

## Beyond ObamaCare: The Ninth and Tenth Amendments and the “Right to Health Care” By John R. Graham

### Key Points:

- Libertarians and conservatives need not fear a “right to health care,” because defining such a right *prevents* ObamaCare and similar federal interference, according to the Ninth and Tenth Amendments.
- A number of legislators and attorneys general have decided to challenge ObamaCare on constitutional grounds, citing the Tenth Amendment, and a bandwagon effect is apparent.
- ObamaCare is hardly the only federal law respecting health care that assaults the Ninth and Tenth Amendments. A successful campaign based on the Tenth Amendment need not stop with the repeal of ObamaCare.
- Other federal regulation of private health insurance, government health plans such as Medicaid and Medicare, inappropriate use of federal antitrust law, and harmful overregulation of prescription drugs and medical devices are a short list of federal laws that likely offend the Tenth Amendment.

As a libertarian-conservative policy analyst, I’m often invited to speak at conferences where the other speakers are more traditional advocates of government control of Americans’ access to medical care. No matter how technical and nuanced the discussion, it usually drifts to the “right to health care,” and how “every other country guarantees universal health care.”

So persistent is this notion that there must be something to it. Indeed, I’ve come to believe that the Constitution is perfectly willing to allow people a “right to health care,” and it’s in the Ninth Amendment. That’s the place where Robert Bork found nothing more than an “inkblot.”<sup>1</sup>

Constitutional scholars such as Randy Barnett and Kurt Lash have tried to restore the Ninth Amendment.<sup>2</sup> As a non-lawyer, my understanding is very simple: The Ninth Amendment states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” So, if you claim a “right to health care,” there’s nothing in the Constitution that denies your claim.

Indeed, libertarians and conservatives should be more willing to concede a “right to health care,” because once it’s defined as a right, the entire weight of the Constitution comes down *against* federal (and perhaps even state) control. Where the Constitution enumerates rights, it’s pretty clear that the Founders’ bias was that your ability to enjoy any right was dependent on Congress *not* meddling in it. The primary example, of course, is freedom to practice the faith of your choice without interference by the federal government, guaranteed in the First Amendment.

What we call “health care” today did not exist in the 18th century, so there was no incentive for the Founders to enumerate a “right to health care” and specifically protect it from federal interference. Officially established churches, however, were characteristic of Mother England and most of the states, so the Founders thought it necessary to single out freedom of conscience and a small number of other enumerated rights, while leaving the balance unenumerated in the Ninth Amendment.

To help focus our thoughts, let’s turn history upside down. Imagine, for example, that 21st century medical technology had existed in the 18th century, and colonists were free to spend their own money on medical services that they chose. Imagine that everyone had also saturated themselves in James Cameron’s movie *Avatar*, such that a primitive faith in the healing force of the magical planet Pandora was universal and uncontroversial. The Founders may well have sought to constrain the new federal government by drafting the First Amendment to read: “Congress shall make no law respecting an establishment of a health-care system.”

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Imagine further, that Moses, Jesus, Buddha, Mohammed, and countless other prophets had preached in America *since* the Founding, fragmenting citizens’ faith in “Pandoranism.” Conflict might ensue, and the people might seek to define a “right to religion.” If the government were to take the approach that the current one has to health care, it would set up a Department of Religious Practice, tax and subsidize church buildings and religious instruction, and grant money to “pilot projects” and “comparative effectiveness studies” to determine which religions were more effective. The law would require you to take up a religion that was available in an “exchange” authorized by the U.S. Secretary of Religious Practice. Unfortunately, your “right” to practice your religion would be controlled by the government, because various faith communities would lobby the continuously for more money to build higher cathedrals and temples, leading to a budgetary crisis that would require the government to ration how much “religion” each community would get.

Fortunately, unlike the Ninth Amendment, the Tenth Amendment addresses “powers,” and limits federal powers to those “delegated to the United States by the Constitution.” So, your “right” to health care is completely separate from any power delegated to Congress. Whether congressional power over your health insurance or access to medical services resides somewhere else in the Constitution, such as the Interstate Commerce clause, I’ll leave to others to wrangle, but it’s certainly not in the Tenth Amendment.

This is very good news for critics of ObamaCare. Beyond the well-founded criticisms of ObamaCare’s costs and negative effects on innovation and access to care, its passage has also created opposition based on the Tenth Amendment. A full 42 state legislatures have introduced or announced versions of the Freedom of Choice in Health Care Act, a model bill approved by the American Legislative Exchange Council, which asserts an individual’s right to be free of government coercion in choosing health insurance, and challenges congressional authority to mandate its purchase. At the time of writing, five legislatures had passed the bill, and three states have framed it as a constitutional amendment on the November ballot.<sup>3</sup>

Furthermore, 13 state attorneys general, basing their case on the Tenth Amendment, have launched a suit against ObamaCare’s mandate to buy health insurance and other areas of intrusion into states’ jurisdiction. The attorney general of Virginia has also launched a separate lawsuit on similar grounds. Finally, the Republican Study Committee in Congress has instituted a Tenth Amendment Task Force, chaired by Rep. Rob Bishop of Utah.

But the Tenth Amendment can reach well beyond ObamaCare, which is hardly revolutionary in its attempt to federalize control of Americans' access to medical services. In 1965, Congress established Medicare and Medicaid with majorities of more than 70 percent in both chambers. In 1996, a nearly unanimous Congress passed a law, now called the Health Insurance Portability and Accountability Act (HIPAA), which imposed federal regulation of private health insurance. HIPAA led to increasingly costly regulation and did not reduce the growth of health spending.<sup>4</sup>

So, why not use the Tenth Amendment as a basis for legislative momentum to repeal HIPAA as well? Or to get the federal government out of the business of micromanaging states' Medicaid programs by giving them block grants instead of the absurd Federal Medical Assistance Percentage?<sup>5</sup> But don't stop there.

If unwilling to voucherize Medicare, Congress could at least get out of the business of setting physicians' fees by transferring that responsibility (as well as Medicare dollars) to the states, and give states the freedom to fix the fee schedule, which occurs in Canada and some other countries. Intelligent state legislatures, of course, would immediately free up prices and allow consumer-driven Medicare to arise.

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How about eliminating the Federal Trade Commission's authority to prosecute antitrust in cases of local contracts between physicians and health plans, leaving it to state law?<sup>6</sup> Or letting states opt out of the Food and Drug Administration's harmful monopoly of pharmaceutical and medical-device regulation, allowing their residents to have earlier access to novel therapies (subject to state consumer-protection laws)?<sup>7</sup>

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## Endnotes

1 Statement of Robert H. Bork, *Nomination of Robert H. Bork to be Associate Justice to the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987).

2 Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2005); Kurt T. Lash, *The Lost History of the Ninth Amendment* (New York, NY: Oxford University Press, 2009).

3 American Legislative Exchange Council, "Oklahoma, Georgia Send Health Care Freedom Act to Governor's Desk: Momentum Against ObamaCare Continues to Grow in the States," press release, May 5, 2010.

4 John R. Graham, "Repeal and Replace, But With What?" *Health Policy Prescriptions*, vol. 8, no. 4 (April 2010).

5 John R. Graham, "The Rich Get Richer: The Senate's Medicaid Proposal Gives a Bigger Bailout to Wealthier States," *Health Policy Prescriptions*, vol. 8, no. 1 (January 2010).

6 John R. Graham, "Solidarity Forever? The Possibilities and Perils of Physicians Unionizing," *Health Policy Prescriptions*, vol. 5, no. 12 (December 2007).

7 John R. Graham, *Leviathan's Body Count: Federal Monopoly of Pharmaceutical Regulation and Its Deadly Cost* (San Francisco, CA: Pacific Research Institute, March 2009).