17. HEALTH CARE AND THE CONSTITUTION #3

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Former Senator Schmitt Advocates Specific Constitutional Challenges To Legislation Nationalizing Healthcare

The Constitution remains America's primary defense against the usurpation of liberty called "national healthcare reform." The States must accelerate their 10th Amendment defenses against the imposition of federal regulatory mandates in areas of governance not enumerated in Article I or elsewhere in the Constitution. At the same time, individuals, businesses, and associations must challenge the constitutionality of federal jurisdiction over healthcare as well as question specific provisions in the new law.

Specific legislative provisions now enacted in the Patient Protection and Affordable Care Act of 2010 and its companion Health Care and Education Reconciliation Act should be contested one by one. Hopefully, the Court's occasional commitment to judicial re-writing of the Constitution has not gone so far that these challenges will prove futile.

First and foremost, plaintiffs must remember that the Constitution of the United States cites no right to "health." Although an intensive, natural individual right to "life" clearly exists and finds its protection in the 9th Amendment, health results from individual circumstances and choices. Preservation of health lies with the people within the activities ***not*** enumerated as functions of the Federal Government. Further, the 10th Amendment gives the people or States control of health policy given that the Constitution does not give that control to the Congress.

The 211th Congressional leadership and the President argue that constitutional power to "provide for the…general Welfare" found in Article I, Section 8, Clause 1, permits ***any*** form of federal legislation. The full Article I phrase, in fact, reads, "provide for the common Defence and general Welfare," and following Clauses limit the specific powers of the Congress in regard to the common defense and general welfare. None give Congress power to do anything it decides is politically or ideologically expedient. Of particular note in this regard are (1) the lack of any Section 8 enumeration of healthcare among other specifically stated areas for Congressional intervention relative to the general welfare and (2) the combined effect of the 5th and 14th Amendments that make unconstitutional the legislative imposition of reward or penalty on some and not on others, thereby depriving those others of "equal protection of the law."

Finally, some lawyers state that Article VI, Clause 2, the so-called Supremacy

Clause, provides that federal law always trumps state law. Basically, this position maintains that the Congress, with the agreement of the President, can override any State law. The Founders would not have agreed. The relevant portion of the Clause actually reads, "*This Constitution*, and the Laws of the United States *which shall be made in Pursuance thereof*…shall be the supreme Law of the Land…" The phrases with italics added clearly indicate that only the Constitution and federal law made by virtue of Congress' enumerated powers are supreme; however, those laws enacted by the States under their 10th Amendment powers lie beyond the reach of federal law so long as State laws honor other constitutional rights of the people.

In addition to the unconstitutionality of mandating health reform by selective prohibition, regulation, taxes, and fines, specific provisions of current proposals add constitutional insult to injury. Some provisions of the new law, enumerated further below, violate several amendments to the Constitution, specifically, equal protection (5th and 14th), warrant-less searches of papers (4th), due process (5th), criminal prosecution rights (6th), and the right for private patients and physicians to associate freely (9th).

Insurance Mandates**:** Congress has no specific or general welfare power under Article I, Section 8, to mandate that all Americans use their incomes to purchase anything, much less health insurance, and to fine them if they do not. Nor can the power of Congress to regulate interstate commerce under Clause 3 provide constitutional justification for federally regulated insurance unless it requires States to allow insurance companies to commercially compete across state lines. Even then, regulation must be the restrained regulation of "commerce" and not include unconstitutional mandates on the insured or the imposition of what insurance must be offered. To make matters worse, fining those who do not wish to purchase insurance deprive them of equal protection under the 5th and 14th Amendments. Further, such a mandate would confiscate private property (money) without just compensation as required under the 5th Amendment.

Criminalization of Non-Compliance**:** Criminalization of both an individual's lack of health insurance and the purchase of health insurance above a government imposed limit violate the 6th Amendment without providing for the extensive and far-reaching protections required for "all criminal prosecutions."

Prosecutions**:** The law now requires that private contracts between patient and insurer contain specific mandated coverage, violating the 4th Amendment right of the people "to be secure in their…papers…against unreasonable searches and seizures…". Without a constitutionally valid warrant, the government has no power to access what is in a contract (paper or oral) between an American and his or her insurer.

Tax Increases**:** New sales taxes disguised as excise taxes will be imposed on a targeted few producers, sellers, individuals, and families to subsidize insurance for others and to cover the vast administrative costs of government healthcare bureaucracies. These taxes will be passed on to some consumers as *defacto* sales taxes, violating, both directly and indirectly, equal protection under the 5th and 14th Amendments. In addition, under neither Article I nor the 16th Amendment, no constitutional justification exists for an actual federal sales tax on visits to tanning solons. If allowed to stand, this specific sales tax could be used as a precedent for more such unconstitutional taxes. Further, the law applies an inverse sales tax if an individual

or a company does ***not*** buy health insurance for themselves or their employees, respectively. This inverse sales tax effectively constitutes a fine and runs afoul of the "due process" clause of the 5th Amendment, as the new law provides no administrative or judicial appeal process.

Free Association*: ** The new law tramples the rights to privacy and free association protected by the 9th Amendment by inserting government review and control between a private patient and his or her doctor. The 9th Amendment states, "The enumeration in the Constitution, of certain rights, shall ***not be construed to deny or disparage others retained by the people." The "certain rights" referenced by this Amendment, clearly include those specified in the Bill of Rights. Those "others retained by the people" logically would embrace all naturally encompassing, or intensive, human rights of a free people, for example, the "unalienable rights of life, liberty, and the pursuit of happiness," identified by the Declaration of Independence. Other such intensive rights include free association, as well as privacy, education, travel, communication, and thought, in other words, rights that inherently belong to humans as a species. Activities like seeking healthcare clearly would not be included as they relate only to voluntary human activity in support of an intensive right to life.

***Mandated State Benefit Exchanges*: ** The new law requires States to create and regulate health benefit exchanges to oversee insurers' allocation of benefits to subsidized patients. Absent State action, the federal government would set up and manage an exchange for the State. This coercive mandate on the States violates both the nature of the federal system of government envisioned by the Founders and the specific rights of the States and the people spelled out in the 10th Amendment. As James Madison put it, "…it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects."

***Insurance Companies as Utilities*: ** Directly and indirectly, the law herds insurance companies into a stable of public utilities. In so doing, Congress not only illogically assumes that insurance constitutes a natural monopoly, like a local power company, but fails to provide for a market rate of return to the companies and their shareholders. Insurers would be limited by law to what could be spent on actual administrative costs. At the same time, the government would establish minimum standards of care over which the "insurance utility" would have no control as to costs, administrative or otherwise. In addition to the economic lunacy of this proposal, the unconstitutionality of this charade lies in the 5th Amendment's right of shareholders to not have "private property be taken for public use without just compensation."

***Limitation on Drug and Device Costs*: ** The new law directly and indirectly mandates limitations on the costs of medical drugs and devices. Without the ability to recover the costs of development, testing, and regulatory approval, drug and device companies will be unable to continue vigorous research and development efforts that potentially benefit everyone. Congress has no enumerated constitutional power to impose restrictions of this nature on selected private entities, either in Article I or under the equal protection mandate of the 5th and 14th Amendments.

Americans must stay forever on guard in the protection of both their liberty and specific Constitutional limitations on governmental power. The elections of 2010 can once again successfully demonstrate our du-

ty to the future and humankind by providing Congressional majorities sufficient to withhold funding for the new healthcare law. The election of 2012, with a change of Presidents and even larger conservative majorities in the Congress, then permits full repeal of this massive intrusion into American liberties.

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