Can Health Care Reform Survive the U.S. Supreme Court?

Presentation by Candace Littell for the Jefferson Educational Society
May 24, 2012
Health Care Reform . . . From the Streets . . .

Tea Party supporters protesting against the health care bill, Washington, D.C., March 2010
To the High Court

The Supreme Court of the United States
Introduction

- **Background**
  - The Supreme Court will address constitutional questions raised by the Patient Protection and Affordable Care Act
    - Congressional powers
    - States’ rights
    - Individuals’ rights

- **State of Play**
  - Oral arguments in March
  - Decision expected to be announced in June
Introduction

- **Discussion Objectives**
  - Examine the issues to be addressed by Supreme Court
  - Explore possible outcomes and effects of the case
  - Understand where the public stands on the issues
  - Consider the future viability of the health reform law based on various scenarios

- **A Note Before We Begin . . .**
  - Policy v. legal perspective
  - Reflections v. advice or counsel
  - High-level review v. detailed assessment
  - Facts, analysis, and conclusions drawn from a broad base of authoritative sources
Introduction

- Terms We Will Use
  - Patient Protection and Affordable Care Act
    - The Law
    - PPACA
    - ACA
  - The Supreme Court of the United States
    - SCOTUS
    - The Supreme Court
    - The Court
  - Congressional Budget Office
    - CBO
    - Non-partisan governmental organization
Our Agenda

- Overview of the Law
- The Supreme Court Case
- Possible Outcomes
- Potential Effects on Health Care Reform
- Court of Public Opinion
- Closing Reflections
Overview of the Law
Largest share receive health care coverage through employer-sponsored group market plans

One-quarter of individuals receive coverage from public programs like Medicare and Medicaid

Others are covered by plans purchased in the individual insurance market

Nearly 1 in 5 non-elderly Americans are uninsured
The Law

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act

2,700 pages in length

Nine major sections, extremely broad and complex
Relevant Provisions of the Law

- **Expands Health Insurance Coverage**
  - CBO estimates that the ACA will cover about 60 percent of those who would be uninsured absent the Law

- **Imposes Individual Mandate**
  - Centerpiece of PPACA
  - Requires individuals to obtain health insurance coverage beginning in 2014
  - Imposes monetary sanction on individuals who do not obtain insurance, subject to certain exceptions
  - Ensures that enough healthy people purchase insurance
Relevant Provisions of the Law

- Imposes Requirements on Insurers
  - Must accept all applicants, regardless of health status
  - Prohibits exclusion from coverage based on preexisting conditions
  - Limits extent to which premium amounts can vary (e.g., age)
  - Sets minimum thresholds for spending on clinical care
    - Medical loss ratio requirement
Relevant Provisions of the Law

- Expands Role of State Medicaid Programs in Providing Coverage for Uninsured
  - Medicaid is jointly funded by federal and state governments and covers low-income individuals
  - ACA expands the role of Medicaid in covering the uninsured
    - Further expands the Medicaid program’s mandatory coverage groups
    - Americans who earn up to 133 percent of federal poverty level would qualify for Medicaid under ACA
  - States must accept this expansion if they want to continue to participate in other parts of the Medicaid program
    - Medicaid is a huge budget item for states
  - Federal government picks up most of the costs of ACA-expanded Medicaid coverage
    - Maximum state exposure is 10% of expansion costs (2017)
The Supreme Court Case
How Did We Get To This Point?

**Timeline**
- March 2010 -- ACA enacted, Florida v. HHS filed
- January 2011 -- Florida District Court decision
- August 2011 -- 11th Circuit Court decision
- November 2011 -- Supreme Court accepts case
- March 2012 -- Supreme Court oral arguments
- June 2012 -- Supreme Court decision expected

**Parties**
- 26 states, led by Florida, National Federation of Independent Businesses, individual plaintiffs
- US Department of Health & Human Services, Treasury, and Labor

Source: Kaiser Family Foundation
The Road to the Supreme Court

26 cases (at least) filed in U.S. district courts -- 2 struck down the individual mandate, 24 have not

7 decisions from U.S. Court of Appeals -- 1 struck down the individual mandate, 6 did not

Source: Kaiser Family Foundation
Oral Arguments
March 26-28

Time permitted for oral arguments before SCOTUS is usually one hour.

Five and one-half hours is the most time devoted to a single case since the 1960s.

The Court is likely to issue a written opinion before the close of the current term in June.
What Are The Issues?

<table>
<thead>
<tr>
<th>Issue</th>
<th>ACA Provision</th>
<th>Key Question</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-Injunction Act</td>
<td>Individual Mandate</td>
<td>Do courts have jurisdiction to decide the constitutionality of the ACA’s individual mandate?</td>
</tr>
<tr>
<td>Constitutionality of Mandate</td>
<td>Individual Mandate</td>
<td>If so, is the ACA’s individual mandate provision constitutional?</td>
</tr>
<tr>
<td>Severability</td>
<td>Individual Mandate</td>
<td>If the individual mandate is unconstitutional, is the provision severable?</td>
</tr>
<tr>
<td>Medicaid Expansion</td>
<td>Requirement for States to Expand Medicaid to Cover More Individuals</td>
<td>Is the ACA’s Medicaid expansion constitutional?*</td>
</tr>
</tbody>
</table>

*The Court did not specifically agree to determine whether the Medicaid expansion is severable.

Source: Kaiser Family Foundation
Anti-Injunction Act (AIA)

- **Issue**
  - To determine whether the ACA can be challenged before it comes into complete effect

- **Background**
  - The federal Anti-Injunction Act (AIA) prevents courts from hearing challenges to the imposition of taxes before the tax is actually collected
  - The individual mandate imposes a penalty for not purchasing health insurance, effective in 2014, with collection in 2015

- **The Decision at Hand**
  - Is ACA’s monetary sanction for not purchasing insurance a “tax” and, therefore, subject to AIA?
Constitutionality of Individual Mandate

- **Issue**
  - To determine whether the individual mandate is constitutional

- **Background**
  - The federal government has the power to regulate areas that affect interstate commerce
  - The question is whether an individual’s lack of health insurance affects interstate commerce and, therefore, falls within an area where the federal government can regulate
    - One point of view holds that the mandate is a valid regulation of the national health insurance market
      - Being uninsured affects others outside the state
    - The contrary point of view is that being uninsured does not have affects felt across state lines
      - Represents an unconstitutional burden on a person’s choice to not buy insurance

- **The Decision at Hand**
  - Did Congress have the power to enact the individual mandate?
Severability

**Issue**
- To determine whether the individual mandate is “severable” from the remainder of ACA
  - If the mandate is struck down, could some or all of the rest of the Law remain in force?

**Background**
- Normally, legislation includes a “severability clause” in anticipation of constitutional or other legal challenges, but the ACA does not include this language
  - Can the Law work without the mandate?
  - What was the intent of Congress?
    - Did Congress view the mandate as inextricably linked to other provisions?
    - Would Congress have passed the rest of the Law if it knew that the mandate would not be in force?

**The Decision at Hand**
- If the individual mandate is declared unconstitutional, is the entire ACA invalid? Or just the mandate? Or just the mandate and related insurance access provisions?
Constitutionality of Medicaid Expansion

- **Issue**
  - To determine whether the ACA’s Medicaid expansion is unconstitutionally coercive of states

- **Background**
  - States currently have significant flexibility to determine coverage of certain individuals under their Medicaid programs
  - ACA requires states to expand Medicaid to cover additional individuals
  - If states don’t pay their share of this expansion, the federal government would deny all Medicaid benefits
    - Essentially eliminates the state’s Medicaid program

- **The Decision at Hand**
  - Did Congress violate states’ rights when it expanded the Medicaid program in ACA? Or was the Medicaid expansion a permissible exercise of the federal government’s spending authority?
Possible Outcomes
Outcomes are Interconnected

**Anti-Injunction Act**
- Does not apply: The court has jurisdiction to hear arguments on the Medicaid Expansion, Individual Mandate, and Severability.
- Applies*: The court does not have jurisdiction to hear arguments on the Individual Mandate but will hear arguments on Medicaid Expansion.

**Medicaid Expansion**
- Upheld: Implementation continues unless the individual mandate is struck down and non-severable in 2012 or 2015.
- Struck-down: Unconstitutional.

**Individual Mandate**
- Struck-down: Unconstitutional.
- Upheld: Constitutional; implementation continues. If the Medicaid Expansion is also upheld, the ACA has survived legal challenge.

**Severability**
- Severable: The Individual Mandate is voided but it’s severable - other provisions can be implemented.
- Non-severable: All other provisions are non-severable, thus, the ACA is dead.
- Severable: Medicaid Expansion is voided but it’s severable - other provisions can be implemented.
- Partially Non-Severable: Some provisions are not severable from the Individual Mandate but others are. Those which are non-severable (ex: ban on pre-existing condition exclusions) would be null and void.
- Partially Non-Severable: Some provisions are not severable from the Medicaid Expansion provision but others are. Those which are non-severable (ex: certain revenue-raising provisions tied to Medicaid Expansion) would be null and void.

*Source: Council for Affordable Health Coverage*
## If ... Then (Part 1)

<table>
<thead>
<tr>
<th>Issue</th>
<th>If the Court Decides That ...</th>
<th>Then...</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-Injunction Act (AIA)</td>
<td>The Law’s financial sanctions represent a “tax” under the AIA and, therefore, the AIA applies</td>
<td>The Court cannot hear cases about whether the individual mandate is constitutional until 2015</td>
</tr>
<tr>
<td></td>
<td>The Law’s financial sanction is not a “tax” and, therefore, the AIA does not apply</td>
<td>The Court will decide whether the individual mandate is constitutional now</td>
</tr>
</tbody>
</table>
## If ... Then (Part 2)

<table>
<thead>
<tr>
<th>Issue</th>
<th>If the Court Decides That …</th>
<th>Then…</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutionality of Individual Mandate</td>
<td>The mandate is constitutional</td>
<td>The mandate will take effect in 2014, unless Congress acts to repeal or postpone it</td>
</tr>
<tr>
<td></td>
<td>The mandate is not constitutional</td>
<td>The mandate will not take effect</td>
</tr>
<tr>
<td>Severability of Individual Mandate</td>
<td>The mandate is not constitutional AND is not severable from the rest of the Law</td>
<td>The entire Law is invalid</td>
</tr>
<tr>
<td></td>
<td>The mandate is not constitutional BUT is severable from the rest of the Law</td>
<td>The Court could strike just the mandate OR strike down the mandate and other related provisions of the Law, but the remainder of the Law stays intact</td>
</tr>
</tbody>
</table>
If ... Then (Part 3)

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<tr>
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<th>If the Court Decides That...</th>
<th>Then...</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medicaid Expansion</td>
<td>The Medicaid expansion is constitutional</td>
<td>The expansion takes effect in 2014, unless Congress acts to postpone or repeal it</td>
</tr>
<tr>
<td></td>
<td>The Medicaid expansion is not constitutional</td>
<td>The expansion will not take effect</td>
</tr>
<tr>
<td>Severability of Medicaid Expansion</td>
<td>The Court did not specifically agree to determine whether the Medicaid expansion is severable</td>
<td>It is unclear what the Court would do if it determines that the Medicaid expansion is not constitutional</td>
</tr>
</tbody>
</table>
Potential Effects on Health Care Reform
Four Basic Scenarios

- Entire Law Stands
- Entire Law Falls
- Individual Mandate Falls, But Rest of Law Stands
- Medicaid Expansion Falls
Scenario 1: Entire Law Stands

Description
- Individual mandate and Medicaid expansion provisions are upheld
- ACA stands as is

Impact
- Implemented provisions of ACA remain intact
  - Young adult coverage under parents’ health insurance
  - Medicare and Medicaid reforms
  - Medicare Part D doughnut hole fix
  - Insurance reforms and quality improvement initiatives
  - Small business tax credits
- Major ACA provisions get implemented in 2014
  - Health insurance exchanges and reforms (guaranteed issue, community rating)
  - Employer requirements, individual mandate
  - Insurance subsidies to purchase coverage
  - Medicaid expansions and reforms
Scenario 2: Entire Law Falls

- **Description**
  - Individual mandate is unconstitutional AND NOT severable from the Law
  - The Law is struck down in its entirety

- **Impact**
  - Uninsured population continues to increase
  - Rescission of ACA provisions that have been implemented
    - Administration lawyers have warned SCOTUS of “extraordinary disruption” if Medicare is forced to unwind ACA provisions
  - May return health care reform to more incremental measures
    - Expanding Medicaid
    - Implementing tax credits
    - Turning over more to the states
    - Other initiatives
Scenario 3: Individual Mandate Falls, But Rest of the Law Stands

- **Description**
  - Individual mandate is deemed unconstitutional AND severable
  - The rest of the Law remains intact

- **Impact**
  - Uninsured population
  - Private health insurance premiums
Severing the Individual Mandate From ACA: A Key Issue For Policymakers

“Cut Off !?” By John Cole, Scranton Times-Tribune
Severing the Individual Mandate

Health policy experts stress the importance of the mandate for expanding coverage and keeping premiums affordable.

Studies estimate that severing the mandate would result in millions fewer people gaining insurance coverage, as well as increases in health insurance premiums, compared to health reform with a mandate.
If There’s No Individual Mandate, Then What?

- Most Alternatives to the Individual Mandate Focus on Voluntary Enrollment
  - Ways to strongly encourage people to sign up for health insurance coverage, but that stop short of a mandate
More On Voluntary Enrollment

- 2011 CBO Report -- *Expert Views on Approaches to Encourage Voluntary Enrollment*

- Four Key Themes Emerged From Interviews With Experts
  - Financial incentives are key to breaking through the high cost barrier of purchasing insurance
    - Most people would *prefer* to purchase health insurance coverage
  - Availability of high-quality, affordable health care plans is key to voluntary enrollment
  - Marketing and public education from trusted sources are important
  - Convenient access to the health insurance system would facilitate enrollment
    - Multiple access points, knowledgeable representatives
Voluntary Enrollment Options

- **Automatic Enrollment in Employer Insurance**
  - “Auto-enrollment” similar to sign-up for 401(k) plan

- **Limited Enrollment Periods**
  - Entails scheduling a time, once a year, to sign up
  - Prevents people from signing up and dropping out based on when they’re sick

- **Opt Out Option**
  - Allowing people to opt out of the Law’s requirement to have health insurance for a period (say 5 years at a time)
  - Individual would also opt out of Law’s benefits
    - Not eligible for subsidies, use of insurance exchanges
    - Would not be guaranteed a policy with no pre-existing conditions
    - Insurance, if available at all, could be prohibitively expensive
Voluntary Enrollment Options

- **Late Enrollment Penalties**
  - Individual pays higher premiums if they fail to enroll in coverage as soon as they are eligible
  - Similar to approach for Medicare Parts B and D

- **Monetary Sanctions**
  - Impose a tax for going uninsured
    - Policymakers continue to disagree over the amount of tax needed to promote enrollment
  - Impose a tax for uncompensated care
Voluntary Enrollment Options

- **Other Measures**
  - Conduct a public education and outreach campaign
  - Provide personalized assistance for health coverage enrollment
  - Allow greater variation in premium amounts based on age
  - Use health insurance agents and brokers differently
  - Condition receipt of certain government services on proof of health insurance coverage
  - Encourage credit rating agencies to use health insurance status as a factor in determining credit ratings
Scenario 4: Medicaid Expansion Falls

- **Description**
  - Medicaid expansion is deemed unconstitutional

- **Impact**
  - Fewer people gaining insurance coverage
    - CBO estimates that ACA’s Medicaid expansion would cover an estimated 16 million uninsured, low-income adults
    - Disproportionate effects on working poor
  - States would not have access to ACA’s *enhanced* federal matching funds to expand coverage
    - Expansions would be reimbursed at the state’s regular Medicaid matching rate
The Court of Public Opinion
Americans Are Divided on Repeal of the Healthcare Law

All in all, do you think it is a good thing or a bad thing that Congress passed this law?

45% Good thing
44% Bad thing

Gallup Poll, February 2012

Protester at a Tea Party rally, Washington, D.C., November 2010
As you may know, the Supreme Court will hear arguments next month concerning a requirement in the healthcare law that every American must buy health insurance or pay a fine. Regardless of whether you favor or oppose the law, do you think this requirement is constitutional or unconstitutional?

<table>
<thead>
<tr>
<th></th>
<th>% Constitutional</th>
<th>% Unconstitutional</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Americans</td>
<td>20</td>
<td>72</td>
</tr>
<tr>
<td>Democrats</td>
<td>37</td>
<td>56</td>
</tr>
<tr>
<td>Independents</td>
<td>21</td>
<td>70</td>
</tr>
<tr>
<td>Republicans</td>
<td>6</td>
<td>94</td>
</tr>
<tr>
<td>Think healthcare law a good thing</td>
<td>38</td>
<td>54</td>
</tr>
<tr>
<td>Think healthcare law a bad thing</td>
<td>4</td>
<td>94</td>
</tr>
</tbody>
</table>

USA Today/Gallup, Feb. 20-21, 2012

GALLUP
There’s Been Little Change in Basic Public Views of ACA After SCOTUS Oral Arguments

Opinion on the health reform law remains evenly divided

The individual mandate is even more unpopular

<table>
<thead>
<tr>
<th>Survey Question</th>
<th>NOW</th>
<th>MARCH</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you have a generally favorable or generally unfavorable opinion of the health reform law?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Favorable</td>
<td>42%</td>
<td>41%</td>
</tr>
<tr>
<td>Unfavorable</td>
<td>43%</td>
<td>40%</td>
</tr>
<tr>
<td>Would you say you feel favorable or unfavorable about the individual mandate?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Favorable</td>
<td>30%</td>
<td>32%</td>
</tr>
<tr>
<td>Unfavorable</td>
<td>70%</td>
<td>66%</td>
</tr>
</tbody>
</table>

Source: Kaiser Family Foundation, April 2012
“What’s In Your Wallet?”

By R.J. Matson, St. Louis Post-Dispatch
Closing Reflections
Can Health Care Reform Survive the Supreme Court?

- Most observers believe that SCOTUS will determine that the Anti-Injunction Act does not apply
  - Private and state plaintiffs and the federal government all argue that the Anti Injunction Act does not apply
  - The Court appointed outside counsel to present the alternative argument
  - The Court is likely to conclude that it can hear the case
Can Health Care Reform Survive the Supreme Court?

- Based on oral arguments, the Court appears skeptical that an individual’s lack of health insurance affects interstate commerce.
- This suggests that the individual mandate may be Constitutionally vulnerable.
Can Health Care Reform Survive the Supreme Court?

- SCOTUS’ focus is on *principles* that express Congressional power in relation to the interstate commerce clause.
  - The Court says that there must be a *limiting principle*:
    - A principle that defines at least one area where the commerce clause does not permit Congress to act (on the theory that the founding fathers would not otherwise have needed to include the commerce clause in the Constitution).
  - And so in the health reform case, the Court is asking:
    - If we interpret the commerce clause to permit Congressional power to reach an uninsured individual, then what is the principle that defines the area(s) where Congress, under the commerce clause, *cannot* act?
  - Could lead to the Court ruling that the individual mandate is unconstitutional.
Some observers urge that eliminating the individual mandate would be a serious, but not in itself fatal blow to health care reform.

- ACA would cover fewer people and not be nearly as effective
- Health insurance premiums would likely be higher
- Other provisions could go forward
  - Expanding Medicaid for the poor
  - Setting up new marketplaces where people can compare and buy health insurance
Can Health Care Reform Survive the Supreme Court?

- However, many others believe there is a strong possibility that SCOTUS could determine that the individual mandate is not severable from some or all of the rest of the Law.

  - The mandate is the centerpiece of ACA
    - It is challenging to see how major aspects of the Law could work without the mandate.
  
  - In the oral argument, the Court sought to identify the standard by which to address severability issues
    - The Court implied that the analysis should be much deeper and more fundamental than whether Congress did or did not include a severability clause in the legislation’s text.
Can Health Care Reform Survive the Supreme Court?

- Most observers believe the Court will not strike down the **Medicaid expansion as unconstitutional**
  - The federal government frequently gives states money with strings attached
    - Civil rights statutes
    - Education
    - Transportation
    - National security
  - A Court finding of unconstitutionality of the Medicaid expansion would have far-reaching implications for other areas
A Close Call?

"Scales Of Justice?" By Matt Wuerker, Politico
Thank You!