CONSTITUTIONAL POWER
AND NATIONAL HEALTH CARE

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Let me begin by making two distinctions: First, I am speaking here today as a Duke Law Professor, not as a representative of the Clinton Administration, and any errors in my remarks are mine. The second distinction is fundamental. It is the distinction between the question of the wisdom of the health care bill and its constitutionality.

We Americans love our Constitution. It is a beautiful document. Whenever we care passionately about some issue of public policy, we think that our position on the question is undeniably true and correct. We tend to assume that the beautiful Constitution dictates that our true and correct view prevails as a matter of constitutional law. This is especially true when a great deal is at stake on the outcome, as no doubt is the case with health care. As Joseph Califano, former Secretary of Health, Education and Welfare, once said, the President's proposal was the functional equivalent of throwing a trillion dollars in the air and telling the special interests, "Go get it." A lot is at stake.

The assumption of a congruence of our important policy views and constitutional command, however, is an error. Judge Robert Bork pointed out this error in his book and during his confirmation hearings. In Judge Bork's case, the specific holders of this erroneous view were liberals who were reading into the Constitution their own views on religion in the schools, on equal protection, on privacy, and so on. We all know this is an error. Isaiah Berlin pointed out the same error when he commented on people's tendency to think that all good values are harmoniously associated with one another. This error,
however, is far easier to see in one's political opponent than in oneself.

In the case of health care, some people believe passionately that any significant move to get the federal government more involved in the regulation or supervision of health care than the government already has become can only be a profound mistake, or worse, a major disaster. These people may be right. I do not think so, but it is possible. At the moment, this view is holding the day in the Congress. My point today is that Congress, and not the courts, is the fight forum because this is a situation where passionate beliefs about the truth and the constraints of the Constitution diverge.

The federal government clearly has the constitutional authority to enact health care legislation. Congress could concoct an unconstitutional piece of legislation, but of the several versions of the bills that have been drafted, I have seen none that meet that description. Although one might be able to find a constitutional infirmity of a rather specific sort in one or more of the bills, perhaps a government official or board exercising significant federal power without having been appointed in conformity with the Appointments Clause, the essential features of the bills that have been discussed during this Congress are constitutionally sound.

The two foundational bases of federal power in the area of health care are the Commerce Clause and the spending power. Including Medicare and Medicaid funds and the various subsidies for low income individuals and small businesses, approximately thirty to forty percent of the dollars in the President's proposed health care system would be federal dollars. Substantial spending power already exists for aspects of health care legislation. Indeed, we already have a substantial federal presence in the health care field in the form of Medicare and Medicaid.

Multiple Commerce Clause cases also support federal power with respect to health care. The insurance industry engages in interstate commerce; medical technology, medical testing, and medical supplies all constitute significant items of commerce;


4 U.S. CONST. art. I, sec. 8.

5 U.S. CONST. art. I, sec. 7.

and the health of American workers directly affects commerce. The federal government already has established a significant presence in that regard through ERISA.\footnote{Employee Retirement Income Security Act, 29 U.S.C. § 1001 (1988).} The availability and affordability of family and individual health care affects people's ability to change jobs as well as to engage in interstate travel.

Health care costs affect the costs of commerce. For example, the Detroit automobile makers estimate that they pay several hundred dollars per car to pay for the health care benefits of people other than their employees and their employees' families because of the current effects of cost shifting. This extra cost puts American automakers at a competitive disadvantage in the marketplace since foreign automakers do not have these costs.

Health care costs draw resources from other sectors of the economy, such as infrastructure rebuilding, retiring the national debt, entrepreneurship, creating high-technology jobs, and improving the environment. A one percent reduction in America's health care costs would free up approximately $10 billion to be spent in other ways.

The abovementioned grounds are more than ample to support the constitutionality of any of the proposals for health care legislation. For a broadscale constitutional attack to succeed would require adopting as the law one or more doctrines that would not only invalidate health care legislation, but also would unravel a substantial amount of other federal legislation. If health care is constitutionally vulnerable, a great deal of other federal undertakings over the past sixty years also would be vulnerable because they are based on indistinguishable arguments about Commerce Clause jurisdiction.

Some critics believe that these other programs are also unconstitutional and that the courts uphold them only because they no longer interpret the Constitution correctly. They argue that the Supreme Court took a wrong turn in the 1930's,\footnote{In support of this argument they refer to such cases as Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel v. Parrish, 300 U.S. 379 (1937); United States v. Carolene Products Co., 304 U.S. 144 (1938).} aided and abetted by liberal intellectuals, and that we now countenance a range of federal activity under the umbrella of the Commerce Clause that would have been unthinkable under the true Constitution. Consequently, these people contend that we should welcome such doctrinal changes.
I disagree with that conclusion. I do not think the transition from *Carter Coal*,\textsuperscript{9} the case striking down the Bituminous Coal Conservation Act,\textsuperscript{10} to *Sunshine Coal v. Adkins*,\textsuperscript{11} the case upholding a revised Bituminous Coal Act,\textsuperscript{12} marked a significant change in constitutional doctrine. I think the Supreme Court quite properly acknowledged that the public's understanding of the common good and public purpose had changed to accommodate more purposes than the early era of social Darwinism had permitted. From its inception, the Constitution has acknowledged the legitimacy of government action and the furtherance of what James Madison sometimes called "the permanent and aggregate interests of the community,"\textsuperscript{13} and sometimes simply "the public good."\textsuperscript{14} The transition of the 1930's occurred because the court acknowledged that the very question of the public good was itself ultimately a question for the people themselves to decide.\textsuperscript{15} The result as expressed in *Adkins* was an appreciation of the role of Congress, as the people's representative, in formulating policy.\textsuperscript{16}

Let me read to you a paragraph from the Supreme Court's opinion in *Adkins*:

But appellant claims that this Act is not an appropriate exercise of the Congressional power. It urges that the nature and use of bituminous coal in nowise endanger the health and morals of the populace; that no question of conservation is involved; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome

\textsuperscript{9} *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).


\textsuperscript{11} *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).


\textsuperscript{13} \textit{The Federalist No. 10}, at 57 (James Madison) (Jacob E. Cooke ed., 1961).

\textsuperscript{14} \textit{Id}.


\textsuperscript{16} 310 U.S. at 394.
restriction of the anti-trust laws. Those matters, however, relate to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen — matters which are not our concern.\textsuperscript{17}

With the appropriate changes in language, a Supreme Court facing constitutional review of any of the health care bills that this Congress has drafted could write the same passage in responding to such a challenge.

Two aspects of the court's recognition of conceptions of public purpose bear special note. One aspect is simply a recognition of the increasing interdependence of sectors of the economy. This recognition forced many people in the 1980's to acknowledge that, as an empirical matter, the distinction that the Supreme Court tried to maintain by compartmentalizing local and non-local matters and by distinguishing manufacturing from commerce could no longer be sustained. The other aspect concerns a change in the Court's understanding of public purpose to include government action designed to redistribute the risks of a laissez-faire society in order to protect individuals and citizens from the risks faced in such an economy. This latter issue arises once again in the health care debate and has not received the attention that it deserves, but this element clearly is central to the conception of the President's proposal. The whole concept of community rating as a strategy for determining fees and allowable charges by health plans is, after all, a scheme designed to distribute risk. The Clinton Health Plan spreads evenly across a population the price of health care benefits that are going to be differentially demanded by that population. The plan is designed to do exactly what Congressman Armey mentioned in his closing remarks: to get some of us to share the costs of services that others are going to use. This cost-sharing aspect of the legislation has been downplayed in the public debate, perhaps because it is not a popular argument to advance in favor of the legislation. However, this is not an unconstitutional or impermissible purpose, and it must continue to be raised and debated. Right now, however, Congressman Armey's position on this issue prevails. Should Congress pass a health care plan, that plan should not be subject to a court battle over the constitutional limits of Congress' power in passing the plan. Instead, I believe that Congress is the proper

\textsuperscript{17} Id.
forum in which the health care debate should take place.