Written by **Jack Kenny** on April 3, 2012

Now “Progressives” Want “Judicial Restraint”

The court itself may face the strongest backlash against its stand since the 1973 *Roe v. Wade* decision overturned the abortion laws of 40 some-odd states. Or perhaps since the 1930s, when Franklin Roosevelt waged verbal and ideological warfare against the "nine old men" on the high court who, with their supposed "horse-and-buggy" adherence to an 18th century document called the Constitution of the United States, were blocking the "progressive" legislation of the New Deal.

Save for Generations X and Y, which seem to regard ignorance of history an inalienable right of youth ("It was before my time, man"), most Americans may recall that Roosevelt proposed to the Congress and nation a plan for expanding the number of justices on the Supreme Court from nine to as many as 15, thereby giving the President more opportunity to appoint judges in accord with his program. The "court-packing" plan died in Congress, but it is a mistake to regard that as a defeat for Roosevelt and his agenda. The legislation was still pending when the court felt the heat and began to see things by Roosevelt’s light. The majority began to move away from its stubborn conviction that an act of Congress, to be constitutionally valid, must fall at least remotely within the legislative powers enumerated in the Constitution. So when the court upheld the claim of constitutionality for the Social Security Act, people noticed the difference and the Democratic Congress allowed the court-packing plan to die a quiet death. Thus was born the classic line, "A switch in time saves nine."

And as people like to say, history stutters a lot, or "repeats itself." Just as there was a second Agricultural Adjustment Act, upheld by the Supreme Court, so it may be that if the current healthcare legislation is stricken for its constitutional infirmity, there will be a new and "improved" version of

ObamaCare (or national RomneyCare) that the court will say is compatible with the Constitution, even if it's not. That could well be the result of a summer and fall campaign in which the central issue is not ObamaCare but the alleged overreach and usurpation by the imperial court. Because if the verdict in June goes against the Affordable Care Act, you can bet the farm and the ranch and half the national debt that Obama and the Democrats and their allies in the media will be orchestrating that charge like a symphony, beating it like a drum, playing it like a violin, and trumpeting it throughout this fair land, from the mountains to the prairies and from sea to shining sea.

Obama appears to have had success in building up resentment against the court's *Citizens United* decision, which took the McCain-Feingold shackles off corporations, including non-profit advocacy groups, allowing them to run ads naming candidates and describing their nefarious deeds right up to Election Day. Though it appears to have been a judicial taking at face value the First Amendment stricture that "Congress shall make no law … abridging the freedom of speech," Obama and much of the establishment media have rather effectively portrayed it as opening the door to a corporate takeover of our elections.

But that campaign will pale in comparison to what we might expect if ObamaCare goes down. Already much of the "mainstream" media has begun venting its indignant wrath based on the kind of questions asked and reservations expressed by the more conservative members of the court in the three days of hearings held last week. The *New York Times*, to cite but one conspicuous example, is not waiting for a decision to be issued before bitterly denouncing the court for its lack of "judicial restraint." Sunday's lead editorial, "The Roberts Court Defines Itself," upbraided the conservative jurists for their "willingness to replace law made by Congress with law made by justices."

Newcomers to the planet or those with very short memories might infer from that editorial that judicial invalidation of "law made by Congress" is something new. Perhaps we missed the protest published on the editorial page of the *New York Times* in 1998 when the high court ruled invalid an act of Congress giving the President a budgetary line-item veto. The court held that the legislative power to appropriate and expend funds, being assigned by the Constitution to the Congress, may not be assigned by Congress to the executive. Surely, the *New York Times* did not protest when the same court in the year 2000 struck down a law banning partial birth abortions, the practice of killing infants partially outside the womb that even many "abortion rights" advocates considered a form of infanticide.

No doubt anticipating charges of hypocrisy, the *Times* editorial defended some of the most expansive and controversial decisions of the Warren Court in the 1950s and '60s as models of cautionary restraint, compared to the allegedly reckless course pursued by the Roberts Court. The Warren Court carefully worked toward and often achieved a broad consensus, in contrast to the narrow 5-4 decisions of recent years. The 1958 *Cooper v. Aaron* opinion, for example, was a unanimous decision in which the court stated for the first time that all the states are bound by decisions of the Supreme Court. Yes, the unanimous court said that. And the *New York Times* thought it not worth mentioning that the Constitution does not.

A 9-0 decision might suggest the case was a "no-brainer," the outcome obvious to any reasonable person. But the Warren Court issued a series of 9-0 decisions in cases involving race relations that went against all relevant law and precedent. A unanimous decision once in a while is to be expected. But a series of them suggests a decision to march in ideological lockstep rather than seek a genuine consensus. It was not, after all, by the incontrovertible reasonableness of his arguments that Stalin used to win near unanimous reelection in the Soviet Union.

The Warren Court's 1954 *Brown v. Board of Education* decision, ordering an end to racial segregation in public schools, was a unanimous decision. To reach it, the justices had to overturn not only the court's own *Plessy v. Ferguson* "separate but equal" decision of 1896, but a long series of court decisions and acts of Congress since then. They include the 1927 decision Supreme Court decision in *Lum v. Rice*, in which Chief Justice (and former President) William Howard Taft wrote that the "separate but equal" principle is "within the discretion of the State in regulating its public schools and does not conflict with the 14th Amendment." Taft, by the way, was writing the unanimous opinion of the court.

The 14th Amendment was the basis for many of the groundbreaking Warren Court decisions, including *Baker v. Carr* (1962) requiring all state legislative seats to be apportioned equally by population rather than by geographic districts, as they were in most legislative bodies and still are in the U.S. Senate. The 14th Amendment requires each state to provide its inhabitants "the equal protection of the laws." What has often been forgotten is that it also says: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Warren Court somehow took that to mean the court has power to enforce, with inappropriate jurisprudence, the provisions of the article, thereby supplanting congressional law with "law made by justices."

It has often been argued that the court had to act to correct injustices because the Congress did not. But there is such a thing as legislative as well as judicial restraint, and on matters that are within the purview of the Congress to decide, a decision not to act is just as much the prerogative of the lawmakers as a decision to act. It is no less a power of the Congress than decisions about which cases to accept and which not to decide are in the power of the court. Inaction by one branch of government does not justify invasion and usurpation by another.

Its current complaint notwithstanding, the *New York Times*, like other critics of the Roberts Court, has long been a fan of court decisions that "replace law made by Congress with law made by justices." Indeed, the very principle of judicial review was established by the *Marbury v. Madison* decision of 1803, in which an act of Congress was declared null and void because it gave to the Supreme Court original jurisdiction where the Constitution allowed it only appellate jurisdiction. There are, of course, abuses of judicial review and the editorial writers at the *Times* and their liberal brethren in other major media have often been in favor of them, particularly when they are directed against the states. They continue to approve, for example, of the jurisprudence in *Roe v. Wade* that found state abortion laws unconstitutional because they violated an undefined zone of privacy, found in "penumbras" formed by emanations from rights that *are* defined in the Constitution. In other words, because there is a constitutional right to be free from unreasonable searches and seizures and from the imposition of soldiers quartered in your home in a time of peace, it surely must follow ("hipso fatso," as Archie Bunker used to say) that a woman must be free to have the child of her womb killed as a matter of choice. What could be clearer?!

But now if the Supreme Court, in an anticipated 5-4 ruling, finds that an individual's decision not to purchase health insurance is not interstate commerce and may not be "regulated" as such by Congress, it will be denounced as a return to the "dark ages," when government recognized some degree of personal sovereignty over one's own life. Likewise, if the federal government does not force employers, including those in religious organizations with a moral and doctrinal objections to it, to provide employees with insurance plans that will cover contraceptives and abortion-inducing drugs, free of charge and without deductibles, it is nothing less than a "war on women."

To paraphrase an ancient Roman, the so-called progressives of our day have created a social, political and intellectual wilderness and have called it "progress."