

## OBAMACARE AND THE CONSTITUTION

- It's Not About Whether It's Good or Bad Policy!

- It's ALL About Whether It's Constitutional!

Stephen L. Bakke 🇺🇸 April 9, 2012

### The Process

The Supreme Court of the United States recently agreed to hear arguments regarding the constitutionality of Obamacare following conflicting decisions from several lower courts. Briefs were submitted and an unprecedented six hours of oral argument was scheduled by the Court. Those arguments have been made (yes, I listened – no video), and now we wait until probably June for the final decision. In the interim, the court will have had preliminary votes, discussions, drafts of majority and minority opinions, and a final decision will be made.



### The Issue

As this discussion develops we must set aside the debate as to whether or not we think Obamacare is good public policy (I think it's **BAD** public policy!) , and whether the reforms an effective way to change our U.S. health care system (It's **NOT!**). Those simply are not the issue. The real issue is very simple: ***Is Obamacare in general, or are any of its provisions, unconstitutional? One major focus in this Supreme Court decision is the constitutionality of the "individual mandate" – i.e. Is it within the federal government's constitutional authority to require individual citizens to buy health insurance.*** This last issue isn't whether or not we think all citizens **should** buy health insurance, but rather, **can the federal government compel them** under penalty of law to buy health insurance.

## What Does the Constitution Actually Say?

Supporters of the mandate would argue that Congress has such powers granted to it in the “Commerce Clause” of Article 1, Section 8 which reads:

*The Congress shall have power ... To regulate commerce with foreign nations, and among the several states, and with Indian tribes ...*

Opponents of this argument would say that the Constitution does not permit the government to forbid any individual from not acting in a commercial manner i.e. not purchasing health insurance. To argue otherwise, they would say, implies infinite powers over all transactions or potential transactions.

Proponents of this bill also argue that Congress also has the right to do this under the “Necessary and Proper Clause” of Article 1, Section 8 which reads:

*The Congress shall have power ... To make all laws which shall be necessary and proper for carrying into execution of the foregoing powers ... [That reference to “the foregoing” would include the earlier Commerce Clause.]*

Opponents argue that there would be no limits to the power of Congress if they could extend their authority in any situation that their leadership considers “reasonable and proper.” This reflects the statement by Justice Kennedy in the oral arguments. **Strict limitation on government is a cornerstone of our Constitution.** That isn’t to say that the Supreme Court would agree, given the huge commercial impact of this legislation. George Will recently stated, “if any activity, or inactivity, can be declared to have economic consequences, then anything can be regulated – or required.”



Quite simply, the individual mandate requires each person to purchase health insurance. If they don’t, they are subject to monetary penalties. I believe it’s also relevant to look back at the 1994 health care reform debate, during which the Congressional Budget Office was obviously concerned over the issue of mandating health insurance. The CBO wrote:

*A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy a good or service as a condition of lawful residence in the United States.*

## But Wait a Minute ..... We Have Unalienable Rights! Isn’t Health Care One of Them?

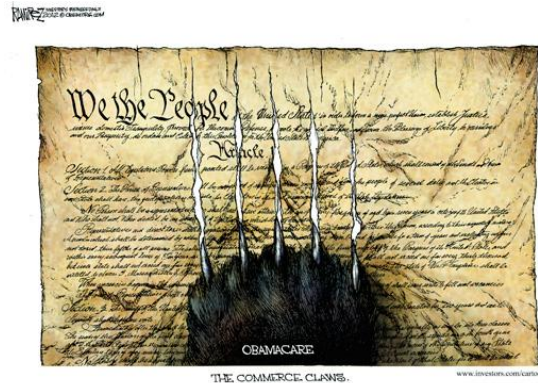
If healthcare really is one of our “Unalienable Rights,” doesn’t that mean the legal challenge is a “moot point”? Well, perhaps, but please note the following which are questions and

answers relative to determining what really are “Unalienable Rights,” express or implied, in our Constitution (For more information, see earlier reports on “Rights.”):

- Do the Unalienable Rights include anything that can be “bought and sold”? **No!**
- Can you think of any Unalienable Rights that you have to pay for? **No!**
- Are there any Unalienable Rights that you can “run out of”? **No!**
- Can you think of any Unalienable Rights that the government provides? **No!**
- Are there any unalienable rights that can be taken away by a government or individuals? **No! The right itself is unalienable and can’t be taken away. But, Yes! The exercise of those rights can be denied or hindered!**
- Can the government provide an atmosphere in which unalienable rights are protected? **Absolutely yes!**

A “YES” answer to any of the first four questions relative to a service or benefit would imply that somehow the granting of that “benefit” would diminish someone else’s rights or resources and it is therefore not an Unalienable Right as envisioned by our Founders. If products and services are considered a right, then one must observe that benefit could possibly be “oversubscribed” because products and services can, at least temporarily, “run out.” **Therefore that benefit can’t be an Unalienable Right under the Constitution.**

True rights are protected, not provided, by government. Health care is a group of products and services that have been successfully developed and refined, to a great degree within the U.S. **Health care is a “good and wonderful” thing, for sure!** Let’s work in the right way to make it available to everyone who desires it. **To equate a true right to a product or service is to cheapen the intentions of our Founders as it relates to individual liberty.** Let us not diminish this good and wonderful thing by attempting to make it an inefficient and poorly administered government entitlement.



### **Some More Things I’m Thinking About as This Supreme Court Challenge Rolls Out**

Here I will present, for my reference and yours, a “digest” of considerations I have picked up in recent weeks particularly from the WSJ, and also from Heritage Foundation, NCPA, Washington Post, NY Times, Patriot Post and numerous other sources and newspapers:

- The main issue currently is the individual mandate requiring individuals to buy health insurance. This is important because it is a funding source for the legislation.
- This funding probably could have been accomplished in more constitutionally acceptable ways including raising general taxes for the purpose – but that was politically unpalatable – or so Obama and the democrats thought. And, that’s not entirely constitutionally “bullet-proof” either.

- The mandate, with penalties, was thought to be politically more palatable, but that may not be the case. They have relied on the federal government’s power under the commerce clause to justify this approach i.e. the regulation of interstate commerce.
- They are on potentially VERY thin ice relying on the Commerce Clause because while the feds do have broad powers under this clause, those powers are not limitless. This approach stretches the clause to include things never before contemplated, and certainly not intended. Remember, the **feds only have powers actually enumerated to them** – and in this case, that is a “stretch” at best!
- **Here is a fact that I find compelling for analyzing this case!** The Supreme Court has consistently acknowledged that the Constitution denies the feds the type of broad public health and welfare regulatory authority know as a “general police power.” This is **reserved exclusively to the states!** The defining characteristic of general police power is the states’ ability to regulate people simply as people – e.g. the Supreme Court has ruled that states, exercising their general police power, can require resident adults to obtain a smallpox vaccination (for example). Only this type of authority could support Obamacare’s individual mandate.
- Based on the last point, an article appearing in the WSJ points out very clearly that Congress has crossed a fundamental constitutional line. According to that article, legal thinkers from the left and right too often forget that Congress has no constitutional power simply to regulate the economy. Rather, that power comes from a series of discrete authorities – not general authority.
- **The Constitution divides governmental power between federal and state governments so that one may check the other. In this case, the states can do this but the feds can’t!**
- The “Necessary and Proper Clause” does NOT guarantee Congress whatever power it would like to reach its policy goals.

Once again, important things we often forget are:

- Federal authority is limited to enumerated powers – however vague they may seem.
- Assisting us in understanding those limits is the concept of “separation of powers.”
- Sometimes we forget that “separation of powers” exists not only between the three federal branches of government, but **also between the federal government and the states.**
- If the individual mandate is upheld by the Supreme Court, it is generally acknowledged that there will be almost nothing that Congress couldn’t do under the Commerce and Necessary and Proper clauses. And that’s NOT a good thing!

*If Congress can do whatever in their discretion can be done by money, and will promote the General Welfare, the Government is no longer a limited one, possessing enumerated powers, but an indefinite one, subject to particular exceptions. – James Madison*

