The Obamacare Ruling: What Does It All Mean?

On June 28, the Supreme Court ruled that the individual mandate component of the Patient Protection and Affordable Care Act is constitutional under Congress’s taxing power. What is left of the idea that the Constitution creates a government of limited and enumerated powers? What does this case of the century mean, for not only our health care system, but also our constitutional republic? And what are the next steps for Congress? At a Cato Policy Forum held days after the ruling was handed down, several prominent scholars joined together to answer these important questions. Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at Georgetown University, a senior fellow at the Cato Institute, and the “intellectual godfather” of the case against Obamacare, offered his examination of the decision. Michael F. Cannon, Cato’s director of health policy studies, highlighted optimistic signs on the future path toward repeal.

RANDY BARNETT: As you all know, last week’s decision did not go the way we hoped it would. This was a real crushing blow to liberty and to myself. But just because it was a bad loss does not mean it could not have been worse. It could have been—and to deny what we accomplished under these circumstances is to give the other side a bigger victory than they in fact won. I want to suggest that the reason this case was so historic is that there was not one, but two huge issues on the table.

The first was on whether the government in this country would control our medical care. If this particular bill remains as law, I believe that it will fundamentally alter the relationship between individuals and their government. It will essentially change our political system to one more closely approximating that of Western Europe. Now I don’t have anything against Western Europe—they have nice buildings and the food is good—but I don’t necessarily want to live under their social-democratic political system. Unfortunately, given the provisions of this bill, I believe that will be the inevitable outcome.

The second huge issue on the table with this law was the Constitution of the United States. Our constitutional republic, which says that the federal government is one of limited and enumerated powers, has been the single most important principle that this country has stood for from its founding. It’s a principle that the Supreme Court has never denied and often affirmed, even throughout the New Deal, the Warren Court, and the Great Society.

But if the core of this bill—the individual mandate—was upheld under the Commerce Clause, then the theories underpinning that decision would eliminate the existence of enumerated powers. If the decision to purchase health insurance could be regulated under the commerce power, then anything could be justifiably regulated. Essentially, what we would have at the end of this legal battle is a “national problems” clause—a provision in the Constitution which gives Congress the power to address any national problem at its own discretion.

So what did the Supreme Court decide? Let me first say that nearly everyone, myself included, believed that these two issues were a package deal. In other words, if we lost our challenge to Obamacare, then we would also lose our effort to preserve the enumerated powers of the Constitution. But that’s not what happened.

Last week, there were five votes in the Supreme Court for the proposition that the Constitution contains limited and enumerated powers, that the individual insurance mandate as drafted exceeds Congress’s powers, that in fact the Commerce Clause is restricted to regulating economic activity that has a substantial effect on interstate commerce, and finally, that it does not reach inactivity. It does not give Congress the power to mandate economic activity in order to then regulate it. That’s what the Court decided, in a position that 99.9 percent of law professors said was based on frivolous arguments. Their position—that Congress had an unlimited discretionary power to address national problems—commanded at best four votes.

I have always argued in favor of an interpretation of the Constitution based on its original meaning. But even those who believe in a living Constitution—a dynamic document that derives its meaning from the Supreme Court—now have to accept two propositions. First, we have a government of limited and enumerated powers. Second, the individual insurance mandate exceeds those restrictions.

This represents a major victory because the alternative would have been so much worse. To put it another way: if you were in a war and you lost a major battle, but still managed to gain some terrain during the course of that battle, would you surrender that terrain when all is said and done? Of course not. Well, that is exactly the situation we find ourselves in. We’ve actually moved constitutional law in a positive direction. The position that has now been affirmed by five justices was not previously on the books in such an explicit form. And what was previously an unreasonable position among the vast majority of constitutional law professors is now the law of the land. It’s important to recognize that.

Where do we go from here? Imagine that we’re actually in 1935 and the Supreme Court has just struck down a minimum wage law by a five-to-four vote. Well, as history tells us, what’s coming next is 1937—
when, as a result of public pressure and a Democratic administration, the New Deal is reauthorized. It’s upheld by a five-to-four vote based on another switch by a different Justice Roberts, the so-called “switch in time that saved nine.”

I believe that we are at a similar point in time now, only our position is the one that could conceivably emerge later. For the first time in my life, a broad swath of the American people has been engaged in a lawsuit of this nature. They’ve followed every step along the way, and a majority have thought the Affordable Care Act was unconstitutional from the beginning. They were riveted by the decision last week, and deeply disappointed with the results.

I don’t believe that the meaning of the Constitution changes. The substance of constitutional law, however, changes with the different composition of the Supreme Court. That’s why, given the choice between fighting to defeat Obamacare or preserve the Constitution—if you taxed me in order to make me choose—I would have undoubtedly picked the latter. In November, voters can still fight Obamacare. No single election could have saved the Constitution, but now that it’s safe, we can rely on voters to achieve what we didn’t in court.

This is not going to be easy—there are no guarantees—but it’s something that can be done. The timing of this was actually quite good because we have an election teed up to do just that. This election is not only going to be about Obamacare, but also about electing a president who commits himself to judicial nominees who believe in both the written Constitution and the enumerated powers contained therein. It will be about nominees who have judicial character as well as judicial commitment.

And if that happens, then we could be standing at the threshold of what Bruce Ackerman of Yale Law School has called “a constitutional moment.” It could mark a moment from which justice will now be selected according to their commitment to the original meaning of the Constitution—not just their favorite parts—and their ability to resist pressure to the contrary. If that happens, we will look back upon this decision as a historic turning point in constitutional law. Now, am I predicting that this will happen? No, I’m not—and in that sense I’m not entirely optimistic. I didn’t predict the way this case was going to be decided, and I’m not predicting which way the election will swing. All I’m saying is that an election is a prerequisite to a constitutional moment. The seeds of that moment have been sown by both our legal challenge and the ruling in this case. There is a reason for hope. Those who value our republican system of limited federal powers should put their disappointment with the decision aside and breathe a sigh of relief over the legal precedent that was set. Now is the time to ensure that we realize the potential of this moment—that this is, in fact, our 1935, and what’s coming is going to be our 1937.

MICHAEL F. CANNON: On the day of the Supreme Court’s ruling in NFIB v. Sebelius, I did a radio program opposite a former health policy adviser to President Obama. The host of the radio program asked her if she could think of anyone who would be harmed by the Supreme Court’s decision, and she said that she could not. Now think about that. This is a law that is spending two trillion dollars over the next 10 years from the federal budget—it compels states, employers, and individuals to spend trillions more—and this Obama adviser couldn’t think of a single person who would be hurt by the associated taxes and regulations.

There wasn’t enough air time for me to talk about all the ways that this law is going to hurt Americans, and is in fact hurting them right now. But here are a few. The mandates that this law imposes on businesses are already discouraging employers from hiring. The medical device tax in particular will eliminate jobs in that industry. There are a million or more people that this law has already thrown out of their health plans. In fact, the Robert Wood Johnson Foundation recently estimated that this law will cause 150,000 Americans with high-cost conditions—very sick Americans—to lose their health insurance.

The law has caused some premiums to rise by 20 to 30 percent—and that was almost immediately after it took effect. Supporters of the law acknowledge that it will cause some peoples’ premiums to double, even after accounting for all of the tax credits and subsidies involved. The law will impose implicit marginal tax rates in excess of 100 percent on low- and middle-income Americans. It is undermining civil liberties, like when the Secretary of Health and Human Services effectively threatened insurance carriers with bankruptcy for the crime of telling their subscribers how much this law was increasing their premiums. Of course, it also threatens religious liberty by forcing people to pay for things that they consider immoral. And finally, the law’s health insurance price controls create a race to the bottom by literally forcing insurance companies to provide lousy coverage to the sick and deny them care.

Supporters of the law like to say that this is a matter of life and death. I don’t think they have any idea how right they are. But it isn’t just the Obama administration that’s oblivious. After the ruling, I spoke to a
reporter who has followed the health care debate for decades. I told him that repealing Obamacare is health care reform, because that law is hurting so many people. The supposedly popular dependent coverage mandate, for instance—which requires employers to offer coverage for dependents up to the age of 26—threw 6,000 spouses and children of members of an SEIU local in New York out of their health insurance coverage, leaving them with nothing. The supposedly popular preexisting condition provision that took effect six months after the law was signed has caused carriers in 39 states to flee the market for child-only health insurance and has caused those markets to collapse in 17 states. The reporter said he had never heard of either example.

We clearly have a lot of education to do, and yet it’s worth mentioning that the polling has been consistent on this law for two years. The public has opposed this law ever since it was first introduced in Congress. A recent New York Times poll found that 65 percent of the public—and more than 70 percent of independents—wanted the Supreme Court to strike down all or part of this law. Yet we keep hearing over and over again that the reason the American people don’t like this law is because they don’t understand it. It seems to me that the people who don’t understand this law tend to be geographically concentrated in Washington, D.C.

Nevertheless, after this decision, the Obama health care law is weaker—and the path to repeal is clearer—than it was one week ago. It’s now becoming clear how severely the Supreme Court’s ruling hobbled this law. The law already gave states the ability to block about half of its new entitlement spending simply by refusing to create health insurance exchanges. The Court’s ruling has now given states the power to block the rest of the law’s new entitlement spending. State officials now have it within their power to collectively reduce the federal deficit over the next 10 years by $1.6 trillion. All they have to do is sit on their hands. Let me explain.

The law relies on states to implement two of its essential components: the health insurance exchanges and the expansion of the Medicaid program. The exchanges will channel about $800 billion to private insurance companies. The Medicaid expansion will spend about $900 billion over the next 10 years, much of that also going to private insurance companies. Contrary to popular belief, states are under no obligation to do either of these things. And they should refuse in both cases.

Many state officials believe that if states create a health insurance exchange, they’ll have more control over how the law is implemented in their state. While it is true that the law directs the federal government to create an exchange in a state that does not create one itself, the law appropriates no funds for them to do so. The Republicans in Congress are unlikely to provide that money. But the law also requires state-run exchanges to be approved by the Secretary of Health and Human Services and empowers her to force a state-run exchange to do everything that she would have done through a federal exchange. And for the privilege of having the Secretary dictate how they run their own exchanges, states would have to pay $10 to $100 million per year in operating costs.

Due to the interlocking nature of the law’s many features, states that create exchanges will be needlessly exposing companies to the employer mandate, which taxes employers up to $2,000 per worker if they fail to offer required coverage. Why is that? That tax is only enforceable in a state that creates its own health insurance exchange, because what triggers that tax is when one of the employer’s workers goes into an exchange and receives a tax credit or a subsidy to purchase health insurance. Those tax credits and those subsidies are available only through state-run exchanges, not those created by the federal government. The law is very clear about this—it laboriously and explicitly restricts those tax credits and subsidies to state-run exchanges. States that refuse to create an exchange can therefore block those subsidies, exempt their employers from that tax, and lure jobs away from other states that do impose that tax.

The Supreme Court also handed Obamacare a serious defeat by striking its Medicaid mandate. As of now, federal Medicaid grants comprise an average of 12 percent of state revenues. The law commanded states to dramatically expand their Medicaid programs even further on pain of losing all federal Medicaid grants. Twenty-six states, led by Florida, challenged that mandate as unconstitutionally coercive, and they won. The Court ruled that the federal government can’t withhold existing Medicaid grants from the states that fail to expand their programs, and so now states can refuse to expand their programs without fear of reprisal, which they should do.

So far, about 73 members of Congress have sent letters to the National Governors Association urging them not to create a health insurance exchange, a move that is essential to repealing this law. Several governors have already expressed their refusal to do so, which is not surprising. If 26 of them sued the federal government because the cost of that expansion was unduly burdensome, then you can bet that at least some, if not all, of them are going to refuse to expand their Medicaid programs.

But you don’t need a governor to do this

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significantly, may not reduce price volatility, and might only raise a modest amount of tax revenue.” They conclude that, far from stabilizing market activity, an FTT “will likely drive business away from U.S. exchanges,” shifting it instead to untaxed foreign markets.

**The Minimum Wage Myth**

Since 1938 the federal government has imposed a minimum wage, and nearly every state now imposes its own wage floor as well. With income inequality a growing concern, states across the country are debating increases in the minimum wage. While the intention of these laws is to help low-income workers, decades of economic research show that minimum wages usually end up harming them, to the detriment of the broader economy. In “The Negative Effect of Minimum Wage Laws” (Policy Analysis no. 701), Mark Wilson, former deputy assistant secretary of Labor, writes that “minimum wages particularly stifle job opportunities for low-skill workers, youth, and minorities”—precisely those groups that policymakers are trying to help. “There is no ‘free lunch’ when the government mandates a minimum wage,” Wilson writes. By requiring that certain workers be paid higher wages, the government ensures that businesses will then make adjustments to pay for the added costs, such as reducing hiring, cutting employee work hours, reducing benefits, and charging higher prices. “These behavioral responses usually offset the positive labor market results that policymakers hope for,” he explains. Wilson reviews the economic models used to understand minimum wage laws and examines the empirical evidence—describing why most of the academic evidence points to negative effects from minimum wages. He also discusses why some studies may produce seemingly positive results. “Rather than pursuing policies that create winners and losers,” Wilson concludes, “policymakers should focus on policies that generate faster economic growth to benefit all workers.”

**Streetcar Collusions**

Spurred by the promise of federal funding, more than 45 American cities are currently expanding, building, planning, or considering streetcar lines. But according to Cato senior fellow Randal O’Toole in “The Great Streetcar Conspiracy” (Policy Analysis no. 699), the trend amounts to nothing more than the latest urban planning fad. “Streetcars are a long obsolete technology,” he writes, and as such, replacing them with higher quality transit options was a rational decision. Why, then, are so many lines being built? “The real push for streetcars comes from engineering firms that stand to earn millions of dollars designing and building streetcar lines,” O’Toole explains. These firms—along with their fellow “smooth-talking consultants and dissembling politicians”—put forth two main arguments for their plans. First, they claim, streetcars promote economic development—but, as O’Toole notes of the subsidies involved, “if streetcars were truly worthwhile, the people who ride them would gladly pay all of the costs.” Second, advocates claim that streetcars are “quality transit,” superior to buses in several ways. Again, however, O’Toole debunks this claim. “Their low average speeds, limited number of seats, and inflexibility make streetcars inferior to buses in every respect,” he writes—except, he adds, “in their ability to consume large amounts of taxpayer money.” As such, O’Toole writes, cities looking to enter the 21st century should concentrate on basic—and modern—services, including fixing streets and coordinating traffic signals.

**The “Anti-Constitutionality” of IPAB**

In 2010 the Obama administration created a new government agency called the Independent Payment Advisory Board (IPAB) as part of the Patient Protection and Affordable Care Act. The act authorized IPAB to cut Medicare payments even further. But the real reason Congress created the agency—according to Diane Cohen, senior attorney at the Goldwater Institute, and Michael Cannon, director of health policy studies at the Cato Institute—is “so that its decisions would automatically take effect, even in the face of popular resistance that would prevent Congress itself from enacting the same measures.” In “The Independent Payment Advisory Board: PPACA’s Anti-Constitutional and Authoritarian Super-Legislature” (Policy Analysis no. 700), the authors begin by describing IPAB’s structure, mission, powers, and scope—explaining that when the unelected officials on this board submit a legislative proposal, it automatically becomes law. “Citizens will have no power to challenge IPAB’s edicts in court,” they write—meaning that its members have “effectively unfettered power to impose taxes and ration care for all Americans.” As such, IPAB may be the most unconstitutional measure ever to pass Congress—a new “milestone on the road to serfdom,” as the authors put it. “IPAB truly is independent,” Cohen and Cannon explain, “but in the worst sense of the word: independent of Congress, independent of the president, independent of the judiciary, and independent of the will of the people.” It, in effect, attempts to amend the Constitution by statute, and it therefore may be more accurate to call it, not unconstitutional, but “anti-constitutional.”

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for you. Remember: we are talking about states passing laws to implement a federal law. All it takes to derail these new federal entitlements is one committee chairman—one bloc of legislators in either chamber—and that state can block the law’s health insurance exchange and Medicaid expansion. You can begin to see just how vulnerable this law is in the wake of the Supreme Court ruling.

The public is likely to reward state officials who do block implementation of this law. As I said, before the ruling, 65 percent of the public and more than 70 percent of independents wanted either part or all of the law struck down. Given that the Court invented a rather slippery rationale for leaving this law on the books, the backlash against Obamacare is likely to grow. The Obama health care law is now weaker and the path to repeal is clearer than it has ever been.