

Constitutional Corner – Healthcare and the Constitution

There is not a single word in the Constitution which gives the federal government the authority to design and deliver a healthcare system, whether we are talking about Medicare, Medicaid or the Un-Affordable Care Act – there are two words; they are: “general welfare.”

Now that I have your attention, let me clarify: I don’t believe for one moment that the Framers envisioned a national government that would be in the business of providing healthcare to all its citizens or any part of them. To the Framers, providing medical care was not the purpose of government; the purpose of government was, and remains today, securing our rights.

Aw, but what if healthcare is indeed a right, as some people insist. Doesn’t that give the government the authority, even the responsibility to be involved?

In 1765, Sir William Blackstone indeed wrote that a person has a right to the preservation of their health, and protection “from such practices as may prejudice or annoy it.”¹ Does being unable to afford health insurance “prejudice” your health? Certainly. Is being unable to afford health insurance a “practice” which prejudices your health? Certainly not. Besides, Blackstone appears to stand alone among early British political philosophers in declaring the preservation of health to be a right.

“The right to adequate medical care and the opportunity to achieve and enjoy good health” was part of Franklin Roosevelt’s Second Bill of Rights, which he proposed during his 1944 State of the Union message to Congress, along with a right to “a useful and remunerative job, the right to earn enough to provide adequate food and clothing and recreation (even if you have no skills apparently). If you were a farmer, FDR thought you had a right to raise and sell your products at a return which gave you and your family a decent living; if you were a businessman, you had a “right” to conduct your business without “unfair” competition; you had a right to a “decent home,” a good education, and protection from the economic fear of old age, sickness, accident, and unemployment.

Roosevelt felt confident proposing these new “rights” because he had seven years earlier effectively neutered the Supreme Court in the infamous “Court Packing” affair. He wouldn’t have any problem getting the high court to see these as new rights hidden in the 9th Amendment. Unfortunately, a little more than a year later FDR was dead and the idea of a second Bill of Rights died with him.

¹ Commentaries on the Laws of England, Book 1. P. 130.

Had this Second Bill of Rights somehow become part of the Constitution, can't you imagine the avalanche of cases that would ensue as the courts were called upon to decide what a "decent" home was, what "unfair" competition consisted of, what a "useful" job meant and what "adequate" food and clothing comprised as the government struggled to provide these benefits to those lacking them?

But we all know there are people walking around today, and a growing number of them, who believe providing our essential needs is precisely why we have government.

Organizing For America, Obama's post-presidency cheerleading organization, believes healthcare to be a right and they are aggressively fundraising based on the threat of Obamacare's repeal.² Once healthcare insurance is determined by a majority of Americans to be a right, and last week's vote on the Republican replacement, the American Healthcare Act, suggests that it may have already become such, there will be no putting that genie back in the bottle. Think of all the poor people who will die if you take away their health insurance, you heartless Republican you.

All this is thanks to two Supreme Court cases in 1936 and 1937: *U.S. v Butler* and *Helvering v. Davis*. In the former the Supreme Court decided that the General Welfare Clause was a separate grant of spending authority given to Congress.

Madison and others had repeatedly said, No! The phrase general welfare was not a separate grant of power, it was instead a constraint, a limitation on the enumerated powers. Spending on the enumerated powers would only be legitimate if it contributed to the welfare of all Americans, not the welfare of specific individuals, groups or classes of citizens. But in *U.S. v. Butler* the Court thumbed its collective nose at Madison, and said Congress could spend willy-nilly on "general welfare." But what was considered general welfare and what was not? The year after *Butler*, the court delivered its *Helvering* decision over the constitutionality of Social Security.³ In a 5-4 decision, the Court said the line between general and specific welfare would not be determined by the courts; it was up to Congress to decide. So now, anything Congress spends money on is clearly general welfare and not specific welfare, because if it was specific welfare, Congress would not have spent the money on it! See the logic? There is no effective limit to what Congress can spend money on. And neither do they have to have cash on hand to do so, as our \$20 Trillion in debt demonstrates.

² https://www.ofa.us/its-no-accident/?email=gport%40aol.com&zip=23693&utm_medium=email&utm_source=obama&utm_content=2+-+httpsmyofausHealthCareIsARight&utm_campaign=em_x_aca_20170330_x_x_jl_remainder&source=em_x_aca_20170330_x_x_jl_remainder&refcode=em_x_aca_20170330_x_x_jl_remainder

³ <http://archive.lewrockwell.com/orig3/attarian7.html>

The Congressional Research Service, in a 2010 report called "[Health Care: Constitutional Rights and Legislative Powers](#)"⁴ agreed that there is no explicit right to health care set forth in the original Constitution. However, they note the growing sense by many Americans that today there should be.⁵ In 2009, Congressman Jesse Jackson introduced a bill that would amend the Constitution to explicitly guarantee that, quote: "[a]ll persons shall enjoy the right to health care of equal high quality" and that "[t]he Congress shall have power to enforce and implement this article by appropriate legislation."

Jackson's proposed amendment didn't go anywhere, Congress hasn't been in the mood to amend the Constitution for 40 years. But why do they need to, in this case the "right" is already there in essence.

On July 30, 1965, President Lyndon B. Johnson signed H.R. 6675, creating Medicare. Former President Harry Truman, who had first proposed the idea of a national health insurance program to Congress, was issued the very first Medicare card during the ceremony.

In 1972, President Richard M. Nixon signed into the law the first major change to Medicare, expanding coverage to individuals under the age of 65 with long-term disabilities and individuals suffering from end-stage renal disease (ERSD).

Medicare and Medicaid coverage have been expanding ever since, with Parts C & D added to the original Parts A & B and disability coverage now including those with amyotrophic laterals sclerosis, aka, Lou Gehrig's Disease.

In 2015, the Kaiser Family Foundation reported the number of Americans on Medicare as just over 55 million or 15% of the population. Another 65 Million, or 20%, are receiving Medicaid benefits. Add to this the people participating in CHIP and veterans' health care programs and you find there is nearly 50% of the American public on some form of socialized health insurance plan or subsidy.

Why shouldn't the government get involved in supplying healthcare? Let me count the ways.

In 2015, a Government Accountability Office report⁶ found that \$60 billion —10% of Medicare's budget — was lost to waste, fraud, abuse or improper payments. Among the worse problems, the GAO found 23,400 fake or bad addresses on Medicare's list of

⁴ <http://www.ncsl.org/documents/health/LegPowers.pdf>

⁵ The referenced report contains a good summary of key healthcare-related opinions of the Court.

⁶ <http://www.investors.com/politics/commentary/medicare-and-medicaid-are-both-in-a-sickly-state-at-50/>

providers -- providers, not recipients. In other words, Medicare paid out \$60 Billion for benefits claimed to have been delivered by providers who either didn't exist or couldn't be reached. And we want more socialized medicine?

Although you'll find a few reports here⁷ and there⁸ that insist Medicare is not going bankrupt, you'll find more which claim it is.^{9, 10, 11} Despite this, many are demanding the government provide "Medicare for all."¹²

With Obamacare imploding¹³ and enough Republicans in Congress not willing to rescue it with the AHCA, it is only a matter of time before the American people demand that their "right" to affordable health insurance be supplied by a new single-payer system, like Medicare.

The lesson here, and Barack Obama knew this better than anyone: is once you give someone a government benefit it is probably there to stay; you are not likely to be successful in ending it. Americans love their benefits, even if it is bankrupting them.

Obamacare is indeed on life support. Thoughtco.com recently published a list of the top ten reasons Obama's signature initiative is imploding.¹⁴ Skyrocketing cost increases have caused some insurers to pull out of state exchanges, in some cases leaving a single insurer still operating. Insurers are responding to these increased costs by raising rates alarmingly. People not qualifying for subsidies will soon be unable to afford their premiums. We all knew this would happen, even those who designed the ACA knew it; Obamacare was designed to fail in order to lead to the demand for single-payer.

Single-payer, as we've seen with Medicare and Medicaid, will most certainly bankrupt us. It is almost as though these people want America to collapse in order to create their dream utopia on its ashes.

If you're concerned about where this issue is going, if you'd like to see the ACA not be replaced with the AHCA, don't you think it is time you had a talk with your Congressional representatives?

⁷ <http://www.cbpp.org/research/health/medicare-is-not-bankrupt>

⁸ <https://www.medicareadvocacy.org/fact-vs-fiction-medicare-is-not-going-bankrupt/>

⁹ <https://www.rpc.senate.gov/policy-papers/medicare-remains-on-fast-track-to-bankruptcy->

¹⁰ <https://www.forbes.com/sites/aroy/2012/04/23/trustees-medicare-will-go-broke-in-2016-if-you-exclude-obamacares-double-counting/#237f21d83d00>

¹¹ <http://www.cnbc.com/id/100780248>

¹² <http://www.medicareforall.org/pages/Home>

¹³ <http://www.washingtontimes.com/news/2016/oct/30/obamacares-implosion/>

¹⁴ <https://www.thoughtco.com/reasons-obamacare-is-and-will-continue-to-be-a-failure-3303662>

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