The American Spectator

The Bell Tolls for Obamacare

By Peter Ferrara **November 23rd, 2011**

The key to the Supreme Court's upcoming ruling will be clear recognition of constitutional alternatives to Obamacare.

On November 14, the Supreme Court granted the Writ of Certiorari to hear the appeal of the cases testing the constitutionality of Obamacare. The resulting decision will mark an historic watershed not only in the restoration of constitutional jurisprudence, but in fundamental, market reform of the entire entitlement state.

Historic Decision Brewing

I write serving as the General Counsel of the American Civil Rights Union (ACRU), as one of several current positions. The ACRU was started by former top Reagan aide Robert Carleson, with former Attorney General Ed Meese as Chairman of the Advisory Board, along with other former Reagan Justice Department officials, besides myself as a former Reagan White House staffer.

In my capacity for the ACRU, I wrote and filed *amicus curiae* briefs on behalf of the ACRU in both the district court and the circuit court in the challenge by 26 states in the 11th Circuit that resulted in an order striking down the entire Obamacare law. I also wrote and filed ACRU *amicus curiae*briefs in the challenge by Virginia Attorney General Ken Cuccinelli in both the district court and the circuit in the 4thCircuit. The district court found the individual mandate unconstitutional, while the circuit court ruled that Virginia had no right to bring the case (two Obama appointed judges on the three-judge panel).

I am predicting that the Supreme Court will strike down the entire Obamacare law on a 5-4 ruling. That starts with the individual mandate, which the Court will find unconstitutional because it has reiterated several times in recent cases that it will enforce some limit on the Commerce Clause as justification for federal regulation, reserving the role of police power to regulate for the general public good to the states. Virtually all the judges in all the lower court cases concluded that there was no precedent anywhere in U.S. history upholding a law requiring citizens to purchase a good or service. Not participating in interstate commerce by choosing not to buy a product or service leaves no basis for regulation to compel such participation under the Commerce Clause power to regulate interstate commerce.

The fate of that argument before the Supreme Court is indicated by the thorough opinions of District Court Judge Roger Vinson in the 11th Circuit, District Court Judge Henry Hudson in the

Fourth Circuit, and the majority of the 11th Circuit panel striking down the Obamacare individual mandate. These judges are good indicators as to how similarly minded Justices Scalia, Thomas, Alito and Chief Justice Roberts will come out.

While the decision of simpatico Judge Laurence Silberman upholding the Obamacare mandate is somewhat troubling, that reflected Silberman's poorly reasoned conclusion that he was bound as a lower court judge by the Supreme Court's 1930s precedent of*Wickard v. Filburn*. That case did not involve a regulation compelling anyone to purchase anything, but rather a defendant who had made an affirmative decision to take action to grow and use wheat in his farm operations, with the regulation applying directly to that action. That illogical blunder is not characteristic of Silberman's usually brave and far sighted work.

The Supreme Court will strike down the entire law as Judge Vinson did because even the government is arguing that Obamacare is unworkable without the individual mandate. Obamacare requires insurers to issue insurance coverage to everyone who applies at just standard rates, regardless of how already sick and costly they are when they first apply. Without a mandate requiring everyone to buy such insurance and so contribute to its costs, the healthy will just wait until they are sick and then buy the guaranteed insurance, avoiding any contribution to the costs (imposed by others) during all their healthy years. That will leave insurers covering primarily a very sick and costly pool, requiring very high insurance rates for financial survival. Those high rates will cause even more of the healthy and lower cost workers to drop out, resulting in an admitted financial death spiral for the insurers.

What makes this predicted legal result especially likely is that the Obamacare law overconfidently excluded a traditional severability clause, which provides that if any part of a law is found unconstitutional, the rest would remain intact. The drafters in their full Obama era arrogance thought excluding the clause would leave the courts less likely to strike down the mandate, which could then legally threaten the entire law. The drafters were so certain that the law would be so wildly popular, just like other overpromised entitlements, that no court would dare do that. But with strong public majorities so virulently detesting the law, the lack of a severability clause just assures that the Court will strike down the unworkable law.

Of course, the law will not work with a mandate enforced with a weak penalty anyway. The healthy will pay the penalty, just a fraction of the costly regulatory mandate, avoiding the bulk of the costs until they are sick. That will happen with the employer mandate as well. We see this practice under the quite similar Romneycare in Massachusetts.

The Key to the Case

I believe the key to winning the fifth majority vote of Justice Kennedy is the argument that striking down Obamacare does not mean there is no constitutional way for a health care safety net to assure no one will suffer from lack of necessary medical care. That argument has been a specialty of the briefs I have filed for the ACRU based on my own direct role in health policy, going back to the first paper proposing health savings accounts which I co-authored with John Goodman almost 30 years ago.

A complete health care safety net assuring essential health care for all can be achieved with no individual mandate and no employer mandate, for just a fraction of the cost of Obamacare, actually sharply *reducing* government in the process. That starts with the provision already in federal law, stemming from the Kennedy-Kassebaum legislation of the 1990s, providing for guaranteed renewability. That means if you already have health insurance, you cannot be terminated because you become sick. That is what the insurance insures against after all, so such termination would actually be fraud, as state law across the country recognized before Kennedy-Kassebaum. Under this regulation, insurers also cannot discriminatorily raise rates for those who become sick while insured. This law ensures that if you have health insurance, you will be able to keep it as long as you continue to pay the premiums.

The second component of a health care safety net would involve block granting Medicaid back to the states, just as was done with the enormously successful reform of the old AFDC program in 1996. Each state would then transform their Medicaid programs into a premium support system which would provide the assistance necessary to purchase essential health insurance for those who are too poor to pay for it otherwise. Each state would decide how much assistance is necessary at each income level in their state to assure the poor could afford such essential coverage.

This would greatly benefit the poor because Medicaid today is structurally an institution serving to deny the poor essential health care just when they are the sickest and most in need of such care. That is because Medicaid does not pay the doctors and hospitals enough to assure such care. But with the above reform, the poor would enjoy the same health care as the middle class because they would have the same private insurance as the middle class, paying market rates for care.

The third component of the safety net is a high risk pool in each state for the uninsured who never get coverage and then become too sick with costly illnesses like cancer or heart disease to buy it. That is like calling an insurance company for fire insurance after your house is already on fire. The uninsured in this case would be able to get coverage as a last resort from the high risk pool, paying what they can based on their income. Taxes would subsidize the pool to keep it afloat. Because only 1-2 percent ever become actually uninsurable like this, this is the least expensive option for assuring an essential safety net.

With that everyone would be assured of a means to obtain essential health care. If you have insurance you will be able to keep it, despite President Obama's abusive, deceptive rhetoric to the contrary. If you are too poor to obtain insurance, the government provides the necessary help to buy it. If you nevertheless stay uninsured, and become too sick to buy it, you can obtain essential coverage from the high risk pool.

Such a health care safety net is entirely constitutional. Consequently, striking down Obamacare as unconstitutional does not mean condemning the needy to suffering without essential health care.

Exploding Medicaid

The Supreme Court in deciding to hear the Obamacare appeal included the question of whether

Obamacare's massive expansion of Medicaid is constitutional. CBO projects that by 2021, Obamacare will explode the Medicaid program for the poor to covering 100 million Americans. Medicaid is financed jointly by the states as well as the feds, so this explosion imposes massive costs on the states. Can the federal government do that constitutionally?

The traditional answer would be if the states do not want to accept the federal assistance financing Medicaid with all the strings Obamacare attaches to that assistance, the states are free to turn down the federal Medicaid funding. But the challenge to Obamacare on these grounds argues that the federal Medicaid financing is now so enormous, and so essential to serving the poor in each state, that states as a practical matter are no longer actually free to turn it down, regardless of the strings attached.

Of course that is true. In regard to Medicaid, Obamacare treats the states as sub-departments of the federal government, like local government units in France, rather than as the sovereign governments they are under traditional American federalism. Federalism was a chief concern of ACRU founder Robert Carleson, as well as his boss Ronald Reagan. So the ACRU will take the lead in arguing this cause before the Supreme Court.

Political Consequences

The Supreme Court decision in this case will come down in the summer of 2012, just before the election. Regardless of the outcome, the decision will be a political disaster for Obama's reelection. If the Court strikes it down, that will confirm that Obama wasted his first two years in office taking America on an unconstitutional frolic, rather than addressing America's most urgent problems in an effective way.

If the Court upholds it, then voters will know the only way to get rid of it is to vote Obama and his Democrats out of office. That will be a result they will have so richly earned.

But if my predictions above are correct, the Court's decision will not only begin the long road back to the real Constitution. It will be the first step in real entitlement reform, as the Republicans likely to take over in 2012 are already coalescing around sophisticated entitlement reform with proven political viability. More on that next week.