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Revitalizing Federalism: The High Road Back to Health Care Independence

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Our Country is too large to have all its affairs directed by a single government.

—Thomas Jefferson, Letter to Gideon Granger, August 13, 1800

Abstract: *The Patient Protection and Affordable Care Act represents more than a federal takeover of health care; it is a direct threat to federalism itself. Never before has Congress exercised its power under Article I, Section 8 of the Federal Constitution to force American citizens to purchase a private good or a service. Congress is also intruding deeply into the internal affairs of the states, commandeering their officers, specifying in minute detail how they are to arrange health insurance markets within their borders, and determining the products that will be sold to their citizens. If allowed to stand, this unprecedented concentration of political power in Washington will reduce the states to mere instruments of federal health policy. State legislatures and sympathetic Members of Congress should consider (among other actions) crafting a constitutional amendment to guarantee the personal liberty of every citizen in the area of health care. Given the trajectory of federal policy, state officials should take the lead in the next phase of the national health care debate, reclaim their rightful authority, and change the facts on the ground for Congress and the White House.*

An Unprecedented Challenge

Americans face a direct and historic challenge to their personal liberty and to their unique citizenship in a federal republic. Though its enactment of the

Talking Points

- The Patient Protection and Affordable Care Act is a direct threat to American federalism that, if allowed to stand, will reduce the states to mere instruments of federal health policy rather than the "distinct and independent sovereigns" they were intended to be.
- State legislators can and should move ahead with their own health reform agenda, not just wait for Washington to tell them what to do and how to do it, and should challenge every transgression of their legitimate authority by federal officials.
- It is crucial that state officials make a compelling argument against the concentration of power on the basis of first principles: It is an argument that can succeed.
- Anticipating a political establishment insulated from popular will and feeling on vital national issues, the Founders provided the people of the states with a final remedy for ills besetting the Federal Republic: constitutional amendment.

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massive Patient Protection and Affordable Care Act (PPACA), official Washington is not merely engineering a federal takeover of health care, but is also radically altering the relationships between individuals and the government as well as the national government and the states.

If allowed to stand, this unprecedented concentration of political power in Washington will result in the states being reduced to mere instruments of federal health policy rather than "distinct and independent sovereigns."

In other words, the PPACA is a direct threat to federalism itself. As Jonathan Turley, professor of law at George Washington University, has argued, "Federalism was already on life support before the individual mandate. Make no mistake about it, this plan might provide a bill of good health for the public, but it could amount to a 'do not resuscitate' order for federalism."[1]

Never before has Congress exercised its power under Article I, Section 8 of the Federal Constitution to force American citizens to purchase a private good or a service, such as a health insurance policy.[2] Congress is also intruding deeply into the internal affairs of the states, commandeering their officers, specifying in minute detail how they are to arrange health insurance markets within their borders, and determining the products that will be sold to their citizens.

If allowed to stand, this unprecedented concentration of political power in Washington will result in the states being reduced to mere instruments of federal health policy rather than "distinct and independent sovereigns," as James Madison described them in *Federalist* No. 40.[3]

A Pivotal Role for State Officials

The officers and citizens of the states, however, have plenty of options. These include the filing of lawsuits against the imposition of the federal mandates on individuals and the states themselves, and many are already pursuing that course of action. They can also enact legislation that can facilitate a constitutional challenge to excessive federal power, and bills have already been filed in 38 states to accomplish that objective.

Legislators can also pass resolutions and memorials to be transmitted to Congress petitioning for relief for their citizens from the terms and conditions of the federal law that they determine to be onerous, damaging, or excessively burdensome to their people, their health care delivery systems, and their economic life. On the great issues that have defined crucial eras of American history, state legislators have often passed resolutions and memorials dealing with such questions as slavery, the right of women to vote, and Prohibition.

State legislators can also hold public hearings and invite United States Senators, who are charged under the Constitution with representing the states, to explain their support for or opposition to the national health care law. Senators would have an opportunity to clarify their own views on such matters as the mandatory Medicaid expansions, the implementation of health insurance exchanges, or projected premium or tax increases that will affect the citizens of their states. Likewise, in preparation for the implementation of the national health law, state legislators can invite federal officials in charge of that implementation to appear at special hearings to respond to their concerns and answer questions about the impact of their regulatory changes on the citizens of their states.

1. Jonathan Turley, "Is the Health Care Mandate Constitutional?" *USA Today*, March 31, 2010, at *http://www.usatoday.com/news/opinion/forum2010-03-31-column31_ST_N.htm*.
2. Randy Barnett, Nathaniel Stewart, and Todd Gaziano, "Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional," Heritage Foundation *Legal Memorandum* No. 49, December 9, 2009, at *http://www.heritage.org/research/legalissues/LM49.cfm*.
3. George Carey and James McClellan, eds., *The Federalist* (Indianapolis: Liberty Fund, 2001), p. 202.

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Finally, as the administrative and judicial processes unfold, state officials and their congressional delegations may find it necessary to amend the Constitution itself to ensure the protection of personal liberty and the integrity of the states in the vital area of health care.

The High Stakes

The Founders in 1787 crafted fundamental law for a large Federal Republic, bucking the conventional wisdom of political science. In the classical sense, a republic means limited government; it underscores a sharp distinction between *res publica* (public affairs) and *res privata* (private affairs). In a republic, political authority is held as a public *trust*, not as a private *right*, and is to be exercised only over public affairs.[4]

America's Founders authorized a clear division of authority between a national government, focused on general concerns, and the particular governments of the states, focused on particular concerns.[5] They thus recognized the astonishing unity and profound diversity of the people of the United States. In a free society, the people are sovereign, but in this instance, they are the people of the states united. National and state governments, under the Constitution, are supreme within their own spheres; neither can encroach upon the other without violating the constitutional order itself.

State officials and their congressional delegations may find it necessary to amend the Constitution itself to ensure the protection of personal liberty and the integrity of the states in the vital area of health care.

While Article VI declares the supremacy of federal law, its supremacy is confined to those limited and enumerated powers that are granted to the national government; the Tenth Amendment unambiguously affirms that the residual powers of the American Republic are left to the people *in and through* their several state governments. In *Federalist* No. 45, James Madison writes:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments, are numerous and indefinite…. The powers reserved to the several states will extend to *all the objects*, which, in the *ordinary course of affairs*, concern *the lives, liberties, and properties of the people*; and the internal order, improvement and prosperity of the state.[6]

The Arrogance of Power

The Constitution is ultimately a political document, and the health care debate is ultimately a philosophical debate on the scope of political authority. If one's health care and medical treatment is a personal matter and an exercise of personal responsibility, then the new law is quintessentially *un-republican*; for all practical purposes, it renders these intensely personal affairs a public concern. The imposition of an individual mandate to purchase health insurance is likewise an unconstitutional restriction on personal liberty, pregnant with potential abuses far beyond a mandate for health insurance.[7]

Under the new law, states are compelled to expand Medicaid.[8] Equally troublesome is the congressional mandate on the states to establish federally supervised health insurance exchanges within

4. For an elaboration of this classical idea of republicanism within the context of the American constitutional tradition, see Orestes Augustus Brownson, *The American Republic* (New Haven: College and University Press, 1972). For further discussion, see Robert E. Moffit, Ph.D., "Constitutional Politics: The Political Theory of Orestes Brownson," *The Political Science Reviewer*, Vol. VIII (Fall 1978), pp. 135-172.
5. In the words of *Federalist* No. 10, "The Federal Constitution forms a happy combination…the great and aggregate interests being referred to the national, the local and particular, to the state legislatures." Carey and McClellan, eds., *The Federalist*, p. 47.
6. Carey and McClellan, eds., *The Federalist*, p. 241 (emphasis added).
7. Barnett *et al.*, "Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional."

their borders where government-sponsored plans and co-ops will compete against private insurance.

Under Section 1311(b)(1), "Each state *shall*, not later than January 1, 2014, establish an American Health Benefit Exchange [emphasis added]." The exchange is either to be a governmental agency or a nonprofit entity. Under Section 1321(c), if a state does not establish such an exchange, the Secretary of Health and Human Services will establish and operate an exchange within the state. In the "state-based" exchanges, of course, only federally approved heath plans would be allowed to compete.

The states, in other words, would be vehicles of federal health policy. This is underscored by the highly prescriptive requirements imposed on the states, governing everything from the simple presentation of health plan information down to the formatting of state Web sites. The statute authorizes over a dozen regulatory interventions by the Secretary of HHS and other federal officials.

Our constitutional tradition limits federal power and does not sanction national intrusion into citizens' personal, private, or domestic relations. As Madison affirmed, law in these areas of domestic life is properly within the jurisdiction of the states; this latest act of Congress is a bold challenge to that jurisdiction.

At the very least, this is a profoundly undesirable alteration in the relationship between the federal government and the officers and citizens of the states—precisely the concentration of power that the Founders feared—and it is also constitutionally suspect. It is one thing to require state officials to obey federal law; it is quite another to compel them to administer it and force their citizens to bear the expense of that administration.[9] Our constitutional tradition limits federal power and does not sanction national intrusion into citizens' personal, private, or domestic relations. As Madison affirmed, law in these areas of domestic life is properly within the jurisdiction of the states; this latest act of Congress is a bold challenge to that jurisdiction.

State Legislators as Tribunes of the People

The states have emerged as the institutional centers of resistance to the new health law. Twenty-one states have filed suit against the individual mandate to purchase health insurance on the ground that it is an unconstitutional burden on their citizens.[10] Even legal specialists who have expressed sympathy for the objectives of the new law fully acknowledge the broader issues at stake in this national debate. According to Jonathan Turley:

> Though the federal government has the clear advantage in such litigation, these challenges should not be dismissed as baseless political maneuvering. There is a legitimate concern for many that this mandate constitutes the greatest (and perhaps the most lethal) chal-

8. Critics of opposing states often respond that no state is required to participate in Medicaid; but as Richard Epstein of the University of Chicago Law School points out, this is a false and coercive option for the states. "States may leave Medicaid but the Medicaid taxes their citizens pay will support the program in other states. The state's option to leave Medicaid would be real only if the federal government refunded its citizens' Medicaid taxes or paid them into the state treasury." Richard A. Epstein, "ObamaCare's Phony Medicaid 'Deal,'" *The Wall Street Journal*, May 10, 2010, at *http://online.wsj.com/article/SB10001424052748704446704575206380880867088.html*; see also Dennis G. Smith, "Facing Obamacare: What the States Should Do Now," Heritage Foundation *Backgrounder* No. 2408, May 3, 2010, at *http://www.heritage.org/Research/Reports/2010/05/Facing-Obamacare-What-the-States-Should-Do-Now.*
9. The United States Supreme Court has addressed the question in other contexts. See, for example, *Jay Printz v. United States*, 521 U.S. 898 (1997). Writing for the majority, Justice Antonin Scalia ruled, "The federal government may neither issue directives requiring states to address particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."
10. There is no "severability" clause in the legislation. Thus, a judicial ruling against the individual mandate could jeopardize the entire law.

> lenge to states' rights in U.S. history. With this legislation, Congress has effectively defined an uninsured 18-year-old man in Richmond as an interstate problem like a polluting factory. It is an assertion of federal power that is inherently at odds with the original vision of the Framers. If a citizen who fails to get health insurance is an interstate problem, it is difficult to see the limiting principle as Congress seeks to impose other requirements on citizens.[11]

Likewise, 13 states have filed suits against the Medicaid mandate.[12] While these legal challenges work their way through the judicial process, state governors and legislators, allied with their aggrieved citizens, can and should pursue a broader political strategy to repeal, resist, or roll back this unjustified expansion of federal power. Because of the potential damage to the states from these costly federal mandates and regulations, the national health law should emerge as an issue in state politics.

State legislators can serve as the true tribunes of the people. They can help to redefine and frame the terms of the national debate. Thus far, legislators in 38 states have already introduced "Freedom of Choice in Health Care Acts" based on model legislation proposed by the American Legislative Exchange Council (ALEC), the leading national association of conservative state legislators. The proposals would generally allow persons to pay directly for medical services if they wished to do so and block the imposition of penalties on those who did not enroll in a particular health plan. Such measures obviously invite a constitutional challenge.

Playing Offense

Under the Tenth Amendment to the Constitution, the powers not granted to the national government are reserved to the states and to the people. There is a large role that states can play in making health care policy, especially over the next four years. Furthermore, inaction by the states is an invitation to the federal government to take over their legitimate power when there is a popular demand for action.[13]

State legislators can and should move ahead with their own agenda for health reform, not just play a waiting game until 2014, listening for Washington to tell them what to do and how to do it.

State legislators can and should move ahead with their own agenda for health reform, not just play a waiting game until 2014, listening for Washington to tell them what to do and how to do it.[14] State legislators should seize every inch of territory in the health policy debate within the law, such as health insurance market reform, and challenge every transgression of their legitimate authority if and when federal officials violate it.

State legislators should also hold their own public hearings on the impact of the federal law on their citizens, employers, employees, insurers and medical professionals, and state agencies. U.S. Senators who voted to impose costly mandates on their states should be invited to state legislative hearings to give an account of their actions and explain why they believe that such mandates advance the true interests of the states they represent.[15]

Likewise, state legislators should invite federal officials to appear and explain how they intend to implement mandates and make them justify their proposed rules in broad daylight. State legislators, in cooperation with colleagues in sister states, should

11. Turley, "Is the Health Care Mandate Constitutional?"
12. Epstein, "ObamaCare's Phony Medicaid 'Deal.'"
13. A point not well understood today but which was clear to President Calvin Coolidge, who argued in an address delivered at Arlington National Cemetery on May 30, 1925, that "the reason for increasing demands on the Federal Government" during the Progressive Era "is that the States have not discharged their full duties.... So demand has grown up for a greater concentration of powers in the Federal Government." See "The Reign of Law," May 30, 1925, in Calvin Coolidge, *Foundations of the Republic: Speeches and Addresses* (New York: Scribner's Sons, 1926), p. 228.
14. For a detailed discussion of how state officials can cope with the challenges of the new law, see Smith, "Facing Obamacare: What the States Should Do Now."

make it clear that dumping hundreds of pages of complex federal rules into the *Federal Register* for public notice and comment is no longer sufficient.

Alexander Hamilton, writing in *Federalist* No. 28, anticipated such cooperation among the states in resisting unjust federal power:

> Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information; they can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in different states; and unite their common forces, for the protection of their common liberty.[16]

The Rebirth of Liberty

The enactment of the massive Patient Protection and Affordable Care Act was a direct repudiation of the popular will and, equally, a bold challenge to the continued viability of the federal political order. There are no guarantees of victory either, in Congress or in the courts, but the United States is still a federal republic, not a unitary state or a mass democracy.

It is crucial that state officials make a compelling argument against the concentration of power on the basis of first principles: It is an argument that can succeed.[17] Anticipating a political establishment insulated from popular will and feeling on vital national issues, the Founders also provided the people of the states with a final remedy for ills besetting the Federal Republic: constitutional amendment.

Given the rapid and continuing growth of the already enormous health care sector of the economy, as well as the gravity of this threat to liberty in such a vital area of personal life, state legislatures, in league with sympathetic Members of Congress, should consider crafting a constitutional amendment to guarantee the personal liberty of every citizen in the area of health care. Prudential considerations, of course, would govern the timing and content of such an action.

Given the trajectory of federal policy, state officials should take the leadership role in the next phase of the national health care debate, reclaim their rightful authority, and change the facts on the ground for Congress and the White House.

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15. Of course, they can refuse to appear before any state legislative body, but the Seventeenth Amendment to the Constitution providing for the direct popular election of U.S. Senators does not alter the simple fact that Senators nonetheless represent the states as civil entities.
16. Carey and McClellan, eds., *The Federalist*, p. 139.
17. Interestingly, even among champions of the superiority of federal power under the Patient Protection and Affordable Care Act, there are those who concede that a strong philosophical argument could be decisive. Randall R. Bovbjerg, a highly respected health policy analyst with the Urban Institute, believes that there is firm legal ground for the new health law's individual mandate and the federal authority over the states in this area, but he concedes that among the vulnerabilities of the federal government's position is the possibility "that the opponents' arguments will strike a philosophical chord with a majority of the Supreme Court, and that five justices could use a PPACA challenge to establish a new constitutional paradigm in place of past precedent." Randall R. Bovbjerg, "Are State Challenges to the Legality of the Patient Protection and Affordable Care Act Likely to Succeed? A Timely Analysis of Immediate Health Policy Issues," Urban Institute, June 2010, p. 3.