

Supreme Court vs. Obamacare II

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By David W. Johnson, CEO, 4Sight Health

The “Thrilla in Manila” in 1975 was Mohammad Ali and Joe Frazier’s second championship fight. In 1967, after Ali refused conscription as a conscientious objector, he was convicted of draft evasion, imprisoned, and stripped of his heavyweight 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 the 1975 match: 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 the risky strategy of leaning on the ropes while an opponent tires himself punching away. This set the stage for the 1975 match. Boxing in oppressive heat before a worldwide audience and going at each other for fourteen rounds, Ali changed tactics and finally prevailed.

After the Supreme Court’s 2012 ruling, most believed the ACA was established law. Surprisingly the Court agreed last November to hear *King v. Burwell*, a lawsuit challenging Obamacare subsidies. This set 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 will not 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 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 and describes 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 is not true here. Two Appellate Court rulings (*King v. Burwell* and *Halbig v. Burwell*) affirmed the government’s right to offer subsidies through Federally-run exchanges.

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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 v. Burwell* to put Chief Justice Roberts on the hot seat.

Justice Roberts is a strict constructionist. His judicial record suggests he would return the ACA to Congress to clarify its position on subsidies. Roberts was quiet during oral arguments. To the surprise of many, Justice Kennedy's comments and questions suggested he might side with the Court's liberal wing and uphold the current law. America's health systems are holding their collective breath awaiting the Court's decision.

RAMPANT IRONY

There's visceral disagreement between Republicans and Democrats regarding the Affordable Care Act. Political positioning, however, has less to do with the Act's actual provisions than with philosophical beliefs about government. Republicans want less. Democrats want more.

Obamacare is a rallying cry for Republicans. They have won governing majorities in Congress by castigating it. Ironically, Obamacare adopted its core features from Republican policy proposals. These include the individual mandate, health exchanges, and insurance "risk corridors." As former President Bush HHS Secretary Mike Leavitt observes, eliminating these market-based provisions, by necessity, will force America into a single-payer system. That is the last thing Republicans want.

By contrast, Democrats have embraced the Affordable Care Act's market-oriented provisions. Their love has not always been so profound. Many (notably Nancy Pelosi) have fought to curtail and/or eliminate Medicare Advantage. Medicare Advantage incentivizes private companies to manage the health of large populations. Long term, Obamacare cannot succeed without better balance between health promotion and treatment. To the extent private companies improve the health of large populations, they reduce the need for governmental assumption of health

risk, a prerequisite for single-payer health systems. A single-payer "Medicare for all" health system is what most Democrats truly want.

No one is really telling the truth. Since the ACA grants private companies principal implementation responsibility, Republicans should like Obamacare more and Democrats should like it less. Even so, the bipartisan bickering and demagoguery continue.

REPEAL, THEN WHAT?

Repealing the ACA's subsidy policy would be a major defeat for the Democrats, but it also creates headaches for Republicans.

- **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.
- **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.
- **Red States:** Most will let Obamacare subsidies wither. Moreover, 23 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, 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 healthcare funding, access, and equity.

REPUBLICAN IDENTITY CRISIS

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 fifty-six percent societal return

POLL FINDING

Public's View on King v. Burwell Implications

Most Want States to Create Marketplace if Needed to Preserve Subsidies

AMONG THOSE LIVING IN STATES WITH FEDERAL OR PARTNERSHIP MARKETPLACES



Source: Kaiser Family Foundation

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for Medicaid dollars invested in childhood healthcare. Thirty-one states have Republican governors, but only six Republican attorneys general have filed *King v. Burwell* amicus briefs in support of overturning Obamacare subsidies.

By contrast, true believers want Obamacare repealed. They delivered the party's massive victory in the 2014 midterm election and are filled with passionate intensity for their very conservative agenda. They are suing Republican Governor Jan Brewer to prevent Medicaid expansion. Nineteen Republican legislators have filed *King v. 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 VS. MEDICINE

Despite its high-stakes political drama, Supreme Court-Obamacare II is not the determinative reform battle. 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.

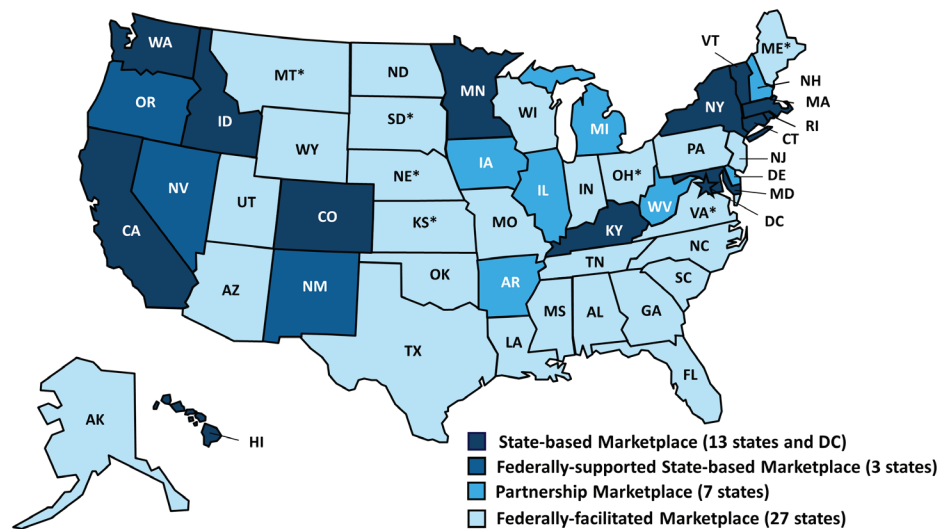
The marketplace is the arena where incumbents and innovators confront one another. Evidence emerges daily that "value-based" companies are the heroes in this conflict. Countless Americans are embracing market-based solutions that deliver on the promise of better, more affordable healthcare for everyone.

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 is "adapt or die" time for hospitals, specialists, and the pharmaceutical and insurance industries. As Ali did in Manila, combatants must change tactics to win or risk being carried out of the ring.

STATE HEALTH INSURANCE MARKETPLACE TYPES, 2015



Source: Kaiser Family Foundation

ABOUT HURON HEALTHCARE

Huron Healthcare is the premier provider of performance improvement and clinical transformation solutions for hospitals and health systems. In 2015, Huron acquired Studer Group, the market leader in driving healthcare cultural transformation. The combination of Huron and Studer Group is focused on improving healthcare providers' clinical, operational, and financial outcomes. By partnering with clients, Huron delivers solutions that improve quality, increase revenue, reduce expenses, and enhance physician, patient, and employee satisfaction across the healthcare enterprise. Clients include leading national and regional integrated healthcare systems, academic medical centers, community hospitals, and physician practices. *Modern Healthcare* ranked Huron Healthcare third on its 2014 list of the largest healthcare management consulting firms. Learn more at www.huronconsultinggroup.com/healthcare or follow us on Twitter: @Huron.

ABOUT 4SIGHT HEALTH

4Sight Health is a boutique firm specializing in healthcare thought capital, strategic advisory services, and venture investing. 4Sight Health operates at the intersection of healthcare economics, strategy, and capital formation. The company's four-stage analytics — Assess, Align, Adapt, Advance — reflects the bottom-up, evolutionary character of disruptive, market-driven change and guides 4Sight Health's professional services, which include regular commentary on market-driven reform, public speaking, board education, strategic advice, capital formation design and execution, advancing organizational change, venture investing, and capital funding.

To see how Huron Healthcare solutions can empower your mission, contact us at 866-229-8700 or visit www.huronconsultinggroup.com/healthcare.

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