

HEALTH CARE: A RIGHT? OR “JUST” A “GOOD THING”

Stephen L. Bakke – March 16, 2010

From the Declaration of Independence

We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

Pursuant to the Declaration of Independence

After the Constitution was ratified by the states in 1788, there was some criticism, particularly among the “Anti-Federalists” that it contained few guarantees of individual rights. Memories, whether Anti-Federalist or not, were still prominent about the many violations of liberty carried out by the British. Those violations led to grievances which had been enumerated in the Declaration of Independence.

The Constitution did not adequately address the individual rights described in the Declaration and hence the motivation, in 1791, to adopt the first 10 Amendments that became known as the “Bill of Rights.” James Madison, then a member of the U.S. House of Representatives, led Congress in this major undertaking.

The Question Regarding Health Care

There are prominent questions in the health care debate, the answers to which demonstrate a major schism between liberal and conservative thought – i.e. Is health care a right? Is it the government’s job to fulfill/guarantee certain of those rights? and ... Can the federal government actually provide rights?

The liberal philosophy tends to lean toward an assumption that the government should be limited only by what it can’t deliver, and that health care would fit their definition of unalienable rights. The conservative philosophy leans more to in the traditional view that the federal government is narrowly limited to its enumerated powers. Further, conservatives would say that while health care is a very good thing, it is not an unalienable right.

Unalienable – What’s That?

No, it has nothing to do with having an anti-immigration policy. According to several dictionary sources, it is intended to convey the following characteristics: incapable of being repudiated; incapable of being transferred to another; belonging to a thing by its very nature; something intrinsic; the very essence of something; AND, a state of something that by its very nature cannot be sold. (I wonder if that final definition also imply that it can’t be purchased?)

Taken in the context of the Constitution, the Bill of Rights, and the Federalist Papers, any mention of rights should generally be taken as a reference to rights of the individual. And, in my opinion, considering the emphasis on limitations on government, the nature of a right inherently implies “hands off” to the government.

The Bill of Rights

The Bill of Rights enumerates certain unalienable rights such as: freedoms of religion, speech, press, and peaceful assembly; right to keep and bear arms; speedy and fair trial; and trial by jury. For the most part the balance of the first 10 amendments deals with prohibitions or limitations on the federal government – e.g. forbids unreasonable searches and seizures, forbids mandatory self-incrimination, prohibits double jeopardy, limits confiscation of property for public use, prohibits cruel and unusual punishment, etc. Given the extent of these limitations, it has been suggested that the nickname for the first 10 amendments should have been “Bill of Limitations.”

As is often pointed out, the Ninth Amendment states simply and unspecifically that just because a right is not enumerated in the Constitution, does not mean that the people do not retain that right. Some of our founders did not want to include a “Bill of Rights” in the Constitution for fear that if certain rights were specified, then the people would be denied other rights that were not specifically listed. This amendment was therefore a compromise.

The Ninth Amendment has been a justification (incorrectly I believe) for significantly expanding the definition of “implied rights”. As it relates to health care, I believe it is important to evaluate its status in the context of the Founders’ intentions.

Some Questions To Ask

Taken in the context of the Declaration of Independence and the Constitution:

- Do the stated rights include anything that can be “bought and sold”? **No!**
- Can you think of any stated rights that you have to pay for? **No!**
- Are there any stated rights that you can “run out of”? **No!**
- Can you think of any stated right that the government provides? **No!**
- Are there any stated rights that can be denied or taken away? **Yes!**

A yes answer to the first four questions would imply that somehow the granting of a right could diminish someone else’s rights or resources. For example, if products and services are considered a right, then one must admit that rights can be “oversubscribed” because products and services can, at least temporarily, “run out.”

Quoting economist, educator, and author Dr. Walter E. Williams:

True rights, such as those in our Constitution, or those considered to be natural or human rights, exist simultaneously among people. That means exercise of a

right by one person does not diminish those held by another ... For Congress to guarantee a right to health care, or any other good or service, whether a person can afford or not, it must diminish someone else's rights, namely their rights to their earnings. The reason is that Congress has no resources of its very own ... If one person has a right to something he did not earn, of necessity it requires that another person not have a right to something that he did earn. To argue that people have a right that imposes obligations on another is an absurd concept.

True rights are not something like a product or service that is to be bought and sold and has limitations. Rights are inherent and are not diminished as there is increased desire for them. Are food, drink, and shelter unalienable rights as used in our founding documents? No, these are merely very good and desirable things that can be bought and sold – i.e. products and services.

To equate a true right to a product or service is to cheapen the intentions of our Founders as it relates to individual liberty.

The Government's Role

We need to look at the definition of the government's role as described first in the Constitution and then in the Tenth Amendment to the Constitution. I believe the order in which you consider these two items is important. A friendly critic of my opinions once wrote: "Clearly the Constitution defines that it is the responsibility of the Federal government to 'provide for the common defense and general welfare' ... and furthermore 'to make all Laws which shall be necessary and proper for carrying into execution the foregoing powers' ... there is an inherent tension between the Tenth Amendment and Article 1, Section 8 of the Constitution. The Tenth Amendment says everything not granted to the Feds is granted to the states and individuals. But at the same time we have this incredibly broad and vague grant of powers in Article 1, Section 8. It is essentially a 'get out of jail free' card."

That last statement may be easily inferred if you consider the Constitution as a "qualifier" of the Bill of Rights. However, the opposite is the case. The Tenth Amendment was intended to be a strong statement that the enumerated powers in the constitution (particularly Article 1, section 8) is lengthy because it was important to be specific. It was specific because the government's role was intended to be limited and include only those things specifically described/enumerated. Unlike the implication in the above quote referring to the "get out of jail free card," Article 1, Section 8 does not weaken or qualify the Tenth Amendment. The reverse is most certainly the case. The Tenth Amendment relinquishes to state governments those powers the Constitution did not expressly grant the federal government or deny the states, thereby absolutely limiting the power of the federal government.

Some would say the right to "keep and bear arms" is satisfied by the federal government's creation of our defense system. By implication, this is used as an example of the the government providing rights. I think not. To reach that conclusion, one has to

diminish or ignore the irrefutable focus of rights as inuring to the individual – not society or some group. No, it’s “We the people” that is emphasized, not any government or formal group.

The mindset should be one of implied limitations, not easily and broadly expandable powers of the federal government. Rights are inherent and not government provided. The government protects our rights. Sometimes people obscure (consciously or unconsciously) the difference between “provide” and “protect.”

But Does Government Guarantee Our Individual Rights?

Government’s job is to guard against the elimination or violation of individual unalienable rights. Its goal is to guarantee that these rights’ exist, and are manifested through what we call liberty. Once again, this responsibility to guard and protect our rights often is misinterpreted to mean the government can provide rights. It is this incorrect interpretation of government’s role that leads the more liberal politicians to try to provide all things that may simply be “desirable and good.” They are not true rights.

What Happens When Rights are Incorrectly Defined?

An “incorrectly presumed” right becomes an entitlement when, by force of governmental influence, it is mandated on an individual. It may be good or bad. It may be constitutional or (in the minds of some) unconstitutional. But the delivery of entitlements is almost always inefficient and inconsistent – and fraught with unintended consequences.

Often, when the government is involved in attempting to widen the definition of a “right,” other artificial forces take hold and results are disappointing - even damaging. Consider the movement in recent years to declare home ownership a right. To that end the Community Reinvestment Act was passed and the marketplace was asked to be creative in finding ways to underwrite mortgages to allow more Americans to own homes. We saw what happened: the housing bubble, Frannie, Freddie, foolish loan underwriting, and eventually a “crash” in the fragile “pretend” housing market.

Stated another way, things that are determined by the government to be deserved by the population shouldn’t be confused with rights. Rights are inseparable, and a given. Those things “deserved” and provided by the government are entitlements which are too often wasteful and inefficient. That is to say, the thing in question may be a “good thing”, but let us not presuppose that government delivery is the best way for citizens to receive it.

There are “good things, and things that are deserved”. Let us not make the mistake of elevating these to the lofty heights and importance of our “Unalienable Rights.”

Where Does Health Care Fit?

For the reasons expressed or implied in this discussion, health care is by no means a right as contemplated by our Founders. It is a group of products and services that have been

successfully developed and refined to a great degree within the U.S. It's a "Good Thing" for sure! Let's work in the right way to make it available to everyone who desires it. Let us not cheapen and diminish what it is by incorrectly labeling it as a right and thereby attempting to make it an inefficient and poorly administered government entitlement. Remember, true rights are protected, not provided, by government.

HEALTH CARE IS A "GOOD AND WONDERFUL THING"! (But not an unalienable right.)