Heritage Lectures

Published by The Heritage Foundation

No. 1183
Delivered March 15, 2011

April 14, 2011

Reforming Health Care on the Foundation of First Principles

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Abstract: *The national health care debate has turned into a broader debate about the size and scope of federal power, and our congressional leaders need to become agents of a new constitutional vitality, animated by a deep and dutiful devotion to the Constitution's fundamental principles of liberty, limited government, and federalism. This means that, to guide our thinking as we grapple with the question of how to reform health care, we must repair to the Constitution. To make health insurance accessible and affordable for millions of Americans, Congress must do its job under the Constitution, not outside of it. In doing so, Congress can also take advantage of the federal system itself, the division of powers between the national government and the states, and allow states to experiment with big ideas.*

> *If it be asked, what is the most sacred duty and the greatest source of our security in a Republic? The answer would be, an inviolable respect for the Constitution and Laws—the first growing out of the last.... A sacred respect for the constitutional law is the vital principle, the sustaining energy of a free government.*
>
> —Alexander Hamilton,
> Essay in *The American Daily Advertiser*,
> August 28, 1794

The Patient Protection and Affordable Care Act of 2010 is unconstitutional. Thus ruled Judge Roger Vinson in *State of Florida v. U.S. Department of Health and Human Services* on January 31, 2011.[1] Citing the

Talking Points

- Within one year of its enactment, most American voters have come to believe that the Patient Protection and Affordable Care Act of 2010 will increase, not decrease, their health care costs and increase America's already dangerously high and unsustainable federal deficits.
- Legitimate health care reform must not only address the problems of cost and quality and access, but also proceed in accordance with the Constitution and enlist the proper authorities of state and national government in their respective spheres.
- Congress should encourage health care experimentation in the states, and innovative governors and state legislators should come forward with their own ideas and compete in testing different approaches to expanding coverage, reforming insurance markets, improving medical malpractice laws, mending the "safety net," and improving the quality of care.

This paper, in its entirety, can be found at:
http://report.heritage.org/hl1183

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
LEADERSHIP FOR AMERICA

absence of a severability clause in the law, which would have protected the body of the statute if one element were found unconstitutional, and noting the Administration's repeated insistence that the individual mandate was central to the functioning of the law, Judge Vinson struck down the individual mandate and the entire statute.

Also, on December 13, 2010, in the case of *Commonwealth of Virginia v. Sebelius*, Judge Henry Hudson struck down the individual mandate to purchase a government-approved level of health insurance as unconstitutional.[2] In holding that Congress exceeded its constitutional authority under the Commerce Clause, Judge Hudson declared that the provision would establish an "unbridled" exercise of federal police power in violation of personal liberty.

Not surprisingly, the debate on health care has evolved into a debate about government and has renewed popular interest in lawmakers' fidelity to the Constitution.

Altogether, 28 states are challenging the law in the federal courts, and three other federal district courts have upheld the constitutionality of the individual mandate to purchase health insurance, so the status is bound to be decided in the United States Supreme Court.

These powerful judicial decisions are a welcome addition to our public discourse. Indeed, this broader constitutional debate on the limits of federal power is long overdue. Former House Speaker Nancy Pelosi of California publicly declared last year that the question of the constitutionality of the congressional power to impose such a mandate was beneath serious consideration. Also last year, former Representative Phil Hare of Illinois admitted to his constituents that he didn't think that the Constitution was anything to "worry about" when he cast his favorable vote for the health care legislation.

Not surprisingly, in the aftermath of the ugly legislative process in 2010, the debate over the legality of the individual mandate, and the cavalier congressional dismissal of the legitimate concerns of ordinary Americans, the debate on health care has evolved into a debate about government and has renewed popular interest in lawmakers' fidelity to the Constitution. And that's good.

Americans want health care reform, and most voters also want the new law repealed. Support for repeal, according to Rasmussen Reports, has ranged from 50 percent to 63 percent of voters since the law was enacted on March 23, 2010.[3] Within one year of its enactment, most American voters have come to believe that the law is bad for the country; that it will increase, not decrease, their health care costs; and that it will increase the already dangerously high and unsustainable federal deficits. The polling firm Zogby International found that when voters opposed to the law were asked why, they cited as their main reason that it would give the government "too much control" over their health care decisions.[4]

The national health care debate has thus turned into a broader debate about the size and scope of federal power. That's also good.

The Constitution both grants and limits federal and state power. When the meaning of the Constitution is expanded beyond any conceivable intention of the Founders, as it is today by those who seek to justify the "regulatory scheme" of the national health law, then it is literally being stretched to death.

Our new congressional leaders should become agents of a new constitutional vitality. When Members of Congress take their oath to uphold the Constitution, understanding, interpreting, and applying

1. Judge Roger Vinson, Order Granting Summary Judgment, *State of Florida et al., v. United States Department of Health and Human Services*, 3:10-cv-91-RVEMT, January 31, 2011.
2. Memorandum Opinion, *Commonwealth of Virginia ex rel. Kenneth T. Cuccinelli, II, v. Kathleen Sebelius, Secretary of the Department of Health and Human Services*, December 13, 2010.
3. Rasmussen Reports, "Support for Health Care Repeal at 60 Percent," December 27, 2010.
4. Zogby International, "Large Majorities of Opponents Agree with Many Criticisms of the Bill: Too Much Government Control Top Reason for Opposition," April 21, 2010.

it becomes a core element of their job description. When deliberating on measures before them, they cannot mentally absent themselves from that part of their job by pushing it off to the judicial branch of government or anticipating what a federal court might find or declare in some theoretical case in the distant future.

When the meaning of the Constitution is expanded beyond any conceivable intention of the Founders, as it is today by those who seek to justify the "regulatory scheme" of the national health law, then it is literally being stretched to death.

Our elected representatives should become aggressive advocates of the "living" Constitution *properly understood* and strongly exercise yet carefully check their own power under its provisions. When they are fortified by the sophisticated political science underlying those provisions and animated by a deep and dutiful devotion to its fundamental principles—liberty, limited government, and federalism—the Constitution will become very much alive and will inspire a higher public discourse as well as superior congressional deliberation.

So to guide our thinking as we grapple with the question of how to reform health care, we must repair to the Constitution. Indeed, to make health insurance accessible and affordable for millions of Americans, Congress must do its job under the Constitution, not outside of it. In doing so, Congress should not only exercise its own legislative powers, but also take advantage of the federal system itself, the division of powers between the national government and the states, and allow a diversity of options in a very diverse and dynamic country, the most revolutionary society in the world.

The Founders' Achievement

The Founders of the American Republic understood that the concentration of powers was the greatest single threat to your liberty. The Founders knew that men weren't angels, as James Madison emphasized; that human intellect and will were often contaminated by dark and sinister motives; and that unchecked power would be exercised abusively and arbitrarily. In hammering out the provisions of the Constitution during months of debate at the Philadelphia Convention in 1787, they provided for the separation of legislative, executive, and judicial authority, thus establishing an elegant system of checks and balances. This elegant constitutional architecture would channel ambition, break faction, and tame special interests.

By this structure, the Founders pulled off perhaps the greatest practical achievement in modern political science: the wise division of authority between a national government, focused on general concerns, and particular governments, focused on particular concerns. In *Federalist* No. 10, James Madison notes, "The federal constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the state legislatures."

What does the Founders' system teach us? Legitimate health care reform must not only address the problems of cost and quality and access, but also proceed in accordance with the Constitution and enlist the proper authorities of state and national government in their respective spheres. Congress should do its job, and state officials need to step up to their responsibilities.

The Four Pillars of Health Care Reform

What would an alternative health care reform proposal look like, and what changes would such a reform proposal make in the American health care sector of the economy?

Considering the enormous complexity and sheer size of the health care sector, Congress and state officials alike should refrain from pursuing a wholesale overhaul of the health care sector of the economy in a single, massive bill of 2,700-plus pages. Instead, they should pursue a step-by-step, deliberative, and fully transparent process of reform, targeting specific problems while improving the functioning of health insurance markets and the financing and the delivery of care.

If done correctly, health care reform would address some of the most pressing and difficult

problems being faced by millions of Americans today: access to affordable coverage, portability in health insurance, and the reduction or elimination of gaps in coverage. Here, only a broad outline of an alternative vision is possible, but we can say with confidence that a reformed health care sector of the economy would have the following features:

- **Portability of Coverage.** In sharp contrast to Obamacare, the federal government would not interfere with the right of employers and employees, individuals and families to keep the health insurance that they want or that they have today. But policymakers would expand their options beyond what they have today and also enable persons who lose their job or change their job to get the health insurance package that they want. In short, unlike today, persons would be able to own and control their own health insurance policies, just as they own and control their auto, life, and homeowners' policies, and be able to take them from job to job without a tax or regulatory penalty. In other words, they would have a property right in their policies. That kind of portability in health insurance hardly exists anywhere in America today.
- **Personal Control of Dollars.** With greater control over their health care dollars and decisions, individuals and families would be able to buy the kind of plans they want, the kind of benefits they want, and contract with doctors and other medical professionals for the services *they* want at a price *they* wish to pay. Today, the terms and conditions of health insurance are almost exclusively set by employers, managed care executives, or government officials instead of being determined by individuals and families in a consumer-driven health insurance market.
- **Robust Competition for Insurance.** Not only would the states reform their own health insurance markets to expand coverage and provide access to care for the poor and the sick, but Congress would also permit interstate competition among plans and providers under health plans, doctors, and other medical professionals on a level playing field. In sharp contrast to Obamacare, the federal government would not be in the business of picking winners and losers, setting different rules for different plans and groups. A clean and clear level playing field for health providers and plans exists hardly anywhere in the health care sector of the economy.
- **Health Care Choice.** Individuals and families would be able to pick health plans that provide them *value* for their dollars; they would know the price of medical services, and they would be able to compare performance and quality in an information-driven market. But value is more than dollars and cents. They would also be free to pick health plans and medical professionals that support, or at least accommodate, their ethical, moral, and religious convictions on sensitive matters of biomedical ethics, particularly care at the beginning and the end of life. No American taxpayer should be coerced into financing abortion, for example, or physician-assisted suicide.

Legitimate health care reform must not only address the problems of cost and quality and access, but also proceed in accordance with the Constitution and enlist the proper authorities of state and national government in their respective spheres.

Building on Constitutional Authority

To address the most pressing problems in health care, Congress should repair to its responsibilities under the Constitution. Under Article 1, Section 8 of the Constitution, Congress has two explicit powers that alone would resolve most of America's health problems: the power to raise revenue, and thus make tax policy, and the authority to regulate, and thus promote, interstate commerce of goods and services. In exercising both powers properly, the Congress would go a long way in promoting the general welfare.

Eliminate Unfairness in Federal Tax Policy

On July 3, 1787, during the momentous debates at the Constitutional Convention in Philadelphia, Benjamin Franklin of Pennsylvania argued strongly that the House of Representatives should be the body responsible for originating taxes as well

as appropriations.[5] "Money affairs," he insisted, should be "confined to the immediate representatives of the people."[6]

But the deliberations of the "immediate representatives of the people" should also reflect a sound understanding of economics. In *Federalist* No. 35, Alexander Hamilton writes:

> There is no part of the administration of government that requires extensive information, and a thorough knowledge of the principles of political economy, so much as the business of taxation. The man who understands those principles best, will be the least likely to resort to oppressive expedients, or to sacrifice any particular class of citizens to the procurement of revenue.

Following Hamilton's advice, Members of Congress are fortunate in having at their disposal a rich professional literature on the relationship between tax policy and health insurance. If there is one area where there is an overwhelming consensus among economists—liberals and conservatives alike—it is that existing private health insurance markets are flawed and do not function like normal markets or function in the same way as other types of insurance markets. If you want to reform the health care sector of the economy, you must reform the private health insurance markets, but if you want to reform the private health insurance markets, you must reform the federal tax treatment of health insurance.

Why? There are many reasons. The current federal tax policy undercuts portability of health insurance coverage; it drives up health care costs; it contributes to the number of Americans who are without insurance coverage; and it is profoundly unfair. Your employer gets a tax deduction for offering you health insurance, just like the tax deduction he gets for offering you wages. It's his cost of doing business, and Congress exempts your employer's provision of coverage from federal taxation. For your employer, it's a wholly transparent transaction.

You, as an employee, also get a tax break on the same employer contribution to your health benefits package, but unless you are self-employed, it's not a deduction. If you get your health insurance through your employer, the tax break you get for your health insurance is called a tax exclusion. What this means is that the Internal Revenue Service counts your health care benefits as compensation, just like your wages, but, for the purposes of calculating your federal income tax and your Social Security and Medicare payroll tax, the government excludes your employer-based coverage from your tax liability. No matter how rich your employer-based benefits package is, it is not at all taxable compensation.

If you want to reform the health care sector of the economy, you must reform the private health insurance markets, but if you want to reform the private health insurance markets, you must reform the federal tax treatment of health insurance.

For example, if your employer is paying you $50,000 annually in wages and also paying $10,000 for your health insurance, your real compensation is $60,000 annually, but the IRS *excludes* that $10,000 in health benefits when calculating your federal tax liability. This is a big tax break, amounting to a large chunk of tax-free income, but many of us are not even aware that we are getting it.

When we are the beneficiaries of employer-based health insurance, we often forget one basic fact: Your employer's contribution to your health care benefits package is your compensation. It's *your money*, just like your wages. For your employer, your employer-sponsored health insurance is a cost of labor, the cost of attracting and retaining your services. Roughly speaking, every dollar increase in your health care benefits package is a dollar decrease in your wages or other types of compensation.

So if you are an American citizen and you are fortunate enough to get your health insurance through the place of work, as noted, you get an unlimited

5. Jeffrey St. John, *Constitutional Journal: A Correspondent's Report from the Convention of 1787* (Ottawa, Ill.: Jameson Books, 1987), p. 85.
6. *Ibid.*, p. 91.

tax break for your employer-provided health insurance. If you work for a large company with a large benefits package, the tax breaks are terrific, and you get a large chunk of tax-free income. If you work for a smaller company and you get a small benefits package, then, of course, your tax breaks are not as robust.

Today's tax system not only undermines the access of millions of Americans to affordable health care, but also fuels higher taxpayer costs.

But if you work for a company, large or small, that does not offer health insurance coverage, you get no tax relief for whatever health insurance you decide to buy on your own. This is a big problem if you have a family and need to protect them from serious illness; it is also a problem if you lose your job or change your job.

How big a problem? Huge. If you do not or cannot get health coverage through the job, then you get no comparable federal tax break at all on the purchase of your health insurance. State tax law almost always mirrors federal tax law. If you want or need coverage, you have to buy that coverage in the individual market outside of the place of work with *after-tax* dollars. You can do that, of course, but without the tax break, the cost to you of doing that is going to be much higher.

What this means, depending upon your tax bracket or where you live, is that you could be paying 30 or 40 or even 50 percent more for the same package of health benefits than you would have paid if you had gotten your health insurance at the place of work. The absence of the tax break alone would add a large price tag to the cost of your coverage, let alone the additional costs of buying on the individual market with its higher administrative costs or, if you live in a state with a lot of benefit mandates, the additional costs of mandated health benefits.

To sum up: The federal tax code treats Americans very differently depending upon the accident of their employment. This is profoundly unfair. Today's tax system not only undermines the access of millions of Americans to affordable health care, but also fuels higher taxpayer costs through the dependence of the uninsured on hospital emergency room care for routine medical services as well as a greater dependence on government programs, like Medicaid, which often perform poorly in comparison to private coverage.

A major change in the federal tax policy would sharply reduce the number of those who are uninsured. The reason: It would equalize access to coverage and would enhance the portability of health insurance. Studies on the uninsured show that the problem is not simply a difficulty with people having access to affordable health coverage; it is even more a difficulty of people keeping it once they have it. Only a relatively small number of persons are chronically uninsured, meaning that they are uninsured over a long period time.[7] The overwhelming majority of the uninsured are persons who are in and out of coverage, getting coverage and then losing it.

The biggest risk of uninsurance is a change of employment or loss of a job. Too many Americans are transitioning in and out of an unstable health insurance market. Because of the greater mobility of the American workforce, the fact that persons are changing jobs more than ever before, and even changing careers before the end of their working lives, means that we need to establish some basic stability in the health insurance markets.

By creating universal, individual tax relief for health insurance, Congress would be taking a big step toward expanding private health coverage for millions of Americans.

What is the solution to this problem? Make health insurance stick to the person, not the job. A change in the federal tax treatment of health insurance can do that. By creating universal, individual

7. For an excellent discussion of the churning in the health insurance markets over time, see Pamela Farley Short and Deborah R. Graefe, "Battery-Powered Health Insurance? Stability in Coverage of the Uninsured," *Health Affairs*, Vol. 22, No. 6 (November/December 2003), p. 244–255.

tax relief for health insurance, Congress would be taking a big step toward expanding private health coverage for millions of Americans.

There are a variety of ways to do this: the provision of a universal deduction, a universal health care tax credit, and a system of tax credits for taxpayers combined with vouchers for low-income persons who don't or can't pay taxes and who today would otherwise be candidates for enrollment in Medicaid or other government programs. By creating a system of individual tax relief, Members of Congress would be giving individuals greater choice of coverage than they have today. They would be leveling the playing field between group and individual insurance, and they would be promoting personal ownership and portability of health insurance policies, just like other types of insurance. By adopting such a policy, Congress would also be reducing the burden on taxpayers and hospitals that today provide free care to the uninsured in the most expensive place on the planet: the hospital emergency room.

Even though federal tax policy change is essential to real health care reform, however, Congress needs to do much more.

Promote Competition in the Health Insurance Markets

At the Philadelphia Convention in 1787, the Founders authorized Congress to regulate interstate commerce under Article I, Section 8 of the Constitution. They did so for the purpose of promoting free trade in goods and services between states and abolishing the restrictive systems of internal tariffs. In approving the Commerce Clause, they were not only promoting a robust system of free trade, but also securing the protection of private property.[8] In his April 9, 1789, speech on the floor of the House of Representatives, Congressman James Madison of Virginia was explicit:

> I own myself the friend to a very free system of commerce, and hold it as a truth, that commercial shackles are generally unjust, oppressive and impolitic—it is also a truth, that if industry and labor are left to take their own course, they will be generally directed to those objects which are most productive, and this in a more certain and direct manner than the wisdom of the most enlightened legislature could point out.[9]

In fulfilling the vision of the Founders, Congress has the power to expand competition in the health insurance market by allowing individuals and families to purchase health coverage across state lines.

The Founders thus envisioned the congressional power to lift artificial barriers on interstate commerce as a necessary condition for a thriving commercial republic. They created a common market among the states, easing free and open commercial transactions and promoting national prosperity.

In fulfilling the vision of the Founders, Congress has the power to expand competition in the health insurance market by allowing individuals and families to purchase health coverage across state lines. Under the McCarran–Ferguson Act of 1945, Congress has ceded the regulation of health insurance almost exclusively to the states. There are a few exceptions, of course, such as the federal rules governing self-insured health plans offered by employers under the Employee Retirement Income Security Act of 1974 (ERISA).

While the Patient Protection and Affordable Care Act of 2010 will result in a massive transfer of regulatory authority from the states to the federal government in 2014, health insurance today is still largely a matter of intrastate commerce, regulated by state agencies and legislatures and heavily influenced by the intense lobbying of brokers, insurers, hospitals, and other "provider" groups. The cumulative impact of this often frenzied process of "rent seeking" is higher health care costs. Obamacare, a fountain of directives, mandates, and regulations, already the focus of special-interest lobbying in

8. St. John, *Constitutional Journal*, p. 186.
9. Matthew Spalding, ed., *The Founders' Almanac: A Practical Guide to the Notable Events, Greatest Leaders & Most Eloquent Words of the American Founding* (Washington, D.C.: The Heritage Foundation, 2002), p. 137.

Washington, is certain to drive those costs even higher.

Right now, there is a very good chance that you live in a state where the health insurance market is a dysfunctional, industrial-age dinosaur. State markets are largely insulated from real consumer choice and are often dominated by a few big health insurance companies. They don't really compete for consumers' dollars in the same way that other types of insurance companies compete.

There are over 1,200 health insurance companies in the United States, and there is no reason why the barriers to cost-cutting competition should be maintained at a time when we desperately need to shake inefficiencies out of the system.

You can see this by just looking at the variety of commercials for auto insurance on television. A health insurance company advertising for your business on television in the same way would be a rare event and would be confined to a very small audience of potential customers. Likewise, if you are like most Americans, it would be a rare event to have a health insurance company call you up and solicit your opinion on how they are doing in hopes of keeping your business.

When President Obama argued that Americans' health insurance markets are not characterized by robust competition, he was exactly right. In every other sector of the economy, Americans can get what they want and pay what they want to pay for goods and services anywhere in the country. They should be able to do the same in health care. There are over 1,200 health insurance companies in the United States, and there is no reason why the barriers to cost-cutting competition should be maintained at a time when we desperately need to shake inefficiencies out of the system.

It does not mean that if you live in New Jersey, you will be able to get the same benefits package at the same price that an Iowa resident pays in Iowa from an Iowa insurance company. If an Iowa company wants to sell a package of benefits in New Jersey, the insurer will have to negotiate with New Jersey doctors and hospitals, and the premiums will reflect the underlying health care costs in New Jersey rather than Iowa. But it does mean an increase in the supply of insurance options and an intensification of competition. That can lower costs or at least restrain cost increases. Moreover, the creation of real markets on a national and regional basis will also mean the creation of large national and regional pools and a reduction of administrative costs.

Altogether, broadening of competition in this fashion would be a major benefit for consumers and improve the functioning of the health insurance markets. Of course, it won't solve every problem with insurance. It is not designed to do so. But it does give millions of Americans an opportunity to do what they cannot do today: They can "vote with their feet" if they are dissatisfied with the quality or the benefits or service they are getting from their existing insurance policies.

Fix Federal Entitlements

In his May 28, 1816, letter to John Taylor, Thomas Jefferson wrote: "The principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale."[10] The Founders feared debt and the destruction of the currency, based on their unhappy experiences of profligate state legislatures under the Articles of Confederation.

Total entitlement spending for Medicare, Medicaid, and Social Security already accounts for nearly six out of every 10 dollars spent by the federal government. By 2050, entitlement spending will consume the entire federal budget—unless Congress can find ways to slow the growth in federal spending. If Congress does not get serious about reforming these programs, imposing budgetary restraint, and slowing the growth of spending, there will only be two major options under current law: crushing taxes on current and future taxpayers or savage benefit cuts for beneficiaries.

This year, the first wave of 77 million baby boomers will begin retiring from the workforce. In doing

10. *Ibid.*, p. 132.

so, they will become eligible for Social Security and Medicare, and many will likely become dependent on Medicaid for long-term care. As a result, the federal and state spending problems worsen literally from moment to moment. We who are baby boomers can selfishly insist that we are "entitled to" all the government benefits under the old terms and conditions that were created and have evolved since the 1960s, but that can only come at an enormous expense for our children and grandchildren. We have no business "swindling futurity" on this mammoth scale.

By 2050, entitlement spending will consume the entire federal budget—unless Congress can find ways to slow the growth in federal spending.

Under Obamacare, neither taxpayers nor enrollees in federal entitlements will escape the consequences of current policies. Under the new law, the growth in Medicare spending is slowed through payment reductions, and a hard cap on Medicare spending is imposed, focused on whatever provider cuts are to be recommended by the newly created Independent Payment Advisory Board (IPAB). But, as noted, the savings from those Medicare payment reductions are to be used to fund other federal program expansions.

Medicaid, the joint federal–state health program for the poor, is a paradoxical problem. Medicaid payments to doctors and hospitals are already very low, and that is discouraging physicians from taking Medicaid patients. More of these patients thus end up in hospital emergency rooms getting "free care," further driving up taxpayer costs.

But the new health law doesn't reform Medicaid; it expands it. So the new law conserves and expands what is broken and, in contrast to its Medicare payment reductions, accelerates Medicaid spending even faster, imposing even bigger financial burdens on beleaguered states that are already facing enormous budgetary pressures.

There is a better way. In his April 22, 1790, speech delivered to the House of Representatives, Congressman James Madison of Virginia declared: "There is not a more important and fundamental principle in legislation, than that the ways and means ought always to face the public engagements; that our appropriations should ever go hand in hand with our promises."[11]

Medicare should indeed be subject to the discipline of a budget, making appropriations in accord with our promises. Moreover, all Medicare savings should be earmarked for Medicare itself and used to enhance the solvency of the program.

As for Medicaid, the skyrocketing federal and state costs are burdening taxpayers and pushing the states into fiscal crises. In reforming Medicaid, the states should be given greater flexibility to manage the program and, at the same time, undertake structural changes in its financing that would improve access for patients and the delivery of a higher quality of care.

The biggest change, however, would be a structural change for both programs that would result in transferring the direct control of the flow of dollars in both entitlements to the patients. The way to accomplish this for most, if not all, beneficiaries is to transform both programs from defined-benefit into defined-contribution programs.

The new health law, in contrast to its Medicare payment reductions, accelerates Medicaid spending even faster, imposing even bigger financial burdens on beleaguered states that are already facing enormous budgetary pressures.

In other words, instead of providing a set of benefits to be redefined periodically by federal officials, Congress would provide a direct financial contribution to the health plan of a person's choice. In the case of Medicare, for example, there is no reason why someone who turns 65 should be forced to give up their private health insurance. In a restructured Medicare based on defined contribution, enrollees should be free to take their private coverage into retirement with them if they wish and get a government contribution.

11. *Ibid.*

In moving to a defined-contribution system, Congress should keep the government contributions generous, based on current levels of per-capita spending for Medicare and Medicaid beneficiaries. In the case of Medicare, Congress should build upon current policy and vary the size of the government contribution by income and health care needs, making sure that more assistance goes to lower-income or sicker retirees. If people want to buy a health plan that is more generous than the contribution, they can do so, but they would pay more out of pocket for that option. If they are able to secure a plan that is less than the government contribution, they should be able to deposit those savings in a tax-free health savings account.

With a level playing field for health care financing, Congress should allow private health plans and providers to compete directly for enrollees' dollars. Choice and competition will not only control costs, as these free-market principles do in every other sector of the economy, but also drive innovation and productivity, improving the quality of care enrollees get from these programs.

This basic approach to health care financing is broadly similar to what Congress does today for itself and for the approximately 8 million federal workers and retirees who get their health coverage under the Federal Employees Health Benefits Program (FEHBP). The FEHBP is basically a defined-contribution system. Obviously, there would be modifications of this approach in its broad application to Medicare and Medicaid, two very different entitlement programs, but the benefits of choice and competition, not unlike those that flourish in the FEHBP, would follow a familiar and positive pattern: greater flexibility in plan and benefit offerings and less bureaucratic micromanagement, strong consumer protection, and high rates of consumer satisfaction.

A Vital New Role for the States

The Founders saw the division of power between national and state authority as a means to check concentration of power and preserve liberty. They also saw this division as a practical necessity in the governance of a huge land mass. They also recognized the profound diversity of the United States, a diversity among the American people that would become even more pronounced with immigration and westward expansion.

The Founders also recognized the special role of the states in the fashioning of policies adapted to their local populations. Today, instead of imposing a set of federal rules and regulations on all states whether they like it or not, Congress should draw from the deep well of federalism and encourage states to experiment with new and different and imaginative public policies. When one state develops a successful policy, this can serve as a learning experience for other states, where innovative proposals can be adapted to the particular conditions that characterize a large and diverse federal republic.

In a restructured Medicare based on defined contribution, enrollees should be free to take their private coverage into retirement with them if they wish and get a government contribution.

There is probably no area of public policy where experimentation at the state level is more appropriate than health care policy. Congress should encourage health care experimentation in the states, and innovative governors and state legislators should come forward with their own ideas and compete in testing different approaches to expanding coverage, reforming insurance markets, improving medical malpractice laws, mending the "safety net," and improving the quality of care.

Rather than having the Secretary of the U.S. Department of Health and Human Services exercise schoolmarm-like supervision over how state officials should organize their health insurance markets, as provided under the Patient Protection and Affordable Care Act, Congress should repeal such an intrusion. Instead, Congress should waive federal rules and regulations and allow states to experiment with big ideas. States can and should compete on a national stage and compete directly with each other in meeting the most difficult challenges in the health care system: how best to handle the sickest and the poorest persons who have the greatest difficulty in securing affordable health care and today are often confined to poorly performing government programs like Medicaid.

In order that states be able to try out various policy options, Congress could provide grants or technical assistance in promoting that experimentation. The experimentation should be balanced; both liberal and conservative policy proposals, emanating from state capitals, should equally be given a try. Members of Congress as politically diverse as Representatives Tom Price (R–GA) and Tammy Baldwin (D–WI) have proposed legislation to provide for such health policy experimentation.

Congress should waive federal rules and regulations and allow states to experiment with big ideas.

If government officials in liberal states really believe in the superiority of a single-payer system or some version of Obamacare at the state level, they should have ample opportunity to prove the superiority of such an approach rather than simply impose it on the rest of America. If governors and legislators in conservative states truly believe in the superiority of a free-market approach to health policy, they should be given free rein to pursue it on behalf of their own citizens. Under the new health law, they cannot legally do so.

Conclusion

Vermont is not Texas, and Utah is not Massachusetts. Americans in different parts of the country profoundly disagree on the best course to follow in health care policy. But, as Congressman Price and others have argued, that disagreement need not be a zero-sum game. There are a variety of health policy options that state officials can pursue.

Meanwhile, we could see how well different proposals actually work, checking their performance in controlling cost, ensuring quality and patient satisfaction in very different states. That would be consequential to the millions who could benefit by bold reforms, and it would be edifying for policymakers who know that no political party or faction has a monopoly on political wisdom.

We will fix what is broken in American health care while preserving what is best, and we can do it the right way because of the ample political opportunities afforded by our unique Constitution, the product of the Founders' peerless political wisdom.

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