

# Message from the Chair

Our Section has recently established a Special Committee to examine issues associated with the upcoming vote on whether to hold a State Constitutional Convention, to be on the ballot in the next general election. The stakes are high. A potential issue is whether our state should adopt an indelible right to health care. We have always looked at the grand experiment of the United States as being unique in the world. What makes our country so unique are the structures we have inherited from the Founders, which not only gave us a national Bill of Rights but reserved to each state the ability to expand upon such rights.



The Special Committee on the State Constitutional Convention—Focus on Health is being co-chaired by Nathan Prystowsky and Hermes Fernandez. In addition, many of the highly experienced and knowledgeable members of our Section’s Executive Committee have volunteered to assist with the Special Committee’s agenda. This agenda will be focused on what our Section should recommend for the upcoming vote as well as prepare for the possibility that a convention may actually be convened. Given the importance of health care and the need to ensure proper coverage of populations that are unprotected or at risk, the Special Committee may assist not only in arriving at recommendations but also examine other issues which may impact health in this state.

Additional background is available on the NYSBA website,<sup>1</sup> which shows that the Committee on the State Constitutional Convention has been working diligently to examine a variety of different issues. This Committee, headed by former Chair of our Section, Henry Greenberg, has issued reports on “The Judiciary Article of the New York State Constitution: Opportunities to Restructure and Modernize the New York Courts,” and the state’s “Home Rule” provision, which deals with relative powers of the state and local governments as well as the Conservation Article, which includes a “forever wild” provision impacting wilderness areas of the state.<sup>2</sup> Our Association has also published a print and e-book entitled *Making a Modern Constitution* which provides an in-depth assessment of the history of the State’s Constitution and devotes a segment involving decisions regarding the health care needs of the poor. (See particularly the chapter on “Positive Rights in the New York State Constitution” at pages 180 to 191.)<sup>3</sup>

As explained in *Making a Modern Constitution*, the so-called “social welfare article<sup>4</sup> was established so that

there would be no doubt involving care to the needy and to “set[ting] down explicitly in our basic law a much needed definition of the relationship of the people to their government.” *Id.* at page 181. This Article provides at § 1 that the “aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine” (emphasis supplied).

This “was one of several progressive measures adopted at the 1938 constitutional convention aimed at strengthening state support for the economically disadvantaged.” (*Id.*) Several decisions involving Medicaid benefits and other benefit programs have given this article some vitality. In the area of Medicaid, the Court of Appeals considered the application of this “positive right” to the health care needs of undocumented aliens.<sup>5</sup> New York denied coverage to a category of such aliens, including those who were “permanently residing under color of law” (PRUCOL). The Court held that this violated “the letter and spirit of article XVII...by imposing on plaintiffs an...eligibility condition having nothing to do with need.” This decision may have increased resonance as we continue to see health care on the public policy agenda.

Given the recent initiatives to further diminish Federal Medicaid coverage and restructure this statute from an entitlement program to a block grant for states, new issues will be raised as to New York’s role in this arena. It would be appropriate for the current generation of New Yorkers to review concepts which will not only impact them today but potentially for many future generations. Is there a need for re-examination of the standard set for the needy? Should the citizens of New York establish further protections beyond the needy? Should there be a positive right to access or universal health care which is not based on need? The Court of Appeals has thus far limited the existing social welfare mandate to denials of access as applied to classes of individuals based on need. Should the mandate also extend to basic health care coverage?

In this regard, several other sections of the New York State Constitution focus on “public health” and treatments for those suffering from “mental disorders or defect.”<sup>6</sup> The section on public health provides that (t)he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine” (emphasis supplied). Commentators in this area have argued that when “(t)aken together, the text, structure, purpose, and history of the provision make clear that it includes a guarantee of adequate health care as essential to safeguarding

the public's health."<sup>7</sup> They point to the arguments of the day during the 1938 Convention, quoting a presentation by then-New York State Health Commissioner Dr. Edward S. Godfrey, where he states: "Care must be taken to make sure that new plans [for the extension of medical services] will work well, at a reasonable cost to the public.... Today, no physician would go back to the old days when the needy were left to fend for themselves medically."<sup>8</sup>

These are important concepts if there is a belief and consensus in progress and advancement of society. To a certain extent, however, the belief that citizens in a constitutional government have a duty to provide for the health of all individuals has existed without question in our history. Over 20 years ago I found a used book while vacationing in Maine entitled simply, *A. Lincoln, Prairie Lawyer*" (published 1960). It was written by a lawyer in NYC—John Duff—who had gone through original documents still on file as of the 1950s within the courthouses and clerk's offices where Lincoln tried cases throughout Illinois. In this book there is a copy of a legal opinion written by Lincoln on the question of who should bear the costs of medical expenses for a destitute immigrant Irishman—found in the streets of City of Springfield within the County of Sangamon and aided by a physician as a "public charge." The physician was seeking

payment for his services and Lincoln was asked to study the charters and opine on who should pay—the city or the county? Lincoln relied on the constitution and charters of the time which provided that "all public charges arising from the indigence of persons *resident* within the City" would be paid by the city. (See Opinion of Lincoln, dated December 18, 1854.)

Interestingly, in 1854 the question was not whether essential care would be met but rather which governmental body would pay for such needs. We look forward to the work of our Special Committee on these issues in the coming months.

Raul A. Tabora, Jr.

## Endnotes

1. [www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=71177](http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=71177).
2. [www.nysba.org/ArticleXIVreport](http://www.nysba.org/ArticleXIVreport).
3. [www.nysba.org/ConConBook/](http://www.nysba.org/ConConBook/) to download this e-book.
4. NYS Constitution Article XVII.
5. See *Aliessa v. Novello*, 96 N.Y.2d 418 (2001).
6. Sections 3 and 4 of Article VII.
7. Alan Jenkins & Sabrineh Ardlan, *Positive Health: The Human Right to Health Care Under the New York State Constitution*, 35 Fordham Urb. L.J. 479, 486 (2008).
8. *Id.* at 489.

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