

# **OBAMACARE – THE SUPREME COURT DECIDED**

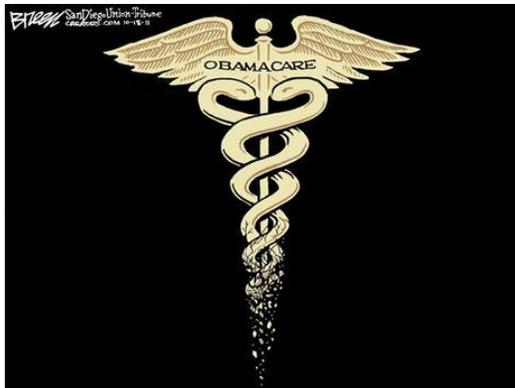
**– Betrayal? Activism? Or Perhaps Judicial Restraint in Disguise?**

**Stephen L. Bakke**  **July 4, 2012**



## **The Decision**

In my last report on health care reform I emphasized that the upcoming **decision by the U.S. Supreme Court had nothing to do with whether Obamacare was good law or public policy. It only had to do with the very technical question of “constitutionality.”** The main point of contention was the penalty which was levied on those not obtaining health coverage. The democrats in congress contended this was constitutional under the Commerce Clause while the republicans disagreed. A majority of states joined litigation challenging Obamacare’s constitutionality. The question ultimately made it to the U.S. Supreme Court. We thought the decision would hinge on the Commerce Clause arguments. Boy, were we surprised!



As the decision approached, and then surprised us, I quickly reached a conclusion as to what happened, why, and started this analysis. Stated simply, this Supreme Court decision rejected the claim that Obamacare was constitutional under the Commerce Clause. But, with Justice Roberts voting with the liberal leaning majority, **the court determined Obamacare to be constitutional if the “penalty” was interpreted as a tax.**

Additionally, states were given the right to “opt out” of expanding their share of Medicaid – without penalty.

**I would not have reached the same conclusion as the court. I am disappointed with the result!** I’m no expert on these issues – only an informed observer. I was not surprised by the opinion read by the Chief Justice, and I understand (sort of) how he got there.

One of the first motifs that occurred to me was judicial restraint, not activism. Initially I found very little discussion that wasn’t full of negative opinions toward Chief Justice Roberts. I wondered where all those conservatives were who might agree with me! Wasn’t I mainstream conservative? Eventually I heard faint mention of possible explanations close to my own –but not many.

Conservatives often preach judicial restraint. Maybe we forgot what it can look like.

## **What is Judicial Restraint?**

Judicial restraint is a theory that encourages judges to use restraint when deciding constitutional issues. This theory asserts that judges should hesitate to strike down laws unless they are obviously unconstitutional – a subjective consideration, but not difficult to understand as to its intent. Some would consider judicial restraint as the opposite of judicial activism.

Some experts say that in deciding questions of constitutional law, judicially-restrained jurists go to great lengths to defer to the legislature. Those who advocate judicial restraint believe the courts should uphold all acts of Congress and state legislatures unless they clearly violate a specific section of the Constitution. In practicing judicial restraint, the courts should defer to the constitutional interpretations of Congress, the President, and others whenever possible. The courts should hesitate to use judicial review to promote new ideas or policy preferences. In short, the courts should interpret the law and not intervene in policy-making.

The original constitutional role of Supreme Court was strengthened and defined by allowing what is described as judicial review, whereby legislation can be overturned, as to constitutionality, by the Court. That power came out of the Marbury vs. Madison Supreme Court Decision over 200 years ago. Constitutional constructionists are still sometimes reluctant to push that power too far, and I see hints of this in the Obamacare ruling. Remember, if there are alternative interpretations to a law, judicial restraint would lean toward encouraging the court to support the one that upholds the question at hand.

## **Chief Justice John Roberts – Confirmation Hearings and His Tenure as Chief Justice**

I initially thought back to the impression I had of Roberts during his confirmation hearings several years ago. He impressed all who listened and all who had a vote. Why? – Because he gave a very balanced expression of who he was and his judicial philosophy. A conservative? – Absolutely! A judicial activist? – No way! Then what is he? – A purveyor of judicial restraint while respecting the original intent of the U.S. Constitution!

Has there been anything since which would contradict my initial conclusion about Roberts? Not really. In fact, a week before the Obamacare opinion was released, Roberts surprised some conservatives by siding with the majority in the Arizona immigration decision. The Arizona legislation was intended to merely mirror the federal regulations. Because of poor federal enforcement policies, Arizona felt it needed to do this to emphasize and help solve its immigration dilemma. Makes sense to me!

Simply stated, Arizona had passed legislation at the state level that provided (among other things) permission for state and local law enforcement officers to require individuals to “show their papers” re: legal status – i.e. it is OK to ask for proof of citizenship if done according to established rules.

In its decision, the Supreme Court allowed the “show me your papers” policy for law enforcement officials. But it struck down the more sweeping legislation establishing immigration rules at the state level. For Roberts and the majority it seemed to make no difference that the Arizona law mirrored the federal law – immigration legislation remains

exclusively the duty of the federal government. That duty remains even though the feds have done an irresponsibly poor job fulfilling their duties regarding immigration policy.

Conservatives didn't like that decision – and I agree with them. But I (being the reasonable person that I am) understand how that was an appropriate application of conservative principles and original intent. It's also an example of judicial restraint – after all, granting permission for states to pass immigration laws would be considered “activist.”

### Conservatives Don't Get to Have It both Ways Either



In the debates over the last months, it was a **common conservative theme** in questioning witnesses and in related discussions, **that the “penalties” in Obamacare were actually taxes.** (Remember, “if it walks like a tax, and it talks like a tax, it’s a tax!”) Raising taxes would violate Obama’s promises not to do so. He repeatedly rejected that line of thinking because raising taxes on the middle class (which is targeted by the “tax”) is politically toxic.

Conservatives didn't like the liberal tactic of using the term “penalty” in the argument for constitutionality under the commerce clause. **Conservatives planted the seed for a line of thinking that this was actually a tax, and they got what they had originally suggested.** The law was declared constitutional on the basis of the broad powers of Congress to tax.

### Quoting from the Obamacare Decision and Some Hints about Judicial Restraint

Some excerpts from the majority opinion read by Justice John Roberts:

*Members of this court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices .....*



*Because the Constitution permits such a tax, it is not our rule to forbid it, or to pass upon its wisdom or fairness .....* ***If you don't like the legislation, change the legislators who wrote the law .....*** ***And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so .....***

*..... (Roberts and the majority) concluded that the individual mandate must be considered as imposing a tax on those who do not have health insurance .....*

### **In the Final Analysis**

You and I may not like the resulting decision. In fact that dissenting minority opinion I fervently agree with! Please consider whether or not the logic explained in Robert's reading of the decision reflect a legitimate underlying philosophy held by him. I am willing to accept and respect his thoughts. The most ardent complaints about the Chief Justice focus on the fact that this is a horrible law which he permitted to be passed. **I must point out that an appropriate Supreme Court decision can still result in a bad law. Bad legislation can still be constitutional, in spite of itself. Might that be the case here?**

To insist Roberts "caved" totally disregards who I think he is. To speak of him as critically as many conservatives are now doing, requires more of an ideological bent than I usually have. And perhaps he is somehow showing leadership to others on the Court, conservatives and liberals alike – who knows? Think about it.

**Join me and "restrain yourself" from throwing Chief Justice Roberts under the bus!** It's over! We now are at a certain point in this battle and we need to start here to continue our fight against Obamacare!

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Next I will deal once again with the Supreme Court's Obamacare ruling. Now that we have something we don't want, I will attempt to assess where we are now as a result of the decision – bad things and good things. This is a first step to better understand how to proceed in this long battle to do away with Obamacare.