Of White Whales, Obamacare, and the Roberts Court: The Republican Attempts to Harpoon Obama's Presidential Legacy*

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Because presidential legacies are shaped by retrospective historical judgments that grow from present-day political successes, failures, and opportunities (Jacobson 2011; Lowndes 2013), the criticisms of President Barack Obama's performance in the White House will be important for making any prospective evaluation of his presidential "greatness" or legacy (Schlesinger, Jr. 1997, 179). As President Richard Nixon once stated, "History will treat me fairly…[but] historians probably won't. They are mostly on the left" (Schlesinger, Jr. 1997, 180). This article describes the strident opposition to Obama's health care program in the federal courts because the success or failure of the litigation will be significant in making historical judgments about what his presidency represents to American politics in the future.

A recurring political attack on President Obama is on his signature domestic legislative accomplishment in health care, the Patient Protection and Affordable Health Care Act (2010) (ACA). Yet, Congress has yet to repeal it and the law also has withstood two formidable challenges in the US Supreme Court: *National Federation of Independent Business* v. *Sibelius* (2012) and *King* v. *Burwell* (2015). Liberal pundits assert that continuing to attack it by repeal or by litigation is analogous to Captain Ahab's misguided and futile attempt on a "judicial Pequod" to destroy the legendary white whale. Milbank (2015) quoted Senator Barbara Boxer (D-CA), who remarked that "More than 50 times they have tried to repeal it, the GOP, and they're going to try again, and they're going to fail again… [and] I think they hope they fail because they have nothing, nothing to replace it with." The same frustration, Milbank concluded, "seems to be the likely result of the House legal effort, too" because the constitutional grounds for trying to dismantle Obamacare by lawsuit remain disingenuous at best (Milbank 2015).

THE *NFIB* AND *KING* RULINGS

In *National Federation of Independent Business* v. *Sebelius* (2012) (*NFIB*), the US Supreme Court upheld the individual mandate but also placed new limits on Congress's spending power in regard to expanding Medicaid coverage. In the controlling opinion, Chief Justice John Roberts concluded that the individual mandate could not be justified under the commerce clause or the necessary and proper clause; but it could be sustained under Congress's Article I power to tax and spend for the general welfare. Also, Roberts declared that Congress overstepped its bounds by forcing the states to expand Medicaid coverage under the threat of losing Medicaid funding. The Court's four liberal justices—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—agreed that the ACA must be upheld, but they argued, in a separate opinion, that Congress had commerce-clause authority to require individuals to buy health insurance. In contrast, a joint dissent delivered by the Court's conservatives—Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito—insisted that the entire ACA must be struck down because Congress exceeded both its commerce-clause authority and its tax-and-spending authority in creating the law. On the Medicaid expansion issue, seven justices—the Chief Justice and Justices Scalia, Kennedy, Thomas, Alito, Breyer, and Kagan—concluded that Congress exceeded its powers in authorizing it because it impermissibly forced the states to make a choice about whether to implement it or lose existing funding. Two liberal justices, Ginsburg and Sotomayor, however, broke from their colleagues to contend instead that there was little statutory coercion. As a result, Congress was fully empowered to use the ACA to expand Medicaid healthcare coverage in the states.

After *NFIB*, the justices agreed to review a direct challenge to the ACA's subsidies' mechanism in *King* v. *Burwell* (2015). King and three other Virginia residents filed a lawsuit that took direct aim at undermining the ACA's subsidy mechanism on the grounds that the wording used in the statute meant that citizens could buy health insurance and receive subsidies only from an "Exchange established by the State" (ACA 2010 §1401) and not the federal government (Howe 2015). In a 6:3 ruling, the majority reasoned that §1401 (and its five words, "Exchange established by the State") could not be read in isolation from the rest of the ACA. In construing the statute, Chief Justice Roberts's Opinion for the Court (joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan) admitted that the words at issue were vague but then quickly added that they could make sense only in light

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of congressional intent and the ACA's overall structure and purpose. The Court observed that striking down the subsidies would upset Congress's intent to use federal exchanges in the event that states chose not to create them. Accordingly, endorsing the petitioner's interpretation would undermine what Congress meant to achieve in using the subsidies to offset the cost of buying health-care insurance, ostensibly to make it more widely available regardless of whether it was accomplished through a federal- or a state-run exchange. In dissent, Justice Scalia (with Thomas and Alito) ridiculed the majority's judicial activism, stating that it "changes the usual rules of statutory interpretation for the sake of the Affordable Care Act." By engaging in a brand of result-oriented jurisprudence that is interested only in guaranteeing that the law remains intact and insulated from legal attack, the dissent argued that the majority disregarded the statute's plain meaning. In Scalia's vitriolic words, the Court was misusing its powers to create "SCOTUScare," an interpretation that flies in the face of the statutory requirement that mandates that federal monies can subsidize health-insurance purchases only in state-run exchanges.

the mandate and the regulatory option to claim an exemption was not the least restrictive means to achieve that interest. In doing so, the Court observed that the government did not prove that it lacked alternative means to achieve that interest, including assuming the cost of paying for the contraceptives at issue (Seidman 2015, 141–2). In dissent, Justice Ruth Bader Ginsburg and her liberal colleagues (i.e., Justices Breyer, Sotomayor, and Kagan) countered that granting a corporation a statutory right to claim an exemption had "startling" implications because it would begin an endless cycle of cases that would encourage for-profit corporations to rely on their religious convictions to seek exemption from a host of regulatory activities, ranging from permitting employers to disregard legal bans on gender or sexual discrimination, or to others allowing bakery owners to refuse to make wedding cakes for same-sex couples (Sepper 2015, 1455).

Similarly, *Zubik* v. *Burwell* (2016) represents one among a number of related statutory challenges to the HHS contraceptive-mandate accommodation rule that actually reached the High Court (SCOTUSblog 2016a). At issue is whether several nonprofit religious organizations that did

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THE HHS CONTRACEPTIVE-MANDATE ACCOMMODATION LITIGATION

Other than the *NFIB* and *King* cases, the US Supreme Court has reviewed challenges to the Health and Human Services (HHS) contraceptive mandate. The cases center on resolving competing interests between affording full health-care access and reproductive freedom and those claiming First Amendment religious-liberty protection. The key issue is whether entities can avoid compliance with the mandate on the basis of the Religious Freedom Restoration Act (RFRA), a 1993 federal law that protects an individual's right to religious expression. In *Burwell* v. *Hobby Lobby Stores, Inc.* (2014), the petitioners operated closely held businesses (i.e., Hobby Lobby, Inc., Conestoga Wood Specialties, and Mardel) that were produced and managed by devout members of religious sects that adamantly oppose insurance coverage of four FDA-approved contraceptives and abortion-inducing drugs.

In a 5:4 ruling, *Hobby Lobby* adjudged that the mandate violated the RFRA, which meant that the petitioners were exempt from providing their employees with contraceptive coverage under the HHS regulations. In writing for the Court, Justice Alito—along with Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas—reasoned that the RFRA applied to artificial entities such as closely held corporations, largely because the people that run them are entitled to statutory protection. Alito and his conservative brethren conceded that the federal government had a compelling interest in offering cost-free women's health-care options under the ACA contraceptive mandate. Yet, they argued that not qualify for automatic exemption from the ACA's contraceptive mandate can avoid compliance for religious reasons under RFRA. The petitioners argued that the notification requirement—or the act of completing a written form that gives notice to the federal government or an employer's insurer that the nonprofits have religious objections—substantially burdens their religious expression because filing the paperwork makes them complicit in advocating the use of objectionable contraceptive drugs. In a *per curiam* opinion, the justices opted to remand the 13 separate cases that were the focus of the litigation back to six federal appeals courts for disposition without taking a position on the merits underlying the challenges. The remand was possible because after oral argument, the parties agreed in supplemental briefing that contraceptive coverage could be supplied through the insurers without requiring the petitioners to give notice. With this new information, the Court put the onus on the appeals courts to arrive at a resolution that would accommodate each side's interests. For one court watcher, the outcome is a practical compromise by the Court—which is operating as an eight-member Court in light of Justice Scalia's death—to allow access to the contraceptive benefits without subjecting nonprofits to statutory penalties for noncompliance—at least until the issue is ultimately resolved by the Court or Congress after results are in from the 2016 presidential election (Denniston 2016).

THE *SISSEL* LITIGATION

Another conservative assault on Obamacare relates to the question of whether the ACA's enactment violates the

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Constitution's Origination Clause, an Article I §7 requirement that stipulates that all legislation must originate in the House and not the Senate. In *Sissel* v. *Burwell*, counsel from the Pacific Legal Foundation filed a writ of *certiorari* to the Supreme Court that claimed that the ACA must comply with this provision because it is using a tax to enforce its insurance mandate. As such, the ACA can be considered only revenue-producing legislation that must begin in the House. In making the petitioner's argument, Sissel's counsel observed that the ACA's legislative history shows that the health-care law actually started in the Senate because the bill that was being considered in that chamber amended—and essentially replaced—an earlier bill that originated and was passed in the House. For counsel, that Senate amendment is important because it contained a tax provision that ultimately became a part of the ACA's enforcement mechanism to induce people to buy health insurance (Sissel 2015).

Both the trial and appellate courts hearing the case rejected Sissel's argument. The circuit court affirmed the district court's findings that the bill proposal containing the tax was beyond the reach of the Origination Clause because the monies it generated were merely incidental to the ACA's main purpose, which was to provide and expand health-insurance coverage. Moreover, even if the bill were deemed to produce revenue, the origination requirement was satisfied because it originated in the House even though it was later amended in the Senate. As a result, the federal government argued in one of its legal briefs that the lower-courts' conclusions are firmly grounded in precedent considering the issue. Furthermore, it added that "[the Supreme] Court has never invalidated an Act of Congress under the Origination Clause, and it reversed the lone court of appeals decision to have done so" (Verrilli, Mizer, Stern, and Klein 2015, 6; see also Dysart 2015). On January 19, 2016, the Supreme Court agreed and denied the petitioner's writ of *certiorari*, thereby ending the case (SCOTUSblog 2016b).

CONCLUSION

For conservatives trying to harpoon it, thus far it seems that Obamacare is the Moby Dick of fictional lore that continues to survive despite the repeated attempts to kill it in the federal courts. Whereas suits such as *NFIB*, *King,* and even *Sissel* held the promise of decimating some or all of the ACA's main features, cases such as *Hobby Lobby*, *Zubik*, and *Sissel* demonstrated that conservatives and ACA opponents have not been successful in using the federal judiciary to sink the health-care law. At best, it appears that the judicial *Pequod* is only good at disrupting the ACA at the margins and, from a more cynical view, draining judicial resources. To illustrate, the HHS final rule implementing the ACA's §1557 nondiscrimination provision, which will mean that large businesses may have to provide coverage for transgendered people and to supply language-translation services, is likely to be challenged in federal courts and, in fact, may represent "the future of health care litigation" (Gregory 2016). Those cases will augment the proliferation of HHS contraceptive-mandate accommodation cases that will continue to appear on the federal docket alongside other challenges that will test the limits of the Free Exercise Clause if and when the Court ultimately decides to tackle the underlying constitutional issue. As *Zubik* suggested, whether the harpoon lands a fatal blow remains even more contingent on the outcome of the 2016 presidential election or whether the Senate retains majority control. These factors will determine who will fill the vacancy created by Justice Scalia's death and the political direction that the Court will take in its decision making relating to future ACA challenges.

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Short of outright legislative repeal, then, the best avenue to eviscerate Obamacare might not be in the courts. Some Republican strategies have been trying to "bleed it to death" through creative legislative solutions that discombobulate Obamacare in the event that the votes are never there in Congress in subsequent election cycles to either repeal it in its entirety or to override a presidential veto if the House and Senate do, in fact, succeed in passing repeal legislation. Former presidential candidate Marco Rubio (R-FL) was at the forefront of getting an omnibus government spending bill passed last year that prohibited the HHS from using general taxpayer funds from bailing out failing insurers in the ACA's "risk corridor" program. This move accelerated the failure of Obamacare insurance cooperatives because the federal government cannot make up the financial difference that the insurance companies need to remain viable. As many pundits have observed, Rubio's legislative maneuver has "tangled up the Obama administration, sent tremors through health insurance markets and rattled confidence in the durability of President Obama's signature health law"—and that effect will be felt for at least another year (Pear 2015; Thiessen 2015).

Ultimately, the historical judgments of Obama's presidential legacy are likely to be heavily influenced by who wins the 2016 presidential election and whether the Democrats can retake control of the Senate. If a conservative enters the White House, Obamacare surely will be dismantled by another piece of legislation that replaces it, assuming that the Republicans can unite to offer a replacement. However, if a Democrat wins the White House and the Senate also shifts control, both Obamacare and historical judgments about Obama's presidential legacy probably will not take much of a beating—at least as long as Progressives remain a healthy part of the political regime and the academic community. ■

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