



Written by [Thomas Sowell](#) on December 28, 2010

Political End Runs Around the Constitution

The Constitution of the United States begins with the words “We the people.” But neither the Constitution nor “we the people” will mean anything if politicians and judges can continue to do end runs around both.

Bills passed too fast for anyone to read them are blatant examples of these end runs. But last week, another of these end runs appeared in a different institution when the medical “end of life consultations” rejected by Congress were quietly enacted through bureaucratic fiat by administrators of Medicare.



Although Congressman Earl Blumenauer and Senator Jay Rockefeller had led an effort by a group of fellow Democrats in Congress to pass Section 1233 of pending Medicare legislation, which would have paid doctors to include “end of life” counselling in their patients’ physical checkups, the Congress as a whole voted to delete that provision.

Republican Congressman John Boehner, soon to become Speaker of the House, objected to this provision in 2009, saying: “This provision may start us down a treacherous path toward government-encouraged euthanasia.”

Whatever the merits or demerits of the proposed provision in Medicare legislation, the Constitution of the United States makes the elected representatives of “we the people” the ones authorized to make such decisions. But when proposals explicitly rejected by a vote in Congress are resurrected and stealthily made the law of the land by bureaucratic fiat, there has been an end run around both the people and the Constitution.

Congressman Blumenauer’s office praised the Medicare bureaucracy’s action but warned: “While we are very happy with the result, we won’t be shouting it from the rooftops because we are not out of the woods yet.”

In other words, don’t let the masses know about it.

It is not only members of Congress or the administration who treat “we the people” and the Constitution as nuisances to do an end run around. Judges, including Justices of the Supreme Court, have been doing this increasingly over the past hundred years.

During the Progressive era of the early 20th century, the denigration of the Constitution began, led by such luminaries as Princeton scholar and future President of the United States Woodrow Wilson, future Harvard Law School Dean Roscoe Pound and future Supreme Court Justice Louis Brandeis.

As a Professor at Princeton University, Woodrow Wilson wrote condescendingly of “the simple days of 1787” when the Constitution was written and how, in our presumably more complex times, “each generation of statesmen looks to the Supreme Court to supply the interpretation which will serve the needs of the day.”



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This kind of argument would be repeated for generations, with no more evidence that 1787 was any less complicated than later years than Woodrow Wilson presented — which was none — and with no more reasons why the need for “change” meant that unelected judges should be the ones making those changes, as if there were no elected representatives of the people.

Professor Roscoe Pound likewise referred to the need for “a living constitution by judicial interpretation,” in order to “respond to the vital needs of present-day life.” He rejected the idea of law as “a body of rules.”

But if law is not a body of rules, what is it? A set of arbitrary fiats by judges, imposing their own vision of “the needs of the times”? Or a set of arbitrary regulations stealthily emerging from within the bowels of a bureaucracy?

Louis Brandeis was another leader of this Progressive era chorus of demands for moving beyond law as rules. He cited “newly arisen social needs” and “a shifting of our longing from legal justice to social justice.”

In other words, judges were encouraged to do an end run around rules, such as those set forth in the Constitution, and around the elected representatives of “we the people.” As Roscoe Pound put it, law should be “in the hands of a progressive and enlightened caste whose conceptions are in advance of the public.”

That is still the vision of the left a hundred years later. The Constitution cannot protect us unless we protect the Constitution, by voting out those who promote end runs around it.

To find out more about Thomas Sowell and read features by other Creators Syndicate columnists and cartoonists, visit the Creators Syndicate web page at www.creators.com. Thomas Sowell is a senior fellow at the Hoover Institution, Stanford University, Stanford, CA 94305. His Web site is www.tsowell.com.

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