Backgrounder

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Preserving Freedom and Federalism: What's at Stake for Americans in the Health Care Debate

The Honorable Thomas C. Feeney

Abstract: *"Federalism" is no outdated concept. The founding fathers of the American Republic are the authors of a brilliant design of the distribution of political power between the national government and the states. Under the Constitution, the federal government is responsible for the general concerns of the republic; the state governments are the custodians of the people's trusts and are authorized to address their particular concerns. This is the essence of federalism—and precisely what is under attack in the massive health care bills currently under consideration in Congress. Former U.S. Representative from Florida Thomas C. Feeney explains what is at stake for every American.*

Many state legislators and governors are rejecting the idea that Congress and the federal bureaucracy can micromanage either state health insurance markets or individual and family health care decisions. The federal government is inherently incompetent in making such decisions. The wisdom of the founding fathers was evident in recognizing the inherent limits of political power, and in constitutionally dividing that power between the officers of the national government and the officials of the states.[1] It is increasingly apparent that Congress, crafting massive trillion-dollar bills with far-reaching consequences, will not solve the problems that ail America's health care sector, instead making American citizens, in Alexis de Tocqueville's words, "minions of an omnipotent government."[2] Indeed, instead of solving widely agreed-upon existing problems, Congress is prepared to create new ones.

Talking Points

- State leaders around the country are expressing alarm: The massive congressional health care bills would devastate state budgets, eviscerate existing health insurance plans, undermine consumer choice and quality of care, and trample on the traditional preeminence of the states.
- The wisdom of the founding fathers was evident in recognizing the inherent limits of political power and in constitutionally dividing that power between the officers of the national government and the officials of the states.
- America's federalist system should not be destroyed in a narrow ideological pursuit of an illusory perfection—a nationalized health care system that will provide perfect security and will "bend the cost curve" downward.
- Congress should support major federal reforms that reduce tax regulations and federal regulatory burdens that stifle state reforms and subvert patient choice.
- State officials should insist on keeping state control of health insurance regulation, and they should enhance patient choice and reward quality providers.

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Not surprisingly, state leaders around the country are expressing alarm, fear, and anger. The massive Congressional health care bills currently under debate would impose requirements, such as mandatory Medicaid expansion, that would devastate state budgets, eviscerate existing health insurance plans, undermine current consumer choices and quality of care, and generally trample on the traditional preeminence that the states, under current law and the Constitution, have long held in enacting and improving the regulation of their very different health insurance markets.

State leaders are making their voices known. The American Legislative Exchange Council (ALEC), with a membership of 2,000 legislators from all 50 states, recently wrote letters of concern to Speaker of the House Nancy Pelosi and Senate Majority Leader Harry Reid. ALEC members noted that, "ALEC is troubled by the public plan and national health insurance exchange, which we believe will trample states' rights and lead Americans down the road to single-payer health care."[3]

Federal and state legislators should take a firm stand for federalism, a crucial component of the unique constitutional order of the United States.

These concerns are shared by the policy community as well. Heritage Foundation analysts, among others, have cautioned Congress to be mindful of its constitutional responsibilities and the limits of national power. They urge the national legislature to proceed with caution and make careful changes in federal tax and health insurance laws to promote accessible and affordable health insurance coverage without ruining the highest quality of health care in the world and nationalizing one-sixth of the American economy.[4]

Taking a Stand for Federalism

Federal and state legislators alike should go back to the basics, the traditional principles of American self-government, and take a firm stand for federalism, a crucial component of the unique constitutional order of the United States. Congress and state policymakers should follow the following four principles:

Principle #1: Reject Federal Micromanagement of State Issues and Encourage Entrepreneurial Health Insurance Reform. Rather than mandating a uniform system of federally supervised health care for 300 million Americans in widely divergent circumstances, Congress should set clear goals for state health reform. Through federal grants and funding for technical assistance, a routine feature of many federal–state partnerships, states can design new means for covering the uninsured, enhancing quality of care and improving patient satisfaction. They can do this in a variety of ways, including health insurance market reforms that expand coverage for low-income working families and new risk-pooling arrangements that can secure stable private health insurance coverage for citizens, including the poorest, sickest, and most vulnerable of the states' populations.

There is strong bipartisan support in Congress for such a federalist approach, as evidenced by the co-sponsorship of the Health Care Partnership Through Creative Federalism Act (H.R. 5864) by Representatives Tom Price (R–GA) and Tammy Baldwin (D–WI).[5] This kind of legislation should

1. David F. Forte and Matthew Spalding, eds., *The Heritage Guide to the Constitution* (Washington, D.C.: Regnery Publishing Inc., 2005), and Eugene W. Hickok, *Why States? The Challenge of Federalism* (Washington, D.C.: The Heritage Foundation, 2007).
2. Alexis de Tocqueville, *Democracy in America* (Teddington, U.K.: Echo Library, 2007).
3. Letter from ALEC members to Speaker Pelosi and Senator Reid, July 29, 2009, at *http://www.alec.org/am/pdf/hhs/HealthCareLetter.pdf* (October 7, 2009).
4. Robert E. Moffit, "State Health Reform: Six Key Tests," Heritage Foundation *WebMemo* No. 1900, April 23, 2008, at *http://www.heritage.org/Research/HealthCare/wm1900.cfm*.
5. For a description of the bill, see Stuart M. Butler and Nina Owcharenko, "The Baldwin–Price Health Bill: Bipartisan Encouragement for State Action on The Uninsured," Heritage Foundation *WebMemo* No. 1190, August 7, 2006, at *http://www.heritage.org/Research/HealthCare/wm1190.cfm*.

include strict neutrality in guaranteeing equal opportunities for conservative and liberal experimentation. There should also be a guarantee to state officials that if they embark on a new health care policy, they should be allowed to change course, if necessary, and not be irreversibly locked into health care policy errors.

Under the federalist principle of the U.S. Constitution, the 50 states can be "laboratories of democracy,"[6] and learn from one another's successes and failures. As Tocqueville wrote in his masterpiece *Democracy in America*, "The most favorable form of government ever created to promote the prosperity and freedom of man was the federalist system."

In 1990, Arkansas Governor Bill Clinton agreed. Before his election as President, he addressed his fellow governors urging them to take the lead in developing "pragmatic responses to real problems" in his foreword to David Osborne's *Laboratories of Democracy.*[7]

It is hard to imagine an issue more suitable to innovative experimentation than the financing and delivery of health care. Indeed, the potential for resolving some of the thorniest issues in health care policy highlight the splendor of the American founders' federalist design. States can make and correct their own mistakes quickly and effectively while learning and replicating the successes of others. Multiple experiments in different jurisdictions tend to improve upon successful reforms while also teaching important lessons from unsuccessful experiments.

TennCare. People tend to overlook the obvious. A federalist balance between state and federal authority has largely worked in American health care policy. In 1994, Tennessee replaced its Medicaid program with a managed care program to cover not only traditional Medicaid beneficiaries, but also lower-income uninsured residents. In designing and implementing the new program—TennCare—the state made serious mistakes, offering expensive, heavily subsidized "comprehensive" coverage and attempting to pay for the resulting dramatic cost increases by adopting severely restrictive reimbursement policies for the participating health care plans and providers.[8] TennCare proved destabilizing and unaffordable;[9] many residents dropped their private coverage to enroll in the new subsidized program and dramatic cost escalation overwhelmed the state budget, forcing the state to scrap the reform. Other states learned the lesson and rejected the TennCare approach.

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Washington State. In 1993, Washington state legislators passed a law that mirrored the Clinton health care plan of that same year. In fact, Clinton Administration officials praised Washington as a test case of their own comprehensive proposals for reform at the national level. The new state law imposed a massive and powerful new bureaucracy, individual and employer mandates, more regulation, higher taxes, and a government-defined standard benefit package that everyone was required to buy. The legislation was repealed less than two years later based on massive public dissatisfaction.[10]

Both the TennCare and Washington state models were widely heralded by proponents of these types of reforms at their inception; both failed. But both would have been disastrous for all Americans if they had been adopted nationwide.

6. David Osborne, *Laboratories of Democracy* (Cambridge, Mass.: Harvard Business School Press, 1990).
7. *Ibid.*
8. Sandra Hunt *et al.*, "Actuarial Review of Capitation Rates in the TennCare Program," PricewaterhouseCoopers, March 1999.
9. Merrill Matthews, Jr., "Lessons from Tennessee's Failed Health Care Reform," Heritage Foundation *Backgrounder* No. 1357, April 7, 2000, at *http://www.heritage.org/Research/HealthCare/bg1357.cfm*.
10. Robert Cihak, Bob Williams, and Peter J. Ferrara, "The Rise and Repeal of the Washington State Health Plan: Lessons for America's Legislators," Heritage Foundation *Backgrounder* No. 1121, June, 11, 1997, at *http://www.heritage.org/Research/HealthCare/bg1121.cfm*.

While unsuccessful state reform efforts provide policymakers with cautionary lessons and a sound reason to avoid certain approaches, successful initiatives offer a treasure chest of new reform tools. West Virginia, for instance, redesigned its Medicaid program to provide a choice for patients between a "basic plan" and an "enhanced plan." The enhanced plan provides beneficiaries a greater range of benefits in exchange for entering into a Health Improvement Plan with their physicians, which requires patients to sign and comply with a "Responsibility Agreement" in which patients agree to follow their physicians' instructions to improve their health. Studies from West Virginia verify that even poor Americans can demonstrate high levels of health literacy, tend to make wise and informed choices about health care when given the freedom to choose, and can adopt healthier lifestyles when offered incentives to do so.[11]

Patient Power in Utah. The state of Utah is in the process of implementing a new program designed to enhance accessibility to and choice of private health care.[12] Just two Utah officials run the program, using almost no new taxpayer money. The law creates a new "defined contribution" option for employers to offer coverage to their workers, administered through an online health insurance exchange. An employer who elects this option will no longer need to manage a traditional one-size-fits-all group plan for his workers. Rather, each worker, during the annual open season, will be able to choose from a menu of health insurance plans—while the arrangement still qualifies as "employer-sponsored" coverage that is tax-free for workers.

This new coverage option, together with the administrative functions provided by the exchange, eliminates most of the obstacles that small businesses face in offering health benefits to their employees, while expanding their workers' choices of health care plan benefits and premiums. Employees of small businesses can shop for health insurance plans that best meet the financial and health coverage needs of their families. They can add their employers' contributions (including multiple employers and their spouses' employers) to their own pre-tax dollars to purchase the policy of their choice.

The leading health care bills would transfer regulatory control of health insurance to the federal government, and would crush state innovation and experimentation.

Utah is testing the exchange this fall with a pilot group of 136 small-business employers who collectively employ 2,333 workers. The average small business size is 17 employees. The exchange already features 66 plans offered by three private insurance companies. So far, 141 additional employers have requested to be notified when enrollment in the exchange re-opens. These Utah small-business leaders embrace the new state-based exchange model because it suits their needs. Nationally, only 43 percent of employers with 50 or fewer workers currently offer employer-sponsored health insurance, but Utah's rate (32 percent) is even lower.[13]

Killing Innovation. The West Virginia Medicaid program and Utah exchange program represent very different types of reforms, yet they share something with each other and nearly every other promising and successful state-based health care reform: They would be abolished by the current federal reform proposals.

While the President and his congressional allies insist that they are not proposing a federal government "takeover" of health care, the facts are indisputable. The leading bills would transfer regulatory control of health insurance to the federal government, and would crush state innovation and exper-

11. Dennis G. Smith, "Health Care Reform in West Virginia: A Lesson From the States," Heritage Foundation *WebMemo* No. 2582, August 7, 2009, at *http://www.heritage.org/Research/HealthCare/wm2582.cfm*.
12. Grace-Marie Turner, "Innovation, Not Intervention," *Forbes*, September 18, 2009, at *http://www.forbes.com/2009/09/17/state-health-care-opinions-contributors-grace-marie-turner.html* (October 8, 2009).
13. Kaiser Family Foundation, "Percent of Private Sector Establishments That Offer Health Insurance to Employees, by Firm Size, 2008," at *http://www.statehealthfacts.org/comparemaptable.jsp?ind=176&cat=3* (October 8, 2009).

imentation. The leading bills would impose federal mandates on individuals and employers to buy and offer federally approved packages of health care benefits. The leading bills would expand government-run health programs, or create a new government-run health plan to "compete" directly against private health insurance for the purpose of eroding it. The leading bills would impose new taxes on middle-class Americans and would, in their current form, add to the large and growing federal debt.

There is something even more disturbing that is becoming evident: hubris. In the face of mounting public apprehension and opposition to these schemes, Members of Congress are intent on having their way with the health care of 300 million Americans, regardless of their wishes in the matter.

Politicians promise cradle-to-grave health care security—on the cheap—while nationalized health care systems worldwide demonstrate that such promises are delusional.

Washington politicians promise cradle-to-grave health care security (on the cheap), guaranteed and ruled by federal authority, while the empirical evidence from nationalized health care systems worldwide shows that such promises are delusional. As early as 1989, British Prime Minister Margaret Thatcher admitted that Britain's government-controlled care resulted in fewer doctors, fewer nurses, and that patients can wait weeks in one area to see a doctor and years in another.[14] A Congress that is running up trillions of dollars in deficits, creating a $10 trillion national debt, presiding over Medicare and Social Security systems that are insolvent, and plagued by mounting debt should not be entrusted with control over every American's health care or permitted to create yet another unsustainable entitlement.

Principle #2: Empower States to Preserve Quality and Choice While Reducing Costs and Increasing Coverage.

Democratic and Republican state legislators will have more confidence in federal health care reform that respects the interests of their states and their people, and also respects the professional relationship that doctors have with their patients. State legislators can only be helped with federal reforms that open up health insurance markets and permit a broader level of choice and competition than exists today. For example, the federal government should reform regulatory and tax obstacles to allow organizations, such as churches, unions, and chambers of commerce, to provide group health insurance plans across state lines.[15]

Draconian federal mandates imposed on states, whether through Medicare, Medicaid, SCHIP, or other collective funding mechanisms, inhibit simple, sensible, and rational state-designed reforms that would allow families, individuals, and businesses to design the optimal health coverage at the most affordable cost. Indeed, federal expansion of Medicare, Medicaid, and SCHIP mandates may well bankrupt the states in the process.[16]

Federal overreach explains not only some of the groundswell of popular uprisings at tea parties and congressional town hall meetings across the country, but also the hostile reaction by many state legislators to the congressional initiatives. It is also not surprising that there is a strong freedom-of-choice movement, evidenced by the introduction of 17 state constitutional amendments to protect personal freedom in health care around the country. Among other things, this movement sends a clear message to Members of Congress that state officials and their constituents are not going to go along with federal micromanagement of their health care decisions.[17] As a matter of public policy, whatever rules Congress

14. Lady Thatcher Speech to the Party Conference, Blackpool, England, October 13, 1989.
15. For an analysis of this proposal, see Robert E. Moffit, "The Health Care Choice Act Eliminating Barriers to Personal Freedom and Market Competition," Heritage Foundation *WebMemo* No. 1164, July 17, 2006, at *http//www.heritage.org/Research/HealthCare/wm1164.cfm*.
16. Henry J. Aaron and Stuart M. Butler, "How Federalism Could Spur Bipartisan Action on the Uninsured," *Health Affairs*, March 31, 2004, at *http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.168v1.pdf* (October 8, 2009).
17. Visit Help Rescue America: In Support of the United States Constitution, at *http://www.states-rights.org* (October 8, 2009).

imposes at the federal level, Congress should also allow states the right and the recourse to opt out if they wish to do so, pursue their own reforms of the health care system (as Hawaii has done in the past), and protect the legitimate interests of their own people.

Principle #3: State Officials Should Adopt Policies that Unshackle Patients from Artificial Restrictions of Choices.

State legislators and governors must be free to adopt patient–doctor-centered policies that allow patients to exercise informed choice. Patients must be empowered to tailor their health care coverage to their needs and obtain portable (job-to-job) health insurance. States should restrict the exercise of their regulatory powers to the establishment of minimum standards and the prohibition of fraud and abuse, and must fight the paths of political expediency—such as federal Medicaid expansion—that lead to a single-payer, government-run option, or federally financed socialized health care.

Principle #4: Congress Should Promote Affordable, Quality Care and Protect Patient–Doctor Relationships. Specifically, Congress should:

- Provide tax equity for individuals and their families to receive equal treatment whether they buy health insurance on their own or through their employer;
- Provide minimum standards for health policies, then guarantee state policymakers wide latitude to tailor consumer-centered health insurance markets for patients to select care based on informed cost and quality decisions;
- Guarantee portable coverage that follows the patient, not the employer, thus ending "job lock";
- Allow states to design new health insurance markets, broaden risk pools and thus reduce the administrative costs for both individuals and small businesses. States can also create new risk-adjustment arrangements to help citizens with pre-existing conditions while reducing the impact of adverse selection that can undermine the stability of the health insurance markets;
- Allow and promote consumer-friendly and tax-advantaged plans, such as personal Health Savings Accounts;
- Promote interstate competition between health care providers by permitting any citizen of one state to purchase policies in any other state.

Conclusion

The founding fathers of the American Republic are the authors of a brilliant design of the distribution of political power between the national government and the states. The national government, under the Constitution, is responsible for the general concerns of the republic; the state governments are the custodians of the people's trusts and are authorized to address their particular concerns. This is the essence of federalism.

America's federalist system should not be destroyed in a narrow ideological hot pursuit of an illusory perfection: a nationalized health care system that will provide perfect security and will "bend the cost curve" downward. The massive bills on Capitol Hill will do neither.

From the inception of the republic, Americans have been instinctively skeptical of the notion that Washington politicians, and the national bureaucrats who supposedly answer to them, are successfully able to micromanage the affairs of tens of millions of individuals and their families.

Americans desperately need sound common sense and consequential health care reform. This means a reform that will result in a measurable expansion of private insurance coverage and control of cost. There is a great deal of work to do. While guaranteeing accessibility and controlling the costs of health care, Americans should reject national micromanagement and let the market work. They—and their elected representatives in Congress—should support major federal reforms that change tax policies that undercut consumer choice in the health insurance markets and federal regulatory burdens that stifle state reforms and subvert patient choice.

The states have a key role to play. State policymakers should support the growing movement in the states themselves that support the protection and expansion of patient choice in health care. State officials should also insist on keeping state control of health insurance regulation. At the same time,

they should take bold steps to enhance patient choice, and create an environment that rewards high-quality care from physicians and other medical professionals. If they are true to their public trust, if they are to defend the legitimate interests of their citizens, state officials must stand with their citizens and reject policies that would put the United States on a glide path to single-payer, government control of the health care of every American.

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