

# Background

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## Interstate Competition and Choice in Health Insurance: The American Way

*The Honorable Thomas C. Feeney*

**Abstract:** *Americans want health care reform—but they do not want compulsive mandates imposed by Congress and the Administration. Private citizens and state legislators across the country, from both sides of the aisle, are engaging in a political rebellion, taking an ever more vocal stand against intrusiveness and coercion from Washington—which they believe to be outright un-American. Former state legislator and U.S. Representative from Florida Thomas Feeney presents interstate competition as a commonsense and very American approach to much-needed health care reform.*

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The year-long national debate between congressional champions of government-controlled health care and proponents of individual freedom is far from over. Nonetheless, while continuing to ignore public opposition to their giant health care bills, even Congress and the Obama Administration cannot overlook the emergence of a crystallizing popular opinion on health policy.

There is a bipartisan political rebellion taking place at the state level, with governors and legislators opposing the growing intrusiveness of Washington and reasserting their claims to authority over health insurance market reform, while demanding greater flexibility in the management of Medicaid, the joint state–federal program for poor and indigent citizens. One of the most promising reform proposals is the creation of larger markets and more robust health

### Talking Points

- While doing their best to ignore public opposition to their giant health care bills, Congress and the Obama Administration cannot overlook the emergence of a crystallizing popular opinion on health policy.
- While Americans clearly want health care reform, they do not support the mandates that Washington is trying to impose on them.
- There is a bipartisan political rebellion taking place at the state level, with governors and legislators opposing the growing intrusiveness of Washington and reasserting their claims to authority over health insurance market reform.
- One of the most promising reform proposals is the creation of larger markets and more robust health insurance competition (i.e., choice) through interstate compacts.
- State legislators and governors can and should take the lead on health care reform: It is time for them to cooperate and form interstate compacts to stimulate greater competition in the insurance markets.

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insurance competition—read “choice”—through interstate compacts.

### Charting Another Path

States have formed interstate compacts on a variety of policy areas, including environmental matters. It is time for state officials to cooperate and form interstate compacts to stimulate greater competition in the insurance markets. Bilateral agreements between states could establish the groundwork for ever more ambitious regional health insurance market agreements. The health care debate could serve as the catalyst for a rebirth of federalism, and a reaffirmation of the legitimate authority of the states and the power of the people as citizens of the states.

**The Political Facts on the Ground.** First, most Americans apparently believe that the health care sector of the economy should be reformed to give poor Americans and those with preexisting conditions greater access to affordable coverage.<sup>1</sup> Second, the vast majority of Americans who have coverage today are generally satisfied with that coverage.<sup>2</sup> Finally, most Americans are rightly alarmed at the prospect of government control of health care, and that concern has grown during the course of the current national debate.<sup>3</sup> Most Americans simply do not share the narrow ideological views of those in Congress and elsewhere who yearn for centralized control or bureaucratized micromanagement of their personal health care decisions.

Fortunately for the millions of Americans who firmly reject this federal intrusion into their per-

sonal lives, there is relief. The Founding Fathers designed a federalist political order, wisely dividing authority between the national government (focused on general concerns) and state governments (focused on specific concerns) that is perfectly amenable to the resolution of many of the key issues in the national health care debate.

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### ***The Constitution itself is the best response to Washington's collectivist health care proposals.***

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The Constitution itself is the best response to Washington's collectivist health care proposals. American citizens should be the primary decision makers when it comes to their health care, and the next level of decision making in a large and profoundly diverse country such as the United States should be within the jurisdiction of state government—not Washington. Not surprisingly, Americans throughout the 50 states, and the energized and imaginative elected state officials who represent them, are responding forcefully to Washington's centralizing proposals with state-led health care resolutions and initiatives.

**A Bipartisan Rebellion.** Recent actions in state legislatures and governors' offices in opposition to the massive congressional health care proposals reflect growing popular sentiment. The American Legislative Exchange Council, the largest nonpartisan association of state legislators in the country, wrote a July 29, 2009, protest letter to Senate Majority Leader Reid and House Speaker Nancy

1. According to a 2009 poll conducted by *Time* magazine, 80 percent of Americans would support a health care bill that requires insurance companies to offer coverage to anyone who applies, regardless of any preexisting conditions. Michael Scherer, “TIME Health Care Poll: Americans Back Reform, Worry Over Details,” *Time*, July 29, 2009, at <http://www.time.com/time/politics/article/0,8599,1913426,00.html> (March 3, 2010).
2. According to Gallup, in September 2009, 80 percent of Americans were satisfied with the quality of the health care available to them and their families; 61 percent were satisfied with the associated costs. Lydia Saad, “Cost is Foremost Healthcare Issue for Americans,” Gallup, September 23, 2009, at <http://www.gallup.com/poll/123149/Cost-Is-Foremost-Healthcare-Issue-for-Americans.aspx> (March 3, 2010).
3. According to Gallup poll results, in November 2009 only 47 percent of Americans believed it was the responsibility of the federal government to ensure that all Americans carry health coverage. This is down from 54 percent in November 2008, and 69 percent in November 2006. The American Enterprise Institute, “Are Attitudes Changing About the Proper Role of the Federal Government?” AEI Public Opinion Studies, December 19, 2009, at <http://www.aei.org/docLib/RoleOfGovernment.pdf> (March 3, 2010).

Pelosi explaining that the bills championed by the Democratic leadership would be “anti-competitive” and amount to a “federal takeover” of the states’ role in interstate health insurance. Democratic and Republican state officials alike have complained that Washington’s gargantuan legislation would “break all 50 state budgets by permanently expanding Medicaid.”<sup>4</sup>

State officials are properly concerned that proposed federal legislation would prohibit states from expanding locally based health care choices and from tailoring costs, coverage options, and benefit packages to individual consumer demand.<sup>5</sup>

### Interstate Insurance Compacts

The United States Constitution is clear about the powers of Congress. Article I, section 8, paragraph 3 grants Congress the power to “regulate commerce...among the several states...” This power grants authority to regulate interstate commerce, which in the special case of health insurance, Congress has chosen to not exercise. Nowhere does the Constitution authorize Congress, or the President, to force American citizens to buy a health insurance policy, or to micromanage any person’s choice in purchasing a package of health benefits.

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The Constitution also reserves unto the states and their citizens powers that are necessary for self-governance and which are not granted to the Congress under Article I, section 8, or otherwise expressly delegated to the federal government. This includes the power to enter into agreement with other states to pursue mutual interests, or facilitat-

ing interaction between citizens of one state and citizens of another.

Of many state-led health insurance initiatives, none is more promising than interstate compacts for health insurance. Such compacts can be designed to broaden the market by allowing consumers and employers to purchase health insurance across state borders—not possible under current law. In order to promote consumer choice in health care, reduce cost, and enhance coverage and competitive innovation, officials from different states should cooperate with each other. This is especially true among officials whose states share a border, have similar demographic and economic characteristics, and potentially have the same networks of doctors and hospitals. They should, with due diligence, consider adopting interstate compacts, allowing people to purchase cost-effective and quality-enhancing health insurance policies across state borders. Bills introduced in states as different as New Hampshire and South Carolina would permit interstate purchase of health insurance plans.<sup>6</sup>

Most of the jurisprudential debate over the scope of the commerce clause of the Constitution has focused on the limitations on Congress to regulate local individual or business activity. But almost no serious constitutional argument has been advanced to the effect that, in the absence of federal preemptions, states are prohibited from engaging in bilateral or multilateral agreements or “compacts” to promote interstate commerce.

Only when a state legislature votes to restrict commerce with other states would that action set up a constitutional challenge and invite the U.S. Supreme Court to potentially strike down the state law as unconstitutional. If the Supreme Court did deem such a law unconstitutional, it would likely be on the grounds that the “burden imposed by such

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4. “Max’s Mad Mandate,” *The Wall Street Journal*, September 27, 2009, at <http://online.wsj.com/article/SB10001424052970203917304574414831869954664.html> (March 3, 2010).

5. See Robert E. Moffit and Kathryn Nix, “The Public Health Plan Reincarnated: New—and Troubling—Powers for OPM,” Heritage Foundation *Background* No. 2364, January 21, 2010, at <http://www.heritage.org/research/healthcare/bg2364.cfm>.

6. Anna Wilde Mathews, “States Restart Health-Care Push,” *The Wall Street Journal*, February 2, 2010, at <http://online.wsj.com/article/SB10001424052748703410004575029392782460192.html> (March 3, 2010).

coverage is clearly excessive in relation to the putative local benefits.”<sup>7</sup> States that expand—rather than limit—options outside their jurisdictions are not restricted by the commerce clause.

State statutes are generally constitutional even if they limit free commerce by citizens of their state with out-of-state businesses or citizens.<sup>8</sup> Constitutional jurisprudence provides few if any examples of constitutional restrictions on state laws that liberalize commercial activities across state borders.

A primary reason the Founders included the commerce clause in the Constitution was their belief that if states failed to unite in ratifying the Constitution and promoting a robust national economy, commerce, as Alexander Hamilton put it, “would be stifled and lost, and poverty and disgrace would overspend a country which, with wisdom, might make herself the admiration and envy of the world.”<sup>9</sup>

There is a potential for broad bipartisan support for interstate cooperation on health insurance. In May 2007, the Brookings Institution sponsored a program on the expansion of health insurance coverage under the auspices of the Hamilton Project, which featured a presentation by Stuart Butler, Vice President of Domestic and Economic Policy Studies at The Heritage Foundation.

While expounding the advantages of liberalizing the federal tax treatment of health insurance and giving individuals more control over their personal decisions in the health insurance markets, Butler touched on the advantages of *intrastate* “health insurance exchanges.” These would be new state-wide markets, designed by state officials to meet the specific needs of their particular states. The objective of intrastate health insurance exchanges would be to create a system of defined contribution for financing health care, level the playing field among a variety of private health insurers, and allow tax-free individual

purchase and ownership of health insurance policies. This arrangement would also facilitate portability of health care coverage, allowing those with private coverage to keep that coverage when they change jobs, or even if they become unemployed.

By enacting innovative reforms of the health insurance markets at the state level, Butler argued, state officials can improve the functioning of these markets by creating “large stable insurance groups, providing coverage that is continuous and portable between jobs,” transforming small business from health care sponsors to “facilitators of health insurance.”<sup>10</sup>

All of the key decisions about the new rules for the health insurance markets—supplanting outdated rules and unnecessary mandates that often drive up the cost of coverage and restrict competition—would and should be made exclusively by state officials. Intrastate reforms, based on such a health insurance exchange model, are infinitely superior to the proposed national mandates or federal health insurance rules imposed on the states by Congress.

But state legislators and governors can go further: By cooperating with their colleagues in other states, they can employ the best features of the intrastate health insurance exchange to create larger and more robust interstate or regional health insurance markets.

**Precedents for State Cooperation.** Interstate compacts are already widespread in a variety of policy areas. According to the Government Accountability Office (GAO), there are more than 59 congressionally approved environmental interstate commissions alone. The National Center for Interstate Compacts (NCIC) provides an interstate clearinghouse for state officials to review and create these kinds of compacts, enabling states to resolve interstate or multi-state problems.

7. See, *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970).

8. See Matthew Spalding and David Forte (eds.), *The Heritage Guide to the Constitution* (Washington, D.C.: Regnery Publishing Co., 2005), p. 106.

9. See Alexander Hamilton’s 1787 essay “Federalist No. 11,” in any edition of *The Federalist Papers*.

10. Stuart M. Butler, “Evolving Beyond Traditional Employer-Sponsored Health Insurance,” The Brookings Institution’s Hamilton Project, May 2, 2007, at <http://www.brookings.edu/events/2007/0502health-care.aspx> (March 3, 2010).

No area is riper—or more advantageous to Americans—for state reform than health care. While Americans are fuming over congressional mandates, taxes, and spending, states can and should pass laws that promote choice and competition within and among states.

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Interstate insurance reform compacts will not only weaken any public or political support for nationalized health mandates, they will also promote personal ownership and control of health care. Done correctly, insurance reform can reduce bureaucracy, provide simplified one-stop shopping, allow people to get better and more varied health coverage, and allow people to take their plans from “job to job without losing the generous tax benefits of conventional employer-based coverage.”<sup>11</sup>

Interstate compacts can also address a variety of other health policy issues, such as enhancing opportunities for low-income Americans who are uninsured, expanding risk-pooling, and allowing risk-adjustment or other types of protections for

citizens with pre-existing conditions so that they can still afford coverage. Interstate compacts can reduce costs for small employers and expand coverage and improve care for individuals.

While Americans clearly want health care reform, they do not support the mandates that Washington is trying to impose on them. The genius of the American federal system provides a natural set of diverse alternatives to a centralized system of planning—which would force 300 million Americans into a collectivist straightjacket, where all key decisions about health care will ultimately be made in Washington.

State legislators and governors can and should take the lead on health care reform. They should not wait. They can change the rules for health insurance markets and design a superior system that can secure better coverage, more affordable options, and greater personal freedom. They can work together—without coercion—to do so. That is the American way.

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11. “A Guide to State Health Care Reform,” The Heritage Foundation, June 2009, p.10, at [http://www.heritage.org/Research/HealthCare/upload/StateHealthReform\\_Handbook\\_web-2.pdf](http://www.heritage.org/Research/HealthCare/upload/StateHealthReform_Handbook_web-2.pdf).