Heritage Lectures

Published by The Heritage Foundation

No. 1181
Delivered January 8, 2011

March 14, 2011

# Why the Health Care Law Has Sparked a National Debate Over First Principles

*Robert E. Moffit, Ph.D.*

**Abstract:** *In a democratic republic, the people are sovereign and normally anticipate respect for their views from their elected representatives, but over the past two years, Americans have come to realize that Washington's political class has become distant from them. Nowhere has that mental and emotional distance been clearer than in the national debate on the Patient Protection and Affordable Care Act of 2010. Even though most Americans did not support the health care bill, many Members of Congress simply ignored the majority of their fellow Americans. It is time to repair to first principles. The next phase of the intense and bitter battle over the health care law, complementing new congressional efforts to repeal, block, or defund it, will take place in state capitals. Regardless of what happens in Washington, state officials can seize the high ground in health care policy, fashion solutions to match their specific problems, and change the facts on the ground for Congress and the White House.*

Millions of Americans are rightfully anxious. They fear that they are losing control over their own personal lives as well as the quality of life and the national heritage that they will bequeath to their children and grandchildren. Struggling through a recession—and resentful of Washington's record deficit spending and mounting debt—most Americans want new political leaders committed to solving the major problems of public policy but who are also respectful of their views and values.

America's future as a free and prosperous federal republic is assured only if official Washington is will-

## Talking Points

- Americans have come to realize that Washington's political class has become disconnected from them.
- Congress's blatant behavior during the health care debate has refocused public attention on the legislative process and the need to re-establish proper order and accountability.
- A strong antidote to the arrogance of the administrative state is full transparency. Those who make the rules should be accountable for the rules they make.
- The United States Supreme Court has struck down congressional attempts to commandeer state officials to carry out federal rules. That challenge to federal overreach should be renewed.
- Congress may write expansive and unconstitutional laws, and their nameless agents in the federal bureaucracy may write highly prescriptive rules, but they exercise no authority over state legislators' power of the state purse.

This paper, in its entirety, can be found at:
*http://report.heritage.org/hl1181*

Produced by the B. Kenneth Simon Center for American Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org



The Heritage Foundation
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ing to confront the facts on the ground and reshape the trajectory of our public policies.

Facts, the great John Adams once remarked, are "stubborn things." The Obama Administration has broken all records, particularly in deficit spending. This spending has been accompanied by a massive expansion of direct and indirect government control over large sectors of our ailing economy.

In recent years, Americans have witnessed an unprecedented concentration of political power in Washington combined with a dramatic increase in government employment, where pay scales and benefits are higher than those of the private sector. Since December 2007, federal government employment, excluding the Postal Service, has grown by over 11.7 percent even as total private-sector employment has declined by 6.6 percent over the same period. The expansion of government continues even as private businesses struggle, small firms go under, and millions of increasingly desperate American families remain jobless.

## A New Culture Gap

In a democratic republic, the people are sovereign; they are the supreme power of the state. As such, the sovereign people normally anticipate due respect to their views and opinions on large matters of public policy from their elected representatives.

But over the past two years, ordinary Americans have come to realize that Washington's political class—the politicians and their staffs and the armies of lawyers and lobbyists and consultants that intermingle with them routinely—really have become distant from them in mind and heart; they have become disconnected in so many ways. That mental and emotional distance had become glaringly evident on many topics, such as record spending and deficits, but none so clearly as in the long and bitter national debate on the Patient Protection and Affordable Care Act of 2010 (PPACA), the new national health care law.

Most Americans did not support the health care bill. Throughout 2009 and 2010, in public forums and town hall meetings, many Members of Congress made it very clear that they did not hear or want to hear what the majority of their fellow Americans thought or felt about the health care bill. The unspoken message was that we did *not* know what was good for us, and that they *did* know what was good for us and, convinced of their superior knowledge, were going to give it to us good and hard, whether we liked it or not.

It was a strange, if not unprecedented, legislative drama, with unpredictable parliamentary gyrations. Politicians have often been criticized for pandering to popular opinion, but in this instance, operating at very high altitudes, they conveyed contempt for the good opinion of the vast majority of their fellow countrymen on a matter that was clearly of vital importance to them.

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The "political class" is not confined to Washington's politicians: It also includes their ardent advocates and allies in the academy and in the policy community. While no major reputable survey showed majority support for the enactment of the new law and more recent polling indicates that a majority of voters favor its repeal, the sentiments are, and have been, very different among "opinion leaders" in health policy. For example, the Commonwealth Fund, a liberal health policy organization based in New York, reported in April of 2010 that nearly nine out of 10 "leaders in health policy" held favorable views of the new law and its key provisions.

## Federal Power and Individual Freedom

One of the popular objections to the health care law was that its enactment would alter, perhaps forever, the relationship between the individual and the federal government; that it would undermine personal liberty and induce dependency. While much of the focus of the discontent was on the federal imposition of an unprecedented individual mandate to purchase a federally approved health insurance policy, the law was pregnant with

bureaucratic control over one-sixth of the economy, including the minute details of health care financing and delivery.

***The Founders crafted the Constitution precisely to limit government power and to prevent its arbitrary exercise.***

In an unforgettable press conference in March of 2010, a reporter asked House Speaker Nancy Pelosi (D–CA) where, under Article I, Section 8 of the Constitution, did she find the congressional authority to impose a federal mandate on American citizens to purchase health insurance? It was a straightforward inquiry. Her voice dripping with incredulity, Speaker Pelosi answered the question, repetitively, with a question: Was the gentleman serious?

Think about that. Congress is imposing an unprecedented national mandate on American citizens to buy a good or service, and in the Speaker's mind, at least as far as we can tell, the central issue as to whether she and her colleagues even have such authority, under the Constitution they swore solemnly to uphold, is not even a question worth entertaining!

But the Founders crafted the Constitution precisely to limit government power and to prevent its arbitrary exercise. Article I, Section 8 states that "All legislative powers *herein granted* shall be vested in a Congress of the United States" and goes on to list 18 such legislative powers. Most Americans revere the profound work of the Founders and appreciate the gravity of the moral commitment of public officials, from police officers to Presidents, who pledge, under oath, to submit themselves to restraints on their powers imposed by the Constitution.

## Striking Back

In this instance, there is no case law for the Congress or precedent for the courts to examine. No such individual mandate has ever come before the United States Supreme Court. So, by its very nature, it is indeed a very serious question. Millions of Americans thought so, even though their concerns were often dismissed by Members of Congress and their academic allies, but the federal courts are vindicating those concerns.

- In a breathtaking decision on behalf of 26 states, rendered on January 31, 2011, in the case of *State of Florida v. U.S. Department of Health and Human Services*, Federal District Court Judge Roger Vinson struck down the individual mandate and the entire health care law as unconstitutional.
- Likewise, on December 10, 2010, in the case of *Commonwealth of Virginia v. Sebelius*, Federal District Court Judge Henry Hudson ruled that the individual mandate exceeded congressional powers under Article I, Section 8 to regulate commerce and emphasized again that never before in the history of American jurisprudence had the Interstate Commerce Clause or the federal taxing power been used to justify such a mandate.

It is worth noting that the Obama Administration made exotic and spectacularly unpersuasive arguments before the courts. Members of the Administration insisted that under the Commerce Clause, *inactivity*—literally doing nothing—was identical to *activity* in the matter of purchasing health insurance. They also insisted that the real source of legitimacy for the imposition of the individual mandate, the "linchpin," was the congressional power to tax.

***If Congress really does have the constitutional authority to force us to buy health insurance, logically, where would that congressional authority stop?***

Even after the President repeatedly denied—including a high-profile denial on national television—that the mandate penalty was a tax, the Administration's lawyers continued to claim that the "penalty" for violating the individual mandate was a constitutionally permissible "tax." As Judge Vinson reminded these lawyers, their position did not square at all with Congress's own appeal to its power to regulate interstate commerce to justify the Patient Protection and Affordable Care Act.

The constitutional issue therefore becomes profoundly important. If Congress really does have the constitutional authority to force us to buy health insurance, logically, where would that congressional authority stop? Why not life insurance? Why not firearms? Why not automobiles? Why would

we need a silly cash-for-clunkers program to secure fuel-efficient automobiles? Why not just force Americans to buy a federally approved, fuel-efficient Japanese car and be done with it?

What is true in the premises of an argument must be true in the conclusion. By the Administration's logic, restraints on future exercises of federal power can only be left to the imagination. During the 2010 confirmation hearings for Supreme Court nominee Elena Kagan, Senator Tom Coburn (R–OK) asked her whether Congress had the authority to require Americans to have three helpings of fruits and vegetables each and every day. From the soon to be Justice Kagan, no.

Under the traditional understanding of the Constitution, of course, there is no such ambiguity. Arbitrary, concentrated power is the wellspring of human oppression. Power must be confined, channeled, and tamed. In *Federalist* No. 45, James Madison explains that "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."

But 222 years later, Congressman Fortney "Pete" Stark (D) of California decidedly expresses a very different view. At an August 2010 congressional town hall meeting, a constituent posed a question to Congressman Stark: If one were to assume the constitutionality of the health care law, is there any limitation on the federal government's ability to "tell us how to run our private lives"?

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Congressman Stark replied, "I think there are very few Constitutional limits that prevent the federal government from rules that would affect your private life." The Congressman went on to say that "The federal government, yes, can do most anything in this country."

Stark's bold declaration was a refreshingly frank admission.

## Public Trust and the Process of Legislative Deliberation

For the Founders, particularly the authors of *The Federalist*, public policy was to be the product of rational debate by the elected representatives of the sovereign people. The architecture of the Constitution itself—the bicameral division of a House of Representatives and a Senate, two different bases (federal and popular) of legislative representation for the lower and the upper houses, the presidential veto, and the demanding legislative requirements for overriding that veto—is designed to facilitate legislative deliberation and forge consensus among competing interests.

There is also a standard of legislative conduct. In No. 53 of *The Federalist*, James Madison writes, "No man can be a competent legislator who does not add to an upright intention and sound judgment, a certain degree of knowledge of the subject on which he is to legislate."

But Congresswoman Nancy Pelosi of California has more expansive views. In 2010, as Speaker of the House, Pelosi insisted that the Congress move as fast as possible to enact the massive health care legislation so that we could "find out" what was in it. Her colleagues obliged and enacted a legislative product exceeding 2,700 pages in length, overhauling a sector of the American economy roughly the size of France, and few pretended to have read their own formidable handiwork before casting their favorable votes.

Post-enactment, even some leading congressional sponsors of the new health care law have conceded confusion. For example, even senior Members of Congress at public forums often find themselves flummoxed by direct questions about the crucial details of the new law they championed.

One provision, for example, deals with the employer mandate to purchase the federally approved level of health insurance. The law says that in 2014, any firm with more than 50 full-time employees is subject to the employer mandate. If the firm doesn't offer health insurance, it faces a $2,000 annual fine for each worker that remains uncovered. The law also provides for the imposition of a heavier per capita annual penalty of $3,000

on employers if their low-income workers purchase subsidized health insurance coverage through the state-based health insurance exchanges to be established on January 1, 2014.

What is the rationale for such a provision? Since eligibility for taxpayer subsidies in the exchange is based on household income as opposed to wages, how is an employer supposed to know any given worker's household income? Does the employer now have to keep track of the wages of spouses or perhaps adult children living at home?

Of course, with this employer mandate, Congress creates a new incentive for businesses to hire part-time workers, not full-time workers. It also creates disincentives for firms to grow beyond 50 employees. Moreover, the heavier penalties for noncompliance would probably discourage firms from hiring low-income workers in the first place.

***For the Founders, public policy was to be the product of rational deliberation by the elected representatives of the sovereign people. The architecture of the Constitution itself is designed to facilitate legislative deliberation and forge consensus among competing interests.***

Why would Congress adopt such an odd set of socially regressive policies amid a steep recession? It is worth asking lawmakers who supported the new health law why, exactly, they voted for such provisions.

Of course, Speaker Pelosi was right: We are finding out what's in the law each and every day, ranging from genuinely odd outcomes to the standard, garden-variety unintended consequences that especially bedevil health policy. A narrowly partisan, hastily drafted legislative monster affecting every citizen and rushed through a flawed process to meet artificial political deadlines—this is not the quality of legislative decision-making that Americans deserve.

Congressional leaders insisted the bill would reduce costs for businesses. It did not. In fact, major corporations were immediately forced to add hundreds of millions of dollars to their annual liabilities. Companies will also soon be facing rapidly rising insurance premiums reflecting the new health benefit mandates, insurance rules, and taxes.

In 2010, the President and the Congress achieved an enormous legislative victory and suffered an historic loss of public trust. The reason: another gap, as big as the Grand Canyon, between official rhetoric and legislative reality.

Since the inception of the legislative debate in 2009, the President has made a series of high-profile promises about the health care law. For example:

- **Obamacare will bend the cost curve downward.** No, it won't. In his April 22, 2010, report on the impact of the new law, Richard S. Foster, the Actuary at the Centers for Medicare and Medicaid Services (CMS), the agency that runs the giant federal health care programs, said the new law would bend the cost curve upward, adding $310 billion more in health care spending than we would have spent if the law had never passed. The Actuary does not speak for the Administration. He may be in the Administration's world, but he is not of it.
- **People who like their health plan can keep it.** No, they can't. I cannot recall any reputable independent analyst who supported that contention. The CMS Actuary estimated 14 million Americans would lose or be transitioned out of employer-sponsored coverage. That number could turn out to be much higher.
- **People will see an annual decline in their health insurance premiums.** No, they won't. In fact, the Congressional Budget Office (CBO) estimated that health premiums would increase between 10 percent and 13 percent in the individual market. Meanwhile, the CMS Actuary concluded that higher taxes on health insurance, drugs, and medical devices would also lead to higher insurance premiums in the group market.
- **The middle class will not see tax increases.** Yes, it will. While the President promised that no family making less then $250,000 annually would pay higher taxes, most of the health law's tax increases affect the middle class.
- **Medicare payment cuts will not cut Medicare benefits.** Yes, they will. The CMS Actuary initially said that payment cuts to Medicare providers

could end the participation of some providers, would make 15 percent of hospitals unprofitable, and would "jeopardize" the access of seniors to health care. Worse, cuts in the popular Medicare Advantage plans would reduce the value of their benefits and cut enrollment in those plans by half over the next 10 years.

- **Obamacare won't add to the deficit.** To make Congressional Budget Office numbers come out right, congressional leaders carefully crafted the language of the health bill on exotic assumptions while making sure that revenues would flow into the system for the first four years and the major benefits and subsidies would be delayed until 2014. If one is gifted with a secular faith that can move decimal points—believing that an additional $1 trillion in federal spending and the creation of two new entitlements are essential variables in a novel formula for deficit reduction—then one can believe just about anything. Most Americans, thankfully, are inveterate skeptics.

## The Triumph of the Administrative State

Congressional champions of the health care law desperately want the debate to end, hoping, to use Speaker Pelosi's phrase, for that infamous "fog of controversy" to lift. It won't. Minor changes are already underway, generating some red-hot reaction over premium increases and anxiety over the status of certain company health plans. Major changes will be implemented between 2012 and 2018: the imposition of insurance mandates for employers and employees; federal control over the health insurance markets; new taxpayer subsidies; new taxes; and the creation of scores of new federal agencies, boards, councils, commissions, panels, and programs.

The exact number of these federal entities is a matter of dispute; it depends on how and what is counted or defined, and some can be created administratively. Interestingly, the Congressional Research Service (CRS) declares that the exact number of new federal entities is, to use their word, "unknowable."

***When elected representatives write overly broad language and delegate vast powers to administrative bodies to define or delineate its precise meaning and minute application, this is not the traditional rule of law; it is the new rule of regulation.***

What *is* known is that over the next eight years, millions of Americans will be on the receiving end of a flood of red tape—tens of thousands of pages of new rules, regulations, and guidelines directly touching on the minute details of the health care system and impacting their personal lives. It will be unlike anything they have ever seen before. No nook or cranny of the sprawling health care sector of the economy will escape the federal bureaucracy: doctors, hospitals, clinics, pharmaceutical companies and biomedical research facilities, medical device manufacturers, employers (large and small), insurers, and the state health care programs currently administered by governors and funded by state legislators.

In the constitutional republic bequeathed by the Founders, the precise language of the law is to be hammered out in open debate by elected representatives of the people, promulgated and enforced by the executive. But the process is qualitatively different when elected representatives write overly broad language—aspirational in tone and vague in substance—and delegate vast powers to administrative bodies to define or delineate its precise meaning and minute application.[1] This is not the traditional rule of law; it is the new rule of regulation.

For most Americans, the regulatory process is an opaque set of transactions, the focal point of special-interest lobbyists and consultants, advertised for "notice and comment" on the turgid products published in the *Federal Register*. In the new health

1. For an excellent account of the massive regulatory regime emerging from the Patient Protection and Affordable Care Act, see John S. Hoff, "Implementing Obamacare: A New Exercise in Old-Fashioned Central Planning," Heritage Foundation *Backgrounder* No. 2459, September 10, 2010, at *http://www.heritage.org/Research/Reports/2010/09/Implementing-Obamacare-A-New-Exercise-in-Old-Fashioned-Central-Planning*.

law, an emerging feature of this bureaucratic process is a growing set of exemptions for certain groups. As Madison warned in No. 62 of *The Federalist*, "Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?"

***The Founders identified arbitrary government with tyranny.***

With the administrative state, law and regulation are one and of equal force.[2] But the rule of regulation is the rule of regulators, persons who are deemed "experts"—unelected, unknown, and unaccountable. In the administrative state, the bureaucracy constitutes the real ruling class, and they daily and directly affect the lives and livelihood of millions. In practice, those who make the rules are those who unmake the rules, who can selectively enforce them or apply them differently to politically favored persons or groups.

For example, under the national health law, the Secretary of Health and Human Services has already made exceptions to major rules governing the "mini-med plans": McDonald's fast-food chain and over 1,000 other firms and organizations, including unions, were granted one-year waivers from the rules that applied to every other company or firm offering plans with limited coverage.

Expect that sort of thing to become standard operating procedure. The regulators can—for reasons of state, to avoid adverse publicity or congressional oversight, to reward or punish according to the criteria they devise—treat similarly situated equal citizens very differently. This is arbitrary government, and the regulators are the chief arbiters of arbitrary government.

The Founders identified arbitrary government with tyranny. The key question for America's elected representatives today is not whether they should roll back the administrative state, but how quickly and effectively they can do it.

The Progressive vision of the administrative state, which concentrates power in federal bureaucracy, has never been more triumphant than with the enactment of the national health care law. It changes the relationship of American citizens to public officials. It becomes a relationship of dependence, and thus subservience.

Never in the history of the world has there ever been a relationship of dependence on public officials that was not also a relationship of subservience. Only an independent and self-reliant people has ever been a free people. The Founders understood that and crafted a republican political order to encourage personal and political and economic freedom and responsibility, for they understood that freedom was "the mainspring of progress" and productivity. Today, their work, and the superior vision that guided it, remains the very best alternative to the stifling, often stupid, and unimaginative rule of a distant bureaucratic elite.

## Federal Power and the Freedom of the States

The new health law will profoundly alter the relationship between the federal government and the states by reducing the states to mere agents of federal policy. Their traditional authority over their health insurance markets has been eviscerated as they are forced to create a congressionally mandated agency and carry out federal responsibilities within their own borders. The Secretary of HHS defines the kind of health plans and health benefits packages that are acceptable: States are forbidden to allow lower-cost plans to compete that don't meet Washington's specifications.

Under Section 1311 of Title I of the PPACA, Congress requires the states to erect state-based health insurance exchanges. These statewide organizations are the means by which individuals and businesses are to buy federally standardized health insurance plans. The exchanges will determine eligibility for government subsidies for insurance and administer

2. For a discussion of the origins of the modern administrative state, see Ronald J. Pestritto, Ph.D., "The Birth of the Administrative State: Where It Came From and What It Means for Limited Government," Heritage Foundation *First Principles Series Report* No. 16, November 20, 2007, at *http://www.heritage.org/Research/Reports/2007/11/The-Birth-of-the-Administrative-State-Where-It-Came-From-and-What-It-Means-for-Limited-Government*.

the distribution of those subsidies. They will also facilitate enrollment in Medicaid, the joint federal–state program for the poor and the indigent. Medicaid expansion under the new law is mandatory for the states and will account for roughly half of all the newly insured persons over the next 10 years.

By 2014, the states "shall" set up these exchanges, and if they refuse to do so or do not do so, the Secretary of HHS will come in and impose them on the states. The states will have no independent authority in running these insurance exchanges.

***Re-energized state officials can be the champions of the recovery and revitalization of our political institutions.***

The health insurance exchanges do not spring from the states and are not empowered by the states, and the functions of these bodies will be carried out only in accordance with highly prescriptive federal rules and detailed federal guidelines. If state officials want to do something different—perhaps something better, or innovative—they have to go hat-in-hand to the Secretary of HHS for a waiver.

If not clearly unconstitutional—a commandeering of state officials—this congressional intrusion strikes directly at the heart of American federalism.

Re-energized state officials can be the champions of the recovery and revitalization of our political institutions. They are already emerging as the institutional centers of opposition to this federal power grab, as the Founders rightly anticipated. In No. 28 of *The Federalist*, Alexander Hamilton, himself a vigorous champion of proper national power, wrote that "projects of national usurpation will be detected by state legislatures at the distance, and possessing all of the organs of civil power, and the confidence of the people, they can adopt a regular plan of opposition."

And so they have. Already, a total of 28 states, led by Virginia and Florida, are challenging the constitutionality of the individual mandate in the federal courts. Twenty-six of these states have challenged the law's mandatory Medicaid expansion. Moreover, 20 states have declined to participate in the law's federally funded risk pools, properly fearing that their citizens will end up facing additional and unforeseen health care costs.

## Repairing to the High Ground

In enacting the health care bill in direct defiance of the good opinion of the vast majority of their fellow citizens and then arrogantly insisting that we *learn* to like it in the face of our pleas for its repeal, it is clear that the President and his congressional allies want a big political fight. Fine. They will get it.

But the basis of that fight is not simply a battle over what is the best way to control health care costs, expand access, or improve the quality of care: The real battleground is over what kind of relationship we want to have as citizens with the federal government and how we want to be governed by those we have entrusted with the privilege of holding public office.

For our part, ladies and gentlemen, it is time to repair to first principles. We need to go back to the basics and ask ourselves some very fundamental questions.

Who are we? We are the people of the United States. But what does that mean? It means that we are the people of the *states* united. We are not a unitary national state; we are not a mass democracy. We are a *federal* republic. There is no union outside of the states, and there are no states outside of the union.[3]

In 1787, the Founders at the Philadelphia Convention pulled off the greatest practical achievement in modern political science: the wise division of authority between a national government, focused on general concerns, and individual state governments, focused on particular concerns. As James Madison explains in No. 10 of *The Federalist*, "The federal Constitution forms a happy combination in this respect; the great and aggregate interests being

3. On this formulation of the organic unity of the United States as a federal republic, see Orestes Augustus Brownson, *The American Republic* (Wilmington, Del.: ISI Books, 2003). Brownson's interpretation of the Union at the end of the Civil War mirrors that of John Jay, another author of *The Federalist*.

referred to the national, the local and particular to the State legislatures."

In carefully crafting this division, the Founders recognized the national unity born in war and revolution, but also the profound diversity of the people of the United States. Of the general and particular governments, each is supreme within its own sphere; neither can encroach upon the other without violating the well-balanced constitutional framework.

***Of the general and particular governments, each is supreme within its own sphere; neither can encroach upon the other without violating the well-balanced constitutional framework.***

This is, or should be, elemental; you learned this in your high school civics class. But it is a fundamental balance of federal and state powers that some politicians simply forget or ignore. Or worse, it is the traditionally held view of the limitations and powers of American government that some in Congress and elsewhere tacitly repudiate or casually dismiss as unserious.

Let's clarify. You know this, but it is worth repeating. Under Article VI of the federal Constitution, the federal law *is* supreme, but it is supreme *within its own sphere* of constitutional authority. As noted, Alexander Hamilton, a vigorous champion of national power and a proponent of "energetic" government, makes this crucial distinction plain, forcefully re-emphasizing it in No. 27 and again in No. 33 of *The Federalist*. The Constitution at once defines, grants, and limits federal power, as Madison also repeatedly reminds us.

Likewise, under the Tenth Amendment, this limitation on federal power is clarified even further. It declares that all authority not specifically granted to the national government is reserved to the states and the people, respectively. The people are thus the sole repository of sovereignty—the supreme power of the state—in the federal republic. This is not mere rhetoric, an outdated formula from a bygone era, or an obsession of those contemptuously dismissed by Washington's entrenched political class as "Tenthers." It is the law of the land.

## Revitalized States

Americans are the heirs of an innovative civic accomplishment. Every elected official represents American citizens who, under the federal Constitution, hold dual citizenship. Every American is a citizen of the United States and equally a citizen of the state in which he has legal residence. On a practical level, this means that every elected official, at the federal or state level, has a solemn duty to protect our rights as citizens of the states, just as they have an obligation to protect our rights as citizens of the United States.

The next phase of the intense and bitter battle over the health care law—complementing new congressional efforts to repeal, block, or defund it—is likely to spread like wildfire to the state capitals. Regardless of what happens in Washington, state officials can take the leadership role in health care policy.

It is up to the states to reclaim their rightful authority and change the facts on the ground for Congress and the White House.[4] Specifically, this means that if you are a state official, you should move ahead with your own agenda for health reform, especially the reform of health insurance markets. The major federal mandates on the states are not effective until 2014; the provisions of the health care law may not even be in force in 2014.

***Every elected official, at the federal or state level, has a solemn duty to protect our rights as citizens of the states, just as they have an obligation to protect our rights as citizens of the United States.***

If you are a state official, you have no business waiting for Washington to tell you what to do. You tell Washington what you are going to do and seize

4. For a further discussion of this issue, see Robert E. Moffit, Ph.D., "Revitalizing Federalism: The High Road Back to Health Care Independence," Heritage Foundation *Backgrounder* No. 2432, June 30, 2010, at *http://www.heritage.org/Research/Reports/2010/06/Revitalizing-Federalism-The-High-Road-Back-to-Health-Care-Independence*.

every inch of territory in the health policy debate that you can, within the law, and challenge every transgression of your legitimate authority if and when federal officials violate it.

## Sunshine

As Hamilton noted, state legislatures possess the "organs of civil power" and can secure the confidence of their people in resisting federal "usurpations." One way for state legislators to pursue that course is to hold high-profile public hearings on the impact of the health care law on the citizens of the state—its doctors and hospitals, employers and employees—and insist that federal officials appear and explain themselves. If federal officials wish to impose detailed and minute regulations on state and local businesses, on medical professionals and health insurers, then they should have no objection to testifying in an open forum, defending the imposition of their rules while listening patiently to the views of those whose lives and livelihoods they will directly impact. Those who make the rules should be accountable for the rules they make.

State officials too quickly assume that they need the cooperation of federal officials, but in truth, federal officials may desperately want and need the cooperation of state officials even more. A strong antidote to the arrogance of arbitrary decision-making or the excesses of the administrative state, short of the repeal of its authority to issue onerous rules, is full transparency: the capacity of state legislators to ask questions and demand answers and to encourage continued public debate on Washington's edicts. The old days of federal officials just dumping hundreds of pages of rules into the *Federal Register* late on a Friday afternoon to avoid media coverage are over.

State governors and legislators should also vigorously challenge federal commandeering of state officials to carry out federal rules. The United States Supreme Court has previously struck down congressional attempts at such commandeering as violations of the Constitution. That challenge to federal overreach should be renewed.

Beyond that, if a state legislator sincerely believes that the health care law is unconstitutional, he is under no obligation to vote one red cent of state taxpayers' money to enforce it. For those who take their oath seriously, it is not even an option. Congress may write expansive and unconstitutional laws, and their nameless agents in the federal bureaucracy may write highly prescriptive rules, but they exercise no authority over state legislators' power of the state purse.

The blatantly bad behavior of Congress during the health care debate—epitomized by backroom deals at the expense of the taxpayers such as the "Cornhusker Kickback" and the "Louisiana Purchase"—has rightly refocused public attention on the legislative process and the need to re-establish both proper order and accountability. Direct election of United States Senators under the Seventeenth Amendment does not make Senators any less representatives of their states under the federal Constitution.

***A strong antidote to the arrogance of arbitrary decision-making or the excesses of the administrative state, short of the repeal of its authority to issue onerous rules, is full transparency.***

Since they represent states as civic entities, state legislators, who once elected Senators, can still invite them to attend open hearings and account publicly for their decisions in Washington that directly affect the citizens of the states they represent. The health care law is a great starting point for such a practice. Of course, Senators may refuse to appear. Fine. They can offer any explanation for their refusals in broad daylight. Let's make them do it.

When the wise old statesman Benjamin Franklin emerged from Independence Hall in Philadelphia in 1787, a woman asked him what kind of government he and his colleagues had created for the young United States of America. His reply has rung down through more than two centuries: "A republic, Madam, if you can keep it."

Franklin gave us our marching orders. Let's do it.

*—Robert E. Moffit, Ph.D., is Senior Fellow in the Center for Policy Innovation at The Heritage Foundation. This lecture is based on his presentation to the 2011 Awakenings Conference at Kiawah Island, South Carolina.*