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Finding a Positive Right to Healthcare

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Edward Rubin, *The Affordable Care Act, The Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 **Wm. & Mary L. Rev.** 1639 (2012).

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A wealth of formidable scholarship has weighed in on the constitutionality of the two aspects of the Patient Protection and Affordable Care Act that were at issue in *NFIB v. Sebelius* (which recently celebrated the anniversary of the historic decision), and so it can be hard to find a new perspective on either the statutory and constitutional aspects of the ACA. Nevertheless, Professor Rubin has furnished a fresh take by proposing that the ACA expresses a legislative interpretation of positive constitutional rights that articulates a right to healthcare in the United States.

The article begins by positing that the ACA faced an impassioned resistance movement because the law represents a sea change in the way we "think about American citizenship and the nature of our political community." To prove this point, Rubin offers a consideration of the nature of the Constitution by working through its historical and philosophical origins. The first part may test the endurance of those not in the business of constitutional theory, but stick with it, because the payoff is a theory worth understanding—that the government serves the people, that a constitution is designed to be an instrument that implements the goals of the people, and that the goals of the people reveal themselves to be the "strengthening of the national government, liberty, and equality." Importantly, this means that the Constitution must serve not only the people who drafted the text but also the subsequent generations bound by the original document's terms. For this to be true, the meaning of the document cannot be fully understood at its drafting, because every generation will have a hand in its interpretation by acting pursuant to the principles of the document as they become meaningful in a given era. Rubin argues that this purposive view of the Constitution alters the constitutional significance of legislation, because legislation reveals the meaning of the constitution to the people living by the document in their time.

Rubin suggests that newer constitutions in other countries have benefited from the groundwork of the United States' experiment in representative democracy. Thus, rather than fighting for first-wave struggles such as establishing the form of government and articulating its constraints (as the framers did), newer constitutions present second wave concerns by articulating positive rights that should be protected by modern democracies. In other words, the work has moved from structure to substance. Professor Rubin advocates for moving to a positive rights view of the Constitution and asserts that this evolution is underlined by the core purposes of liberty and equality. Thus, "strong national government, liberty, and equality" should be recognized by the Court as central to a functioning democracy, but these purposes are also reinforced by legislative efforts that serve to declare the importance of positive rights to the citizenry. The Social Security Act, Food Stamp

Program, and housing support programs are examined as examples of federal legislation articulating a constitutional baseline for basic human needs such as food, shelter, and protection against the vagaries of aging and disability.

To bring his early observations full circle, Rubin examines the ACA as a "declaration of positive rights" that adds healthcare to the list of basic needs protected by federal legislation. To explain the dogged pushback against the ACA, the article describes three key features of the law. First, the ACA applies to all Americans, rather than certain segments of the population, rendering it more like a right and less like a targeted program for suitable populations. Second, the law is "uniform," unlike Medicaid, or public housing, or food stamps, and perhaps threatening to those who challenge it because it diminishes the distinctions that have allowed Americans to be parsimonious with social welfare programs. And third, the law was presented as a moral choice, establishing a normative minimum of healthcare access that belongs to all Americans. These three key features, according to Rubin, track constitutional rights, and therefore the ACA legislatively establishes a positive right to healthcare that should challenge courts to reconsider such unfortunate decisions as *DeShaney v. Winnebago County Department of Social Services* (or even *Harris v. McRae*).

I found the arguments in this article to be persuasive, though I may be less sanguine than its author. Nevertheless, the strong background section provides a solid foundation for arguing that a right to healthcare can be found in the Constitution and that the ACA is a legislative step in that direction. One minor critique stems from disappointment with the analysis of the ACA itself. The statute played a surprisingly small role in the article, especially given that these arguments could have been even more powerful through deeper engagement with the legislative details of the ACA. For example, Medicaid is addressed only in passing, but the Medicaid expansion provides a strong example of the federal government's choice to abandon outdated ideas regarding which populations are deserving of government assistance. The federal government deemed expanding Medicaid to all impoverished citizens so important that it will fund the expansion of the program 100% for several years. The expansion of Medicaid may say more about the commitment to the basic human need for healthcare than the article acknowledges.

It is easy to underestimate the role the ACA may play in American lives by minimizing the law to its small patches on the concatenated whole of the healthcare system. Professor Rubin provides a greater sense of coherent, important change by articulating the law as establishing a right within the larger project of discovering positive rights in the Constitution. Though the Court found no "emerging doctrine" in *NFIB* that shares this view, perhaps in time it will.

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