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On the Wings of Their Court Victory, States Should Advance Health Care Freedom

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Federal Judge Roger Vinson recently struck down the massive Patient Protection and Affordable Care Act (PPACA) as unconstitutional.[1] With a total of 28 states challenging official Washington, the issue of the new law's constitutionality is doubtless headed for final resolution in the U.S. Supreme Court. But the fundamental direction of health policy, affecting the future of 300 million Americans, remains unresolved.

Alabama state Representative Greg Wren (R) best summarized the opportunity for state officials: "In siding with the states and small businesses, the court made it clear that Washington, once again, overstepped its bounds. That said, the ruling does not change the urgent need for state-based reforms nor should it derail efforts in the states targeted at fixing a broken and unsustainable system. Health system reform in Alabama is not, nor has it ever been, about federal compliance; rather it is about state-specific solutions that address the unique needs of Alabamians."[2]

States can advance the cause of patient freedom, properly reorganize their health insurance markets on the free market principles of real consumer choice and genuine market competition, and dramatically change the facts on the ground for Congress and the White House.

Taking Direct Action. Regardless of what happens in Washington, state officials can now take the leadership role in health care policy.[3] Practically speaking, that means governors and state legislators should not hold back on moving ahead with their own agendas for health reform and *getting the details right* on the tough, technical, and inescapable problems of health insurance market reforms, risk pooling, and Medicaid and malpractice reforms. There are four policy initiatives state officials can pursue immediately.

1. Create a Defined-Contribution Health Insurance Market for Employees. Under current defined-benefit health insurance arrangements, few employees have any real choice of benefit options at the workplace, and where there is choice, it is often plan options offered by the same company with the same networks of doctors and hospitals. In other words, there is no real competition, which is compounded by an absence of portability of coverage and the continuity of care.

State officials can circumvent these obstacles by leveraging the generous federal tax benefits that are exclusively available to persons under group insurance while promoting personal ownership and portability. As former House Speaker Newt Gingrich and others have recommended, they can do this by creating a statewide market—a market-based exchange that would serve as a group insurance mechanism—for employers to make defined contribu-

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tions on behalf of employees for the plans of the employees' choice.[4]

Employees would own and control these plans and take their health care coverage with them from job to job. Intense competition among plans for consumers' business would cascade throughout the entire system, increasing the productivity of providers in delivering value for patient dollars. Utah has already begun to enact such a system. It enables people to choose plans on the Internet and benefit from the collection of premium contributions for their plans if they have more than one employer.[5]

In conjunction, state officials should review and repeal costly and unnecessary health benefit mandates that drive up the cost of insurance and price millions of individuals and families out of health coverage.

2. Enable Insurers to Jointly Manage Risk Selection. In a market based on personal choice among a plurality of plans, there will be risk segmentation, resulting in one or more plans attracting a disproportionate share of sicker enrollees who incur higher costs. In the individual market, the standard response to this problem has been to permit insurers to deny coverage to those individuals and then segregate high-risk persons into high-risk pools that are funded by insurer contributions and taxpayers' dollars. In the employer-sponsored coverage market—where federal law (pre-PPACA) requires insurers to cover all eligible individuals (guaranteed issue)—the standard response has been to prevent selection effects by limiting employee choice to one plan or only the plans offered by one insurer.

State officials should require health plans to participate in a common statewide pool—a risk-transfer pool—through which they jointly share the extra cost of the small number of expensive enrollees in the market, regardless of which plans those enrollees pick. Over the course of a year, the pool defrays the extra costs of those insurers out of the pool contributions made by insurers with disproportionately low shares of expensive enrollees.[6]

In this pooling model, the governance, the funding assessments charged to member plans, the rules for risk assessment, and the risk-adjustment payments to plans are all jointly determined by the participating private plans with no taxpayer financing of pool losses. Thus, cross-subsidization of a high-cost individual is done market-wide through the private sector instead of the burden of his or her extra medical costs falling on only one insurer, one employer, or the taxpayers.

3. Reform Medicaid Through Premium Support. Judge Vinson, while appreciating the difficulty fac-

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. State Representative Greg Wren (R–AL), "Statement on Federal Judge's Ruling on Health Care," January 31, 2011. Wren is chairman of the National Conference of State Legislatures's Task Force on Federal Health Reform Implementation.
3. For a further discussion of this issue, see Robert E. Moffit, "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.*
4. "Health insurance can best serve you and your family if it is always there, regardless of your employer or employment status. This can be attained by creating a health insurance 'exchange' for individuals and businesses to buy and sell the right insurance for them. This exchange would increase the odds of you getting your preferred plan and reduce the administrative overhead that adds unnecessary cost." Newt Gingrich, "Jindal's Health Care Plan a National Model," *Ouachita Citizen*, October 18, 2007, at *http://www.ouachitacitizen.com/news.php?id=1415* (January 12, 2011).
5. For a detailed description of how Utah created a defined-contribution system, see Gregg Girvan, "Utah's Defined-Contribution Option: Patient-Centered Health Care," Heritage Foundation *Backgrounder* No. 2445, July 30, 2010, at *http://www.heritage.org/Research/Reports/2010/07/Utahs-Defined-Contribution-Option-Patient-Centered-Health-Care.*
6. For a description of the risk-transfer option, see Edmund F. Haislmaier, "State Health Care Reform: A Brief Guide to Risk Adjustment in Consumer-Driven Health Insurance Markets," Heritage Foundation *Backgrounder* No. 2166, August 1, 2008, at *http://www.heritage.org/Research/Reports/2008/07/State-Health-Care-Reform-A-Brief-Guide-to-Risk-Adjustment-in-ConsumerDriven-Health-Insurance-Markets.*

ing them, rejected the states' complaint that the Medicaid expansion was "commandeering" of state officials in violation of the Constitution and emphasized that state participation in Medicaid was voluntary. Nonetheless, states can substantively reform their ailing Medicaid programs.[7]

Under Section 1937 of the Social Security Act, state officials have the ability to set up a defined-contribution (or premium-support) program for Medicaid enrollees (specifically, "moms and kids"). By enabling them to use the equivalent of a voucher for private coverage, they could improve the continuity and quality of their care, secure access to a broader range of physicians than they have today, and help stabilize the private health insurance markets through their participation.

4. Reform Medical Malpractice Laws. Doctors often face frivolous lawsuits, pay high premiums for medical malpractice insurance, and practice defensive medicine, ordering marginally appropriate tests and procedures to protect themselves against the threat of ruinous litigation. The price tag is enormous and utterly unnecessary.

California, Indiana, and Texas have all enacted far-reaching and consequential tort reforms. There are a variety of remedies—ranging from arbitration to health courts—that are within the jurisdiction of the states. All that is necessary is the state legislators' ability and willingness to take remedial action.[8] They should also be prepared to take on activist judges who thwart their efforts at tort reform.[9]

Move It. The PPACA's major federal mandates on the states are not effective until 2014, and the law's provisions may not even be in force by 2014. Nonetheless, state officials should not wait for the federal government to tell them what to do. Their job is to seize every inch of territory in health policy they can, within the law, and challenge in the courts every transgression of their legitimate authority if and when federal officials violate it.

The inability or unwillingness of state officials to frame the issues and define the terms of the national health care debate—and offer consequential policies that will improve the lives of millions of Americans—is tantamount to political surrender on the installment plan.

Congressional efforts to repeal, block, or defund the unconstitutional PPACA should be complemented by a new federalist movement spreading like wildfire in the state capitals. The United States is a federal republic. Every public official should act like it.

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7. For a step-by-step approach on this option, see Dennis G. Smith, "State Health Reform: Converting Medicaid Dollars into Premium Assistance," Heritage Foundation *Backgrounder* No. 2169, September 16, 2008, at *http://www.heritage.org/Research/Reports/2008/09/State-Health-Reform-Converting-Medicaid-Dollars-into-Premium-Assistance*.
8. For an excellent discussion of the wide range of tort remedies available to state officials, see Randolph Pate and Derek Hunter, "Code Blue: The Case for Serious State Medical Liability Reform," Heritage Foundation *Backgrounder* No. 1908, January 17, 2006, at *http://www.heritage.org/Research/Reports/2006/01/Code-Blue-The-Case-for-Serious-State-Medical-Liability-Reform*.
9. For a discussion of this problem, see Hans A. von Spakovsky and Jack Park, "Judicial Nullification in Georgia: Overriding Medical Malpractice Reform and Federal Law to Reward the Trial Bar," Heritage Foundation *Legal Memorandum* No. 62, January 31, 2011, at *http://www.heritage.org/Research/Reports/2011/01/Judicial-Nullification-in-Georgia*; Hans A. von Spakovsky, "A Case Study in Judicial Nullification: Medical Malpractice Reform in Illinois," Heritage Foundation *Legal Memorandum* No. 52, April 29, 2010, at *http://www.heritage.org/research/reports/2010/04/medical-malpractice-reform-in-illinois-a-case-study-in-judicial-nullification*.