

## WHAT DOES THE CONSTITUTION HAVE TO DO WITH HEALTH CARE? – (MAYBE NOTHING)

Stephen L. Bakke – November 22, 2009

### Preface

In a report I wrote a few days ago I decided to give up on my prior suggestion for Federal regulation of health insurance companies. I had originally justified this based on practicality and also because I had concluded that my suggestion could be challenged on the grounds of it being unconstitutional. Here's what I wrote:

“I guess I have to give up on something. OK – I believe the most unlikely suggestion I presented was to move insurance regulation from the state to the Federal level. My logic for this was that since I was now permitting competition between insurance companies across state lines, it made sense that the regulation should also not be limited to the states ..... Shame on me! I have been reminded by others that federal regulation would likely be challenged in the courts as being UNCONSTITUTIONAL! The U.S. Constitution does not give the Feds the power to regulate the insurance industry. That means it is left to the states. As conservatives always preach: “If it ain't in the Constitution, the Feds don't get to do it!” This relates to concepts referred to as “enumerated powers”, and “states' rights”, etc. etc. – about which I'm no expert.

Step aside just for a moment and let's look at some more context for my original comment. I have been influenced by many comments about Obama's “transformation of America” being unconstitutional. Many have uttered opposition to requiring individuals to buy insurance, or pay a penalty for not being insured, to be unconstitutional – and numerous similar protests. But do they really make a difference and hold enough substance to be worthy of debate – at least in today's world?

### Challenge

It didn't take long for me to hear from my chief political and governmental advisor, son Jason. He wrote: “Well, I'm glad you abandoned the idea of federal control and regulation, but you didn't do it for the right reason.” He expanded this terse rebuttal of my logic with the following:

“While I agree that federal regulation is not a solution, the idea that it is unconstitutional is ludicrous, except for a principled conservative / fairly-strict constructionist (which I am and would like to see more conservatives agree).

In practice, the constitution is not "what it says" or "what we want it to say"; the constitution is what the Supreme Court **SAYS IT IS**. The fact is the Supreme Court has continually and dramatically eroded states rights and the idea of limited federal government. This has most commonly been done under powers

"IMPLIED" by the commerce clause, which gives congress the power to regulate interstate commerce. However, the definition of interstate commerce has been widely expanded to include any transactions that may, even theoretically, impact transactions across state lines.

In one recent decision, the Supreme Court ruled that vegetables and produce grown, sold and consumed in the same state theoretically impacted pricing and transactions in another state. This gave the USDA power to regulate the sale. In another, a person who grew and personally "consumed" marijuana was subject to federal regulation and prosecution due to the powers granted the government by the commerce clause. This resulted in a scathing dissent by Clarence Thomas who concluded: **‘Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything – and the federal Government is no longer one of limited and enumerated powers.’** *Gonzales v. Raich*; Dissent - Thomas

That (disappearance of states rights and the idea of limited federal government) being the reality, the idea that federal regulation of health care is unconstitutional probably would not have much of a chance on a constitutional claim. At least with the current interpretation of the constitution ..... I guess I’m starting to rant. – Jason”

## **Explanation**

OK ..... so now I understood why he agreed with my decision but he added that he thinks I made the right decision for the wrong reason. There he had me, so I asked what the right reason is. And he responded:

“The right reason (in my mind), is the idea of "competition of ideas" and what (syndicated radio host) Jason Lewis calls the impact of ‘laboratories of democracy’. When regulation and control are determined at the state level, new ideas can be tried in one state without impacting everyone in the country. If people are not happy with how their state is handling healthcare regulation, they can move to another state that is doing it better. This will put pressure on the state with the bad policy to correct/improve the policy, even if it is politically painful. Likewise, if a state is on to a great idea/program, other states can and will see their success and hopefully emulate it.

With federal control, there is absolutely no competition of ideas. Everyone either sinks or succeeds together. As you and I both know, federal regulation is commonly used to win the approval of constituencies even if the idea is horrible and not widely popular. e.g. look at the drive by the liberal "wing" to ensure abortion coverage is included in any federal healthcare ‘legislation’.

I guess it is just my old fashioned belief that competition drives innovation and new/better ideas. Centralized, federal regulation will smother true competition.  
– Jason”

### **Clarification**

Out of curiosity, I looked up additional information on the afore-mentioned Supreme Court decision and found that there was an unusual “split” among the justices. Conservative Justice Scalia agreed with the liberal majority – opposing Justice Thomas. And curiously, liberal Justice O’Connor joined Thomas and Chief Justice Rehnquist in dissenting from the majority. A quote from Justice O’Connor’s dissenting comments: **“Federalism promotes innovation by allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country .....**” Compare her reference to “federalism” and “laboratory” to the comments above in which Jason quotes commentator Jason Lewis referring to the “laboratories of democracy” – very insightful!

### **Surrender**

OK – Jason made some great points. I stand significantly more informed – and maybe even, at least partially, corrected. I’ll have to think about it some more .....  
OK, that’s enough time – he’s (gulp) totally correct. I learned something. Did you?

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I extend thanks, as always, to the many writers, commentators, researchers, and others, from all political extremes, whose hard work helps me greatly. They gather details and present much information. About all I do is gather, organize, summarize, and attempt to fill in with comments – commonly referred to as my frequent **“RANTS”**.

More comments will follow on important topics and personal thoughts as our President battles through tough territory. I want to join other conservatives in recognizing and respecting our new President – and supporting him when we should. But when we oppose our President’s policies, we should act in accordance with values of decency – but that doesn’t preclude a healthy dose of sarcasm and satire, which are valuable tools for political commentary.