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Courts & Health Care

Michael Sean Winters | Feb. 1, 2011 Distinctly Catholic

It is right and fitting that the courts are looking at the question of whether or not the health care reform bill passed last year is constitutional [1]. That is what courts ask and answer. But, if the issues were not so important, it would be hilarious to see these conservative judges repudiating the kind of judicial restraint they have been urging for years. They have long argued that the courts should defer to the political branches, but evidently now they are having qualms. They will hide behind a restrictive reading of the Commerce Clause, to be sure, but it is difficult to see the intellectual consistency of their stance. If they argue, as for example Justice Scalia argues, that Roe was wrong to remove the issue of abortion from the political branches, why should the Congress and the President not be able to fashion a health care law too?

Ever since Bush v. Gore, it has required more than a little credulity to believe conservative jurists when they decry activist judges. Now, it is becoming impossible.

I will say this. I suspect that Chief Justice John Roberts, who is still a young man, cares more about the Court's long-term status than he does about health care. I agree with Charles Fried, who was Solicitor General in the Reagan years, that Roberts will seek a 6-3 decision when the matter lands before the high court. Nothing more clearly erodes the Court's stature than a series of highly controversial 5-4 splits.

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[1] http://www.politico.com/news/stories/0111/48563.html