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Towards Achieving Lasting Healthcare Reform: Rethinking the American Social Contract

*Fazal Khan**

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. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. July 4, 1776.¹

I. INTRODUCTION



This famous preamble to the United States Declaration of Independence reflects a concise and eloquent understanding of the Lockean social contract theory that underpinned the foundation of the original American government: that free people will naturally find it in their self-interest to leave the state of nature (and the tyranny of foreign rule) and join a society where a legitimate sovereign power and the rule of law protect the citizens' fundamental rights. As of the writing of this essay, a new decade approaches and both the U.S. Senate and House have passed historic healthcare reform bills. The two legislative bodies, however, have not yet reconciled the differences between the two bills nor realized the scope of political compromise necessary to get the final bill signed into law. My goal in this essay is not to predict what the final healthcare reform bill will look like. Rather, I will posit as a theoretical matter that, whatever the merits of the final 2010 healthcare reform bill to improve the access, cost, and quality of American healthcare, this effort will necessarily be deficient and need significant reformulation as it has been formed outside of a political context in which basic healthcare is an intrinsic part of the American social contract. In other words, to achieve lasting, rational, and

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1. The Declaration of Independence para. 2 (U.S. 1776).

comprehensive healthcare reform there must be a political consensus in the U.S. that healthcare is a basic fundamental right, not merely an important legislative concern subject to compromise among various interests. To illustrate this point, I will briefly examine the historical view of healthcare in the U.S., how other developed countries have viewed healthcare, and how the U.S. has recently dealt with non-healthcare crises that have seemingly imperiled the American social contract.

II. THE TRANSFORMATION OF HEALTHCARE

Recently, I had the opportunity to debate a State Senator on Georgia's Health and Human Services Committee who made the claim that there is no Constitutional right to healthcare and that any government effort to interfere with market-driven healthcare in order to ensure healthcare access was politically and legally misguided. The Senator then held up a pocket copy of the U.S. Constitution and declared that nowhere in this document will you find any mention of a "so-called right to healthcare." He then stated that if the founding fathers wanted healthcare to be a right, they would have included it in the Constitution—Q.E.D. In response, I affirmed that the Senator was absolutely correct—while the Preamble of the Constitution does mention the promotion of "the general welfare," historically there is no basis to think the founding fathers contemplated healthcare as a constitutional right or part of the inherent social contract like the protection of property and individual rights or the provision of common defense. I noted, however, that there is a good historical reason for this: the notion that the medical profession could actually save and improve lives on a consistent basis is a phenomenon that postdates the founding of our country by at least a century.

As Paul Starr recounts in his seminal work, "The Social Transformation of American Medicine," it was not until the latter half of the 19th century to the early 20th century that we saw such developments as the rise of standardized scientific techniques, professional training for doctors and nurses, antiseptic protocols, radiology, laboratory testing, and the modern hospital as a place for curing disease rather than segregating the hopelessly ill and impoverished.² Accordingly, through the advent of modern medicine it has become clear that universal healthcare is vital to ensuring that all citizens have equal opportunity to achieve "Life, Liberty, and the Pursuit of Happiness."

2. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY* 79 -144 (Paul Starr, 1982).

III. HEALTHCARE AS A FUNDAMENTAL RIGHT

Many explanations have been advanced as to why the U.S. stands alone among developed nations as lacking universal health care. Economic explanations that universal health care is simply too expensive are particularly weak—the U.S. has been a very wealthy nation since World War II and already spends approximately twice as much on healthcare as other developed nations. Empirically, then, universal health care in similarly developed countries costs much less per capita than our non-universal system. Further, the United Kingdom instituted the National Health Service in 1948 while still reeling in debt and rebuilding from the Nazi blitz, and the list of countries less wealthy than the U.S. that provide for universal health care is extensive.

There are numerous historical-cultural explanations such as our elevation of individualism over communitarianism, our ethnic heterogeneity (making us less likely to sacrifice for the benefit of other citizens than say the Swedes or Japanese), and our inherent mistrust of strong centralized government. In addition, there are many political-structural explanations including the ability of interest groups (like the medical profession, insurance industry, and “big pharma”) to capture the legislative process, unique procedural rules that can prevent legislation even where a majority consensus exists (e.g., the filibuster), and the intractable complexity of the American healthcare industry. Separately and in conjunction, there is considerable descriptive merit to these various explanations. These narratives, however, ultimately break down as a conclusive explanation as to why the U.S. has failed to cut the Gordian Knot of its longstanding healthcare crisis.

Switzerland in particular often comes up when discussing how healthcare reform can be accomplished in the U.S. The reason is obvious as the Swiss healthcare system is primarily based on private insurers and providers, like most American healthcare. Other important similarities include the fact that the Swiss pharmaceutical, insurance, and medical industries have considerable economic and political clout. Therefore, it seems like a reasonable conclusion that if we want to *transition* to universal health care, all we have to do is model a universal system closer to our own, rather than modeling off of divergent systems like the U.K.’s or Canada’s which would require dramatic structural changes.

Going back to Switzerland, in the early 1990’s the Swiss Federal government considered their dramatic rise in healthcare costs and aggressive policies by insurers to deny coverage to constitute a national crisis. Political proposals to reform the Swiss system proved to be very controversial and faced stiff opposition from many powerful interests—sound familiar? Ultimately, in 1994 the Swiss response was to approve by

referendum a law that provided the following: universal coverage by requiring all individuals to purchase insurance, a requirement that private insurers provide comprehensive basic health insurance on a non-profit basis to any willing customer, and direct cash subsidies if premiums surpassed a certain percentage of income. In the current U.S. healthcare reform debate, we have seen serious consideration of an individual mandate and subsidies to lower-income individuals but nary any discussion of forcing private insurers to offer basic insurance on a non-profit basis.

So how similar are we to the Swiss when the simple idea of mandating non-profit insurance from private providers has not even entered serious political dialogue? It is a mistake to consider the 1994 Swiss referendum as a simple legislative *transition* to universal healthcare. As former Swiss President Ruth Dreyfus has stated, the 1994 referendum was profoundly controversial, dramatic, and amounted to no less than “a law recognizing health care as a human right.” Going back to the U.K. and Canada, universal healthcare did not spring forth in these countries as “an accident of history.” In the U.K., William Beveridge issued the “Beveridge Report” in 1942 to create support for the National Health Service and the concept of healthcare as part of social insurance. In the following years, an intense campaign by universal healthcare supporters, even during the war, led to the inception of the NHS in 1948.

In Canada, Tommy Douglas campaigned on the plank of healthcare as a fundamental right and was elected premier of Saskatchewan in 1944. He successfully established universal healthcare in this rural province by 1947. In 1961, despite strong opposition from Canadian medical community, who threatened to go on strike, Tommy Douglas was able to launch Canada’s Medicare system which extended universal healthcare to all provinces. The point here is that even among many of the staunchest supporters of American healthcare reform, you will find reluctance to publicly declare healthcare as a human or fundamental right. Until this political mindset changes, it is unlikely that we will see changes to the American healthcare system that meaningfully emulate the Swiss system, let alone the Canadian or British systems.

IV. PROTECTING FUNDAMENTAL RIGHTS IN THE AMERICAN POLITICAL SYSTEM

On October 26, 2001, the USA PATRIOT Act passed by wide margins in both houses of Congress and received considerable bipartisan support. The Act is an astonishing piece of legislation that overnight increased the ability of the federal government to, among many other expansions of federal power, monitor phone calls, emails, medical records, financial transactions, and detain individuals. Civil libertarians vigorously protested passage of

this law and in subsequent years federal courts found numerous provisions of the Act to be unconstitutional. Further, this Act was pushed through by a President that many considered to have lost the 2000 election. How did this deeply flawed Act pass so easily? The answer is obvious: September 11, 2001. On that terrible day, over 3,000 Americans perished in a terrorist attack and the political consensus formed that the personal security of every American was threatened. As a result, heretofore unthinkable government actions became politically legitimate overnight.

On October 3, 2008, the Emergency Economic Stabilization Act became law through a notably partisan Congress and during the last months of a lame duck President with historically low approval ratings. This bill set aside \$700 billion to bailout large investment banks through the Troubled Asset Relief Program (TARP) and was popularly excoriated on both the left and the right as ordinary Americans were feeling the pain of widespread unemployment, home foreclosures, and the worst economic recession since the Great Depression. The following year, President Obama used TARP funds to takeover General Motors (GM) and Chrysler and effectively fire the CEO of GM. If we rewound the clock to 2007, these actions by the federal government would all sound fantastical. Yet once again, the political consensus formed that the economic security of every American was threatened, so bold and previously unimaginable actions were necessary. Supposed partisan gridlock and fear of unhappy constituents did little to stop this legislation and its subsequent execution.

Let's return to healthcare. A recent Harvard Medical study linked lack of medical insurance to a shocking 45,000 deaths *every year*. Medical debt is the leading cause of personal bankruptcy. Medicare and Medicaid are projected to bankrupt the U.S. government in less than a decade. Healthcare costs place American employers at a significant disadvantage to foreign competitors. As ambitious and laudable as current healthcare reform efforts are, it is clear from the onset that healthcare was not considered a fundamental right or an essential component of our social contract. For instance, *ex ante* the debate was constrained with such limitations as being "deficit-neutral," "bipartisan" (even if that means only vote from the opposition party), and a "something for everyone" approach in terms of the special interests in the healthcare industry. In stark contrast, there has never been any political discussion that the ongoing wars in Iraq and Afghanistan (costing an estimated \$3-5 trillion) have to be "deficit-neutral." Further, the federal government has not shied away from risking the displeasure of Wall Street or Main Street with its economic bailout program.

V. CONCLUSION

I want to be clear that I am not endorsing or making any comment about the propriety or effectiveness of federal efforts to respond to global terrorism or the recent economic crisis. Furthermore, I do not wish to diminish the substantial political courage, and frankly hard work, that has delivered the American public the two historic Senate and House bills that are currently in the reconciliation process as I write this essay. Improving access to healthcare in the U.S. is a monumental achievement that deserves much praise. My particular concerns are that the final bill will not do enough to control costs or integrate the delivery of care, and that the problem of our broken healthcare system will continue for some years. I sincerely hope that I am proven wrong.

My primary contention is that whichever healthcare system ultimately proves to be workable for the U.S. (e.g., Canadian single-payer, Swiss model, N.H.S., etc.), we will never reach that ultimate endpoint until the political consensus is formed that healthcare is a basic human right and part of our social contract. Reaching this endpoint will necessarily require tremendous political risk, the upsetting of important stakeholders in the current system, and the firm resolve borne from the realization that a legitimate government *has no choice* but to ensure fundamental rights. Forming this political consensus is no easy task, but we certainly can learn from the likes of Tommy Douglas in Canada or William Beveridge in the U.K., and contrasting their actions and words with our current efforts to reform the American healthcare system.