. This one-two punch will exacerbate existing variations in health status. On average, red state citizens are poorer, more obese, more disabled and die younger.

Meanwhile, the Obama Administration is threatening to withhold uncompensated care payments to states that refuse to expand Medicaid (a right granted in the Court’s 2012 ruling). This sets the stage for more court battles on health-care funding, access and equity.

Republican Identity Crisis



Forget Ali-Frazier, the real “Thrilla” is the battle for the Republican Party’s soul. Obamacare is the lightning rod issue that pits pragmatists against true believers.

Pragmatic Republican governors understand the macroeconomic, societal and fiscal benefits of investing in health and nutrition.

A recent National Bureau of Economic Research study finds a 56% societal return for Medicaid dollars invested in childhood healthcare. Thirty-one states have Republican governors, but only six Republican Attorney Generals have filed King-Burwell amicus briefs in support of overturning Obamacare subsidies.

By contrast, true believers want Obamacare repealed. True believers delivered the party’s massive victory in the 2014 mid-term elections. This is their mandate moment. They’re filled with passionate intensity for their very conservative agenda. Republican legislators in Arizona are suing Republican governor Jan Brewer to prevent Medicaid expansion.

Nineteen Republican legislators have filed King-Burwell amicus briefs in Tennessee. They and many more of their colleagues oppose Bill Haslam’s (Tennessee’s popular Republican governor) proposal for Medicaid expansion.

This fight for Republican identity is vicious, bloody and will go the distance.

The Main Event: Market versus Medicine

Despite its high-stakes political drama, Supreme Court-Obamacare II is not the determinative reform battle. In boxing parlance, it’s an “undercard” fight. Value-based competition is the “main event”. Consumer and employer demands for better, more convenient and more affordable healthcare combat institutionalized medicine’s fierce desire to keep the current system (highly profitable for incumbents) intact.

The marketplace is the arena where incumbents and innovators confront one another. Evidence emerges daily that “value-based” companies are the heroes in this conflict. Countless Americans are embracing market-based solutions that deliver on the promise of better, more affordable healthcare for everyone.

Companies, big and small, new and established, are changing business models to win customers. The market increasingly determines winners and losers. We are in the early rounds. Most incumbents still cling to traditional business models that reward activity over outcomes and separate product prices from their cost. Traditional service models generate negative value.



New business models create positive value by delivering better, more convenient healthcare services at lower prices. It’s “adapt or die” time for hospitals, specialists, big pharma and big insurance. As Ali did in Manila,

combatants must change tactics to win or risk being carried out of the ring.