

Heritage Lectures

No. 1154
Delivered April 12, 2010



Published by The Heritage Foundation

May 3, 2010

Federalism Under Attack: How Obamacare Turns Citizens into Government Minions

The Honorable Thomas C. Feeney

Abstract: *The nationalized health care system pushed by President Barack Obama and congressional Democrats has been signed into law. Policymakers and private citizens across the country are rebelling against what they see as an intrusion of the federal government into state and individual rights. On April 12, 2010, former Member of Congress Thomas C. Feeney addressed a gathering of state legislative leaders at The Heritage Foundation, explaining how opponents of federalized health care have history on their side and why the Founders' idea of federalism must be preserved.*

At the time of the 2008 presidential election, a majority of American voters were desperate for virtually any political program that could be sold as “Hope and Change.” For many of those same voters, their initial optimism has been replaced by reality and frustration over the dramatic expansion of federal control over decisions that, in America, have historically been made at the individual, community, local, or state levels.

For some, the last straw was health care policy. Indeed, a majority of Americans have expressed concern, skepticism, or downright outrage at the recent health care bill passed by Democrats in Congress and signed by President Barack Obama.

It is easy for advocates of limited constitutional government to get discouraged these days, considering the near-daily national encroachments on individual liberty and the federalist balance in American government. It was Winston Churchill who said: “The

Talking Points

- The majority of Americans have expressed concern, skepticism, or downright outrage at the recent health care bill passed by Democrats in Congress and signed by President Obama.
- Americans have a traditional cultural suspicion of nationalist encroachment into state, local, or individual decisions, yet are faced with near-daily national encroachments on their individual liberties and the federalist balance in American government.
- Alexis de Tocqueville warned that undermining the Founders' federalist design and allowing nationalist micromanagement of local and individual decisions would turn all Americans into “minions of an omnipotent government.”
- Instead of acquiescence in the unprecedented power grab of nationalized health care, legislatures, governors, and other policymakers should continue to reject the federal mandates and push for repeal and reform of the new health care legislation.

This paper, in its entirety, can be found at:
<http://report.heritage.org/hl1154>

Produced by the Center for Health Policy Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
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American people will always do the right thing, after they have tried everything else.”

Until American government runs out of bad policies to attempt, citizens’ fear of their own government will continue to grow. There are many reasons for this. An important one is a traditional and cultural American suspicion of nationalist encroachment into state, local, or individual decisions. Indeed, Amendment I of the Bill of Rights begins with the declaration that “Congress shall make no law respecting” the following matters: religion, speech, press, assembly, and petitions to government.

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On its face, the First Amendment does not restrain state or local governments from doing anything. This country’s Founders were concerned with limits not on the states, but on the national government. The last of the Bill of Rights is, of course, the Tenth Amendment, which states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

As Alexis de 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.” Writing more than half a century after the adoption of the U.S. Constitution, Tocqueville recognized the inherent beauty and benefits of our form of government.

Tocqueville also warned that undermining our Founders’ federalist design and allowing nationalist micromanagement of local and individual decisions would turn all Americans into “minions of an omnipotent government.”

The Commerce Clause

America’s Founders had Tocqueville’s concerns decades earlier: The Founders confined federal control of trade and commercial dealings to activity with foreign sovereigns or “between” different states.

Shortly after the Revolution but before ratification of the Constitution, several states had imposed taxes

or regulations on goods imported from sister states, which often retaliated. Some states had begun to punish sister states at such a level that many political leaders feared that economic warfare between the states would lead to dissolution of the Union.

To promote commerce and stop trade wars among the states, Congress included the Commerce Clause in Article I, Section 8 of the Constitution, which describes the powers of Congress. The Commerce Clause provides in full that Congress has the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” Intrastate dealings were left to the states to manage.

The Obama health care law exceeds any Commerce Clause power by mandating fines for American citizens who do not purchase federally approved health insurance. But a decision not to purchase a specific good or service is not activity “among the several States,” nor is it “Commerce.” It is not a legitimate constitutional power of the federal government.

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Preserving federalism is good for prosperity, Tocqueville pointed out. In fact, this was the Founders’ design. Both individual freedom and personal wealth are protected by constitutional limits on the federal government. As Thomas Jefferson said, “If we were told what to reap and what to sew by a federal government, we should soon want for food.”

Or, as my favorite economist of our lifetime, Milton Friedman, put it, “If we put the federal government in charge of the Sahara Desert, there would soon be a shortage of sand.”

As James Madison described it, “The powers delegated by the... Constitution to the federal government are few and defined,” while “[t]hose which are to remain in the State governments are numerous and indefinite.” The Commerce Clause was a key component of limiting national government.

Unfortunately, in response to the New Deal, the U.S. Supreme Court has incrementally misinterpreted the Commerce Clause to allow Congress to micromanage virtually any behavior. For example, sales of milk by a farmer to a neighbor within the same state were found constitutionally unacceptable on the tenuous theory that local wheat sales by a single farmer impacted wheat prices nationally.

In 1942, the Supreme Court decided in *Wickard v. Filburn* to uphold a federal quota on sales against a farmer who grew a small amount of wheat, most of which was consumed on his own farm. Even though the farmer sold just a minute amount of wheat to his local neighbors, any wheat grown increased the total national supply. A farmer taking excess crops to market a few miles away was now engaged in “interstate commerce”!

Restoring Proper Perspective

Recently, for the first time in 50 years, the majority of the Supreme Court has begun to put the Commerce Clause in proper perspective—allowing Congress to intervene in sales only if a state law adversely impacts commerce between citizens of different states.

In *United States v. Lopez* in 1995, in a revolutionary restoration of traditional jurisprudence, the Supreme Court struck down a congressional act as violating the long-dormant Commerce Clause. The court held that a “federal” law criminalizing possession of a firearm on school property trampled on the “general police power of the sort retained by the states.”

No Supreme Court has ever ruled that Congress could mandate that individuals purchase a particular good or service. Many state attorneys general and governors have brought suit to challenge this and other aspects of nationalized health care law passed in April 2010.

State legislators have the right and obligation to fight for the preservation of federalism and state government prerogatives. If the federal government can micromanage personal health care decisions, state legislatures may as well be dissolved, as our nationalized government has turned them into administrators and tax collectors for a nationalized

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welfare state. And we, the citizens, have become “minions of omnipotent government.”

Nationalization of decisions historically made by individuals, communities, and states is not just confined to health care. The traditional balance of limited federal control is increasingly being undermined by Congress and the executive branch in education policy, water use and environmental regulations, banking, and insurance.

A Watershed in the Fight for Liberty

Nationalization of health care is a watershed in the fight for American liberty. The Congress has attempted to undermine a fundamental constitutional principle. Citizens and state leaders across the nation are rebelling against usurpation of powers rightfully left to state governments.

Instead of acquiescence in this unprecedented power grab, legislatures, governors, and other policy-makers should continue to reject the federal mandates and push for repeal and reform of the new health care legislation. Legislators take the same oath to uphold the U.S. Constitution as do Members of Congress, Supreme Court justices, and Presidents. As the great Senator Daniel Webster famously said:

Hold on, my friends, to the Constitution of the United States of America and the republic for which it stands. Miracles do not cluster, and what has happened once in 6,000 years may never happen again. Hold on to your Constitution, for if the American Constitution should fail, there will be anarchy throughout the world.

—*The Honorable Thomas C. Feeney is Senior Visiting Fellow at The Heritage Foundation, a former Member of the U.S. House of Representatives from Florida, and former Speaker of the Florida House of Representatives. He delivered these remarks at a conference on state health insurance reform at The Heritage Foundation.*