

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.)

HEALTH CARE LEGISLATION – CONSTITUTIONAL ISSUES

Stephen L. Bakke – March 20, 2010

As health care legislation moves closer to its final legislative moments, one of the things that is being discussed by those opposing its passage is the constitutionality of the process being followed and also certain provisions of the proposed law. Whether or not the legislation passes, it is relevant to discuss the nature of the constitutional issues. And if the legislation does pass, it is likely there will be attempts at constitutional challenges.

As I understand it there are four major areas of constitutional concerns:

- The "individual mandate" in the legislation, whereby individuals will be required to purchase health insurance.
- The deals that were cut to provide more favorable treatment to a few states.
- The requirement that states establish such things as benefit exchanges.
- The potential "deem and pass" procedure in the House followed by the "reconciliation" procedure in the Senate.

It seems that public opinion and strict application of our Constitution is getting in the way of the Democrats' goal to pass this legislation – so they are resorting to nothing less than trickery. Maybe Obama, a very savvy and clever politician, was anticipating a future battle when he "called out" and ridiculed the Supreme Court during his last State of the Union Address. Maybe he was saying, "don't take me on because I'm too formidable."

Individual Mandate

Quite simply, the individual mandate requires each person to purchase health insurance. If they don't, they are subject to monetary penalties. In the 1994 health care reform debate, the Congressional Budget Office was sufficiently 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.

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. An interesting example of how this could be extended has been presented approximately as follows: What would then prevent the government from requiring all citizens to purchase a GM or Chrysler automobile to help out the suffering auto industry – particularly since these are now owned/controlled by the federal government? Remember that most of the basis for requiring all persons to buy health insurance was to subsidize the expansion of coverage to many millions of citizens.

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 would 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.” A strict limitation on government is a cornerstone of our Constitution. That isn’t to say, however, that the Supreme Court would agree with this position given the huge commercial impact this legislation would have. But George Will comments that “if any activity, or inactivity, can be declared to have economic consequences, then anything can be regulated – or required.”

Favorable Treatment Given Certain States

Senator Orrin Hatch, and several legal scholars believe that granting of favors in exchange for votes is a violation of the General Welfare Clause of Article 1, Section 8 which reads:

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties imposts, and excises shall be uniform throughout the United States.

Their argument seems logical that selective spending targeted at certain states runs afoul of the “General Welfare Clause.” The impact of these favors seems to be diminishing, but is not totally eliminated.

Requiring the States to Establish Benefit Exchanges

Under this legislation, states would be required to establish benefit exchanges and other such things. I will again quote Senator Orrin Hatch, et al:

... [the proposed legislation commands] that states establish such things as benefit exchanges ... requires states to establish these exchanges or says that the Secretary of Health and Human Services will step in and do it for them. It renders states little more than subdivisions of the federal government. This violates the letter, the spirit, and the interpretation of our federal-state form of government ... In [two decisions] the Supreme Court struck down two laws on the grounds that the Constitution forbids the federal government from commandeering any branch of state government to administer a federal program ...

This is dealing with the issue of “dual sovereignty,” which I understand to recognize the fact that the federal and state governments each have their own distinct sovereign constitutional powers. While I understand that federal law can trump state law on some issues, I found reference to the fact that the Supreme Court has upheld that each level of government can “remain independent and autonomous within their proper sphere of authority.”

“Deem and Pass”

The procedure being considered for passing the bill is called “deem and pass.” It uses a “self executing rule” which allows the House to accept the already passed Senate legislation without actually having an “up or down” vote on that version of the bill. As of this late date we don’t know if they will have the temerity to use this procedure, but it’s worth examining just in case.

If used, it will be part of the House’s entire effort to, at the same time, send their desired changes to the Senate. The actual vote will be on the House’s intended “fixes” to the Senate bill but because of this rule, successful passage of the fixes will deem the Senate vote passed. The House members receive “cover” because they can honestly say they didn’t vote for the Senate bill, rather it was the “fixes” they were approving.

The Senate is then supposed to use reconciliation to pass the bill with 51 votes. But remember, reconciliation can’t be used unless the legislation is actually signed by the President. So the House has to “trust” the Senate to come back and apply reconciliation to make changes satisfactory to the house. There really isn’t any incentive for the Senate to do so. So it’s highly likely the Senate version will be the final law!

The constitutional problem with “deem and pass” is that it doesn’t comply with this:

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the president of the United States ...
- Article 1, Section 7 of the United States Constitution

This clause has always been interpreted as meaning that actual “up or down” votes must be used. Unless passed, the law can’t be sent to the President for consideration.

There seems to be strong precedence for requiring a formal vote. The Supreme Court recently emphasized that specific procedures must be followed – i.e. pass with a majority vote in the House; pass an identical version by vote in the Senate; and signed into law by the President. Justice Stevens wrote for the majority (re: The Balanced Budget Act of 1997):

The Constitution explicitly requires that each of those three steps be taken before a bill may “become a law” ... “The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debate and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only “be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”

Regrettably, there is also precedence for applying the self executing rule – unfortunately including by Republicans. But the prior use was for routine legislation and had been agreed to by both parties. There is nothing bi-partisan about Obamacare and it certainly isn’t routine. But is a “deem” actually equivalent to a constitutional vote? Clearly not if you pay attention to Nancy Pelosi’s recent comments:

Nobody wants to vote for the Senate bill ... I like it because people don’t have to vote on the Senate bill ...

Here is Obama’s response (dodge) when asked about the “deem and pass” process:

I don’t spend a lot of time worrying about what the procedural rules are in the House or Senate ...

Obviously the end justifies the means for our President. This is reminiscent of what his “deemed” mentor “in-absentia,” radical leader and organizer Saul Alinsky, wrote in his book “Rules for Radicals.” Alinsky was ruthless and would stop at nothing to win. Alinsky’s tactics are eerily similar to Obama’s. It was reported that Obama taught community organizers using Alinsky’s book. Here is a montage – some of this is scary:

Ridicule is man’s most potent weapon ... if you push a negative hard and deep enough, it will break through ... pick the target, freeze it, personalize it, and polarize it ... in war the end justifies almost any means ... the less important the end to be desired, the more one can afford to engage in ethical evaluations of means ... [an organizer] asks of ends only whether they are achievable and worth the cost; of means, only whether they will work ... you do what you can with what you have and clothe it with moral garments ... what follows is for those who want to change the world from what it is to what they believe it should be ... the first

step in community organization is community disorganization ... an organizer must stir up dissatisfaction and discontent ...

In the final analysis, I'm not qualified to know if this "deem and pass" is technically constitutional or not. But I know it is not in keeping with the spirit of the Constitution. And I know "sleazy" when I see it. Pay attention and see if they do try to use "deem and pass.

For information on the "reconciliation" procedure, refer to my recent report thereon.

If this legislation passes, I believe a judicial review should be performed. As of this date, a majority of states (37) and other groups have stated their intention to seriously consider challenging this legislation on Constitutional grounds. Obviously there is more to the issue of constitutionality than can be effectively summarized here. I gave it my best shot anyway.

In closing, I will quote Thomas Jefferson who had this to say about the limited power of Congress:

[G]iving [Congress] a distinct and independent power to do any act they please which may be good for the Union, would render all the preceding and subsequent enumerations of power completely useless.