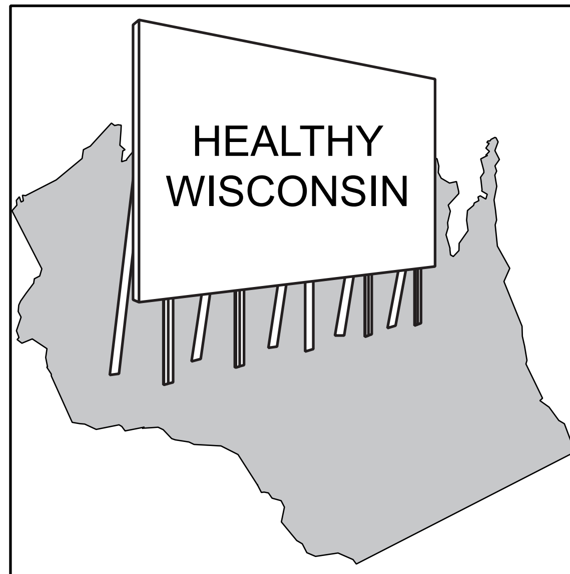
Making Wisconsin The Health Care Migration Capital

Rick Esenberg

There is a school of thought about American federalism holding that the states ought to be the laboratories of democracy. Each state can try its own unique solutions to policy problems and, through this state-by-state experimentation, we will learn what works. Let fifty flowers bloom!



A problem may arise when these "experiments" benefit one part of the population at the expense of another. Because states can't seal their borders, there is nothing that prevents attracting those who will benefit and chasing away those who will not. When I am handing out free pizza, I'm the most popular guy on the block. When I am collecting to pay the delivery guy, no one is happy to see me.

Here in Wisconsin, Senate Democrats have proposed a form of universal health insurance, currently under the tag "Healthy Wisconsin." The plan would provide health insurance for everyone, funded by a payroll tax paid partially by employers (in the sense that they would get the tax bill), and partially by employees, much in the manner of FICA taxes. It would extend coverage without regard to preexisting conditions.

The proposed plan seeks to create an entitlement that exists nowhere else in the United States. If you believe the Senate Democrats' numbers (a commitment that requires more faith than reason), we will not only have health insurance, we'll have great health insurance—the equivalent of the "Cadillac" plan currently enjoyed by state employees. When it comes to health care, Wisconsin will become the American land of milk and honey. We will have something that no one in the country enjoys and—here's the beauty part—at, so they say, no increase in expense.

It is beyond the scope of this article to assess the probability of this (the Cliff's Note answer is zero). Let's just assume that Healthy Wisconsin could work as promised.

But even if it could, it won't. Remember those open borders. We cannot deny this wonderful benefit to anyone else and if, in fact, we are going to offer valuable health care that millions living elsewhere do not have, it seems plausible that some of them will come here to

Rick Esenberg *is a Visiting Assistant Professor at the Marquette University Law School.*

get it. Those who would come here, moreover, are likely to be disproportionately made up of those for whom health insurance is particularly important or difficult to get. In other words, many of our new neighbors, however wonderful they may otherwise be, will be sick or older.

This creates the problem of what insurers call adverse selection; i.e., the attraction of insureds (here, new state residents) who are more likely to suffer losses. Since the purpose of health—or any other—insurance is to spread the losses of the sick among the healthy, attracting more sick people (or people likely to become sick) is a bad thing.

Recognizing this, the current version of Healthy Wisconsin is written to cover only those adults who are gainfully employed (or pregnant) or who have resided in the state for at least one year. One problem is that this exemption is, on its own terms, insufficient to prohibit adverse selection. If a low-to-middle-income worker in Illinois suffering from cancer lacks insurance and faces prohibitive health costs, it seems reasonable to expect that she may well move to Wisconsin and take whatever job she can. The payroll taxes imposed by Healthy Wisconsin will not begin to cover the cost of treating this type of health care migration.

But the problem is larger than that. More fundamentally, she will probably be able to obtain coverage even if she does not find—or is unable to—work. The one year residency requirement is very unlikely to, as we law professors like to say, pass "constitutional muster."

There is a thread of constitutional analysis, expressed by the U.S. Supreme Court, first in a case called *Shapiro v. Thompson*[1] and, most recently, in *Saenz v. Roe,*[2] holding, essentially, that a state may not deny or offer less generous benefits to newcomers. In *Shapiro*, for example, the Court held that the state of Connecticut could not impose a one year durational residency requirement for welfare benefits. In *Saenz*, it ruled that California could not, during their first year in California, restrict newcomers to whatever level of welfare assistance that they would have received in their old state.

Although different Justices explain the source of this constitutional requirement in different ways in different circumstances, sometimes, for example, emphasizing the equal protection clause and, at other times, referring to the Privileges and Immunities clause of the Fourteenth Amendment, the right of newcomers to be treated like established residents is most often placed under the rubric of the "right to travel" and that's how I will refer to it here. It seems clear that this constitutional "right to travel", among other things, requires that people who seek to become permanent residents of a state to be treated exactly like other citizens of the state.

From Day One.

The *Saenz* Court explained why. Writing for a 7-2 majority, Justice John Paul Stevens explained that, in addition to the rights to enter and leave a state and to be treated as a welcome visitor while present in a state other than one's own, the Constitution protects the right of "those travelers who elect to become permanent residents the right to be treated like other citizens of the state."[3] Newly arrived citizens, the Court held, are entitled "to the same privileges and immunities enjoyed by other citizens of the same state."[4] Thus, California had to provide the *exact same* welfare benefits to newly arrived residents as to long time citizens. No waiting periods or modification of benefits to match those that would have been available to the new citizen in her state of origin were permitted.[5]

This is true even if the waiting period is designed to protect existing residents from the burden of newcomers attracted by benefits that are unavailable elsewhere. The *Saenz* Court made clear that imposing a durational residency requirement in order to deter welfare applicants from migrating to California "would be unequivocally impermissible." It observed that while "[c]itizens of the United States, whether rich or poor, have the right to choose to be citizens" of the state in which they live, the states "do not have the right to select their citizens."

There are some cases that suggest that a waiting period may be imposed on "readily portable" benefits that can be obtained by new citizens and then enjoyed after they return to their domicile of origin. Thus, the Supreme Court has upheld a waiting requirement for obtaining divorce[6] and has generally held that in-state tuition can be denied to those that are not bona fide residents of a state.[7]

While I suppose one could say that health care is "portable" in the sense that once a patient has been treated, whatever benefit she has received from that care cannot be taken away, that is true of welfare payments as well. Financial sustenance, once provided and consumed, cannot be taken back. In *Saenz*, the Court concluded that "because whatever benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other states to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or college education, that will be enjoyed after they return to their original domicile."[8] Health care would seem to be no less portable than welfare because financial sustenance, once provided and consumed, cannot be taken away.

It is unlikely that the one year residency requirement could be applied to most migrants seeking the benefits of Healthy Wisconsin.

For those who come to Wisconsin to stay, health care, like welfare payments, is likely to be treated as a benefit that is consumed while a newcomer is a resident in the state, rather than a portable benefit that one comes into a state to obtain and take elsewhere. In fact, the Supreme Court did just that in *Memorial Hospital v. Maricopa County*,[9] holding that a county hospital could not impose a residency requirement on indigents seeking care. According to the majority, the rule against penalizing newcomers first announced in *Shapiro* should apply to require medical care for newly arrived indigents, in part, because "medical care is as much a basic necessity of life to an indigent as welfare assistance." Quoting the Levitical injunction that "ye shall not have one manner of law, as well for the stranger, as for one of your own country," the Court observed that "the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other citizens."

More recently, the Seventh Circuit Court of Appeals (in which appeals from federal courts in Wisconsin are heard) held that Wisconsin may not require persons living outside of Wisconsin who are seeking admission to living facilities for the mentally incompetent in the state to be physically present here or to satisfy a durational residency requirement. Such a requirement, the court concluded, would violate the right to travel even if it is considered necessary to avoid making the state a magnet for those seeking superior care facilities.[10]

Even if health care could be treated like in-state tuition, it is unlikely that the one year residency requirement could be applied to most migrants seeking the benefits of Healthy Wisconsin. The Supreme Court has made clear that, even with in-state tuition, a state may not establish a durational residency requirement as an irrebuttable presumption of nonresidency. In other words, it must give newcomers an opportunity to show that they have truly come to the state to stay. While states may be able to deny these benefits to those who are just passing through, they may not deny them to those who are newly arrived and intend to stay.

Thus, it is possible that Healthy Wisconsin benefits could be denied to someone who comes to the state for an operation, or course of treatment, with no intent to stay. We may

not be inundated with medical tourism in the sense of folks popping in from South Dakota for a long weekend and quick angioplasty.

But it seems inescapable that we would see medical migration; i.e., people choosing to move to Wisconsin and stay here because they can get something here that they cannot get elsewhere. In fact, for those with chronic health problems, coming to stay is precisely what makes sense.

Some may be poor, but many, perhaps most, will not be. People with preexisting conditions that cannot obtain coverage elsewhere are likely to see Wisconsin as the answer. Older people who may have the resources to retire but who cannot, given their age and medical histories, obtain coverage where they live or, even if they can, prefer free or inexpensive coverage, will have an incentive to become new Badgers. Put simply, we are proposing to offer everyone in the country health care coverage without regard to what it costs us.

Of course these new folks may be wonderful people. They may work or have income that is subject to the new payroll tax that is designed to fund Healthy Wisconsin. But if, by reason of age or preexisting condition, they are more likely than others to require health care, it is unlikely that they will pay enough to cover the cost that each will add. Assume, for example, a 55-year-old couple in which the husband has a history of coronary artery disease and the wife is a survivor of breast cancer. Assume further that they move to Wisconsin and have a combined income of $60,000 subject to Healthy Wisconsin's payroll tax. Current estimates of the maximum tax that would be imposed suggest that this couple would generate $9600.00 in annual tax revenue.

It is highly unlikely that this couple could obtain decent health coverage anywhere for $9600.00 in annual premiums. This is not because insurance companies are mean and greedy. It is because they don't want to lose money and the annualized cost of care for this couple is likely to be far in excess of $ 9600.00.

It is beyond the scope of this article to estimate the probable extent and cost of health care migration as a result of the adoption of universal coverage in a single state. But the economics of health care are not different for the state than they are for private insurers. Any underwriter will tell you that it doesn't take much adverse selection to turn a profitable or break-even book of business into a financial disaster.

Wisconsin was once a welfare magnet, drawing people from states where benefits were, at the very most, several hundreds dollars per month lower than they were here. The stakes are much larger here as we run the risk of becoming a magnet for those who are likely to incur tens or hundreds of thousands of dollars in health care costs.

I can't exclude the possibility that a future Supreme Court will abandon the line of cases represented by *Shapiro* and *Saenz*. Although Chief Justice John Roberts and Justice Samuel Alito may adopt a less expansive view of the right to travel, six of the seven Justices who joined the majority opinion in *Saenz* remain on the court.

We can, of course, debate whether universal or government-provided health insurance is a good thing. But for this, and other reasons, providing such coverage in a single state where borders must be open and the Supreme Court will require newcomers to be treated like everyone else is a fool's errand. We cannot afford to become, if not the America's ER, the national critical care ward.

Notes

1. 394 U.S. 618 (1969).

2. 526 U.S. 489 (1999).

3. Id. at 500.

4. Id. at 504.

5. Id. at 506.

6. Sosna v. Iowa, 419 U.S. 393 (1975).

7. Vlandis v. Kline, 412 U.S. 441 (1973).

8. 526 U.S. at 504.

9. 415 U.S. 250 (1974).

10. 122 F.3d 443 (7th Cir. 1997) See also Duffy ex rel. Duffy v. Meconi, 508 F. Supp.2d 399 (D. Del. 2007).