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Confronting Washington's Administrative State: A Renewed Role for the States

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Abstract
The modern administrative state, entrenched in the Washington bureaucracy, is the most serious challenge to the Founders' vision of a balanced constitutional order. But political power ebbs and flows, and states are reasserting themselves not only in pushing the limits of their own powers, but also in testing Washington's limits. Reinvigorated states can demand and secure more accountability in Washington, pressure congressional delegations to remember their constituents, and help to restrain some of the excesses of the bureaucratic behemoth that is exercising so much control over the everyday lives of ordinary Americans. That is how federalism is supposed to work.

This paper, in its entirety, can be found at
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While the Constitution continues to be read, and its principles known, the States must, by every rational man, be considered as essential component parts of the Union; and therefore the idea of sacrificing the former to the latter is totally inadmissible.
—Alexander Hamilton, 1788[1]

Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.
—President Ronald Reagan, 1986[2]

The theory of federalism, the genius of federalism, is that it is wrong as an ethical matter, wrong as a moral matter, for you to delegate so much power over your own life to a remote central authority that you can no longer plan your own destiny and the destiny of your children.
—Hon. Anthony M. Kennedy, Justice of the United States Supreme Court, 2012[3]

Most Americans are troubled by the scope and power of the national government. Even as President Barack Obama won re-election in 2012, exit polling showed that voters, by an impressive margin of 53 to 41 percent, said government was doing too many things better left to businesses and individuals.[4] In a July 2012 Rasmussen survey of "likely voters," 66 percent said that there is "too much" government power and "too little" individual freedom.[5] In a January 2013 Gallup Poll, 77 percent of Americans identified individual freedom as the outstanding virtue of life in the United States.[6]

The Administrative State

Washington's power is exercised through its complex bureaucratic operations: the enforcement of innumerable and detailed rules and regulations devised and promulgated by executive offices, administrative agencies like the Environmental Protection Agency (EPA), and departments of the federal government. It is a regulatory regime that produces far more detailed edicts than the relatively small number of laws enacted by Congress.

This is the administrative state, the “Fourth Branch of Government.” Increasingly, that is our governing reality.

Joseph Postell, assistant professor of political science at the University of Colorado, defines the administrative state as a process “in which the authority to make public policy is unlimited, centralized, and delegated to unelected bureaucrats.”[7] Policy flows from regulation, but the rule of regulation is the rule of the regulators. This process is usually opaque and undemocratic; it is often arbitrary and unaccountable. On the scope of the administrative state, Christopher DeMuth, distinguished fellow at the Hudson Institute, says:

> It has enabled the federal government of a vast, populous, diverse democracy to partake directly in the everyday affairs of scores of millions of citizens and businesses. *The Code of Federal Regulations* runs 165,000 pages and contains tens of thousands of rules involving every conceivable aspect of commerce and society. Federal agencies add about a thousand new mandates every year; many are relatively minor and uncontroversial, but somewhere between 50 and 75 fall into the “major rule” category, with annual costs of $100 million or more. By the agencies’ own estimates, the total annual costs of complying with their rules amount to hundreds of billions of dollars, with each year’s new rules adding more than $10 billion to the total (private estimates are higher).[8]

President Barack Obama is an unabashed champion of the administrative state. In the President’s first three years, his Administration imposed 106 “major” regulations at an estimated cost of $46 billion annually.[9] Right after the 2012 election, the White House unveiled its 2012 regulatory agenda, which included 128 “economically significant” rules.[10]

Under Obama, the EPA has evolved into a powerful regulatory machine that imposes heavy costs on businesses and workers. For example, its new “soot” rule governing emissions from automobiles and smokestacks will impose costs in the range of $53 million to $350 million annually, while its new rule limiting emissions from industrial boilers comes with annual costs in the range of $1.4 billion to $1.6 billion.[11]

PRESIDENT BARACK OBAMA IS AN UNABASHED CHAMPION OF THE ADMINISTRATIVE STATE.

Likewise, the Wall Street Reform and Consumer Protection Act (the Dodd–Frank Bill) creates a massive regulatory regime. In commenting on the scope of the law, Peter J. Wallison, a fellow at the American Enterprise Institute, writes:

> More than 800 pages in its enrolled form, and requiring more than 400 separate regulations and studies, it covers every part of the financial system

1. Alexander Hamilton, “Speech on the Senate of the United States,” June 24, 1788, Liberty Fund, Online Library of Liberty, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1379&chapter=64207&layout=html&Itemid=27.
2. Ronald Reagan, Executive Order No. 12612—Federalism, October 26, 1987, http://www.reagan.utexas.edu/archives/speeches/1987/102687d.htm.
3. The Honorable Anthony M. Kennedy, “The Constitution and Its Promise,” Heritage Foundation *Lecture* No. 1221, February 14, 3013, p. 4, http://www.heritage.org/research/lecture/2013/02/the-constitution-and-its-promise.
4. Philip Klein, “A Comeback for Limited Government Conservatism,” *The Washington Examiner,* November 7, 2012.
5. Rasmussen Reports, July 16, 2012, http://www.rasmussenreports.com/public_content/politics/general_politics/july_2012/66_u.s. In 2011, Rasmussen recorded similar results, finding that 64 percent of likely voters thought that the federal government had “too much money” and “too much power.” See Jeffrey H. Anderson, “The Real Issue in the Upcoming Election: Does Washington Have Too Much Power and Money?” *The Weekly Standard,* October 27, 2011, http://www.weeklystandard.com/blogs/real-issue-upcoming-election_604102.html.
6. Lydia Saad, “Americans Consider Individual Freedoms Nation’s Top Virtue,” Gallup Politics, January 7, 2013, http://www.gallup.com/poll/159716/americans-consider-individual-freedoms-nations-top-virtue.aspx.
7. Joseph Postell, “From Administrative State to Constitutional Government,” Heritage Foundation *Special Report* No. 116, December 14, 2012, p. 5, http://www.heritage.org/research/reports/2012/12/from-administrative-state-to-constitutional-government.
8. Christopher DeMuth, “The Regulatory State,” *National Affairs,* Issue No. 12 (Summer 2012), p. 75, http://www.nationalaffairs.com/publications/detail/the-regulatory-state.
9. James L. Gattuso and Diane Katz, “Red Tape Rising: Obama-Era Regulation at the Three-Year Mark,” Heritage Foundation *Backgrounder* No. 2663, March 13, 2012, p. 1, http://www.heritage.org/research/reports/2012/03/red-tape-rising-obama-era-regulation-at-the-three-year-mark.
10. Adam J. White, “Obama’s Regulatory Rampage,” *The Weekly Standard,* January 28, 2013, p. 25.
11. Ibid.

> except insurance and extends the federal government's reach into areas that had previously been the province of state or local regulation. It is by far the most substantial financial regulatory regime ever enacted, far exceeding anything developed during the New Deal."[12]

The President's biggest contribution to the growth of Washington's administrative state, however, flows from his 2,700-page Affordable Care Act of 2010. The Department of Health and Human Services (HHS) and other agencies will continue to issue reams of additional health care regulations to fill in the nitty-gritty details of the law's broad prescriptions for health care financing and delivery.

Thus far, HHS has published more than 13,000 pages of rules and related paperwork and has granted numerous waivers or surprising exemptions to selected states and organizations.[13] The Administration has also unveiled a 3.5 percent administrative fee to fund HHS-administered exchanges on citizens of recalcitrant states that do not set up Obamacare health insurance exchanges, as well as a *per capita* fee to finance state risk pools. This is tantamount to taxation by regulation.

Resurgent Federalism: The Springboard For Renewal

While the primary remedy for the expansion of Washington's administrative state rests with Congress,[14] the states can also play a corrective role. For decades, expanding national power has preempted or curtailed the authority of the several states. No political trend is, however, inevitable, irreversible, or somehow divinely ordained. Interests shift, popular sentiments change, and partisan allegiances are realigned.[15]

AMERICANS MUST FIRST GRASP THE FACT THAT THEY INHERIT AN INGENIOUS CIVIC ARRANGEMENT: DUAL CITIZENSHIP. EVERY AMERICAN IS EQUALLY A CITIZEN OF THE UNITED STATES AND A CITIZEN OF THE STATE IN WHICH HE OR SHE HAS LEGAL RESIDENCE.

Though excessive federal regulation is not a narrowly partisan issue, most state officials have been elected on platforms that differ greatly from Washington's policy agenda. Most—though clearly not all—don't believe the false promise of "free" federal taxpayers' money. Today, in 24 states, Republicans control *both* houses of the state legislature, the strongest level of GOP control since 1928. Also, 30 states have Republican governors. Courageous and imaginative state officials can not only undertake innovative policy projects on their own, but also resist and repel Washington's regulatory overreach.

Americans must first grasp the fact that they inherit an ingenious civic arrangement: dual citizenship. Every American is equally a citizen of the United States and a citizen of the state in which he or she has legal residence.[16] The Constitution, of course, creates this duality of citizenship. America's public servants, from the President of the United States to the minor civil servant, take a solemn oath to uphold and defend the Constitution. They may not fully realize it, but every official has thus avowed a formal obligation to protect our rights as citizens of the *states,* just as he or she has an obligation to safeguard our rights as citizens of the United States. It's a primary duty.

The Delicate Balance. At the Philadelphia Convention of 1787,

12. Peter J. Wallison, *Bad History, Worse Policy: How a False Narrative About the Financial Crisis Led to the Dodd–Frank Act* (Washington: The AEI Press, 2013), p. 517.
13. HHS regulations specify caps on levels of insurance coverage and copayments; what are and are not allowable administrative expenses for insurance; rate reviews of insurance premiums to determine whether they are or are not justified; and what rules should apply to state insurance exchanges, federal insurance exchanges, and federally sponsored multi-state plans. Beyond that, there will be rules to enforce the offering of 10 categories of mandatory "essential" benefits in health insurance coverage. Among the most controversial of the rules issued thus far is an odious edict compelling virtually all employers and employees or their insurers to finance abortifacients, as well as mandatory contraceptive and sterilization coverage in health insurance.
14. For a detailed discussion of how Congress can solve this problem, see Robert E. Moffit, "Why Congress Must Confront the Administrative State," Heritage Foundation *Center for Policy Innovation Lecture* No. 5, April 2, 2012, http://report.heritage.org/cpi_lecture_5; see also Robert E. Moffit, "How to Roll Back the Administrative State," Heritage Foundation Center for Policy Innovation *Discussion Paper* No. 1, February 17, 2011, http://www.heritage.org/research/reports/2011/02/how-to-roll-back-the-administrative-state.
15. "Indeed it is through the political parties that state and local interests find expression in the national councils, a fact which helps to insure that in the resolution of state–national conflicts through the political processes state and local interests have to be reckoned with." George W. Carey, *In Defense of the Constitution* (Cumberland, Va.: James River Press, 1989), p. 77.
16. It is worth noting that in 1873, the United States Supreme Court formally endorsed the concept of Americans' dual citizenship. Eugene W. Hickok, *Why States? The Challenge of Federalism* (Washington: The Heritage Foundation, 2007), p. 54.

striking the proper balance between national and state power was the Founders' central concern.[17] The result of their exhaustive deliberations was a division of authority between a national government, focused on *general* concerns, and the governments of the states, focused on *particular* concerns. Among the Founders, James Madison of Virginia is the most authoritative exponent of federalism.[18] In No. 10 of *The Federalist*, Madison is explicit, "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."[19] The constitutional status of the general and particular governments is, as Madison and Alexander Hamilton both insist, a status of equality. Neither the national government nor the state governments can encroach one upon the other without violating the well-balanced constitutional framework.[20] Of course, under Article VI of the Federal Constitution, the national law is indeed supreme, but the qualification, as Madison and Hamilton emphasize, is crucial: The national law is supreme only *within its own sphere* of constitutional authority.

The Constitution at once grants and limits government power. In *Federalist* No. 45, Madison offers his classic formulation: "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite." The states therefore retain plenary political authority over most domestic policy. Under the Bill of Rights—the core protection of Americans' liberties—this restraint on national power is further clarified in the Tenth Amendment. It declares with crystalline clarity that all authority not specifically granted to the national government is "reserved to the States respectively, or to the people."

THE FOUNDERS' RATIONALE FOR FEDERALISM IS NOT SIMPLY GROUNDED IN DEMOGRAPHIC OR POLITICAL EXPEDIENCY. IT ALSO REFLECTS A SOPHISTICATED POLITICAL SCIENCE, EXPLICATED BRILLIANTLY AND CAREFULLY IN *THE FEDERALIST* AND OTHER TREATISES.

This judicious division of constitutional power reflects historical necessity; it is not simply an artifice of abstract theory. Federalism is grounded in the prudential recognition of the concrete facts of American life. America's real national unity was born in 1776 in war and revolution, but that war and revolution was prosecuted by a diverse people with very diverse interests living in the several different states. America's popular diversity—in race, religion, geography, and ethnicity—has dramatically increased over the course of our history. New York is not California; Vermont is not Texas. An even greater American diversity today should fuel a robust revival of federalism and experimentation in public policy.

The Founders' rationale for federalism is, however, not simply grounded in demographic or political expediency. It also reflects a sophisticated political science, explicated brilliantly and carefully in *The Federalist* and other treatises. The Founders shared a firm conviction that the concentration of power is the single greatest threat to liberty. This was the just verdict of history, sadly evident in the bloody chronicles of the Graeco–Roman republics and wisely reaffirmed by such luminaries as Polybius and Montesquieu.[21] In his June 21, 1788, speech before the New York Convention, Alexander Hamilton says:

> This balance between the national and state governments ought to be dwelt on with peculiar attention, as it is of the utmost importance. It forms a double

17. Ibid., p. 13.
18. "Any penetrating treatment of state–national relations must, sooner or later, deal with the teaching of James Madison because, far more than any other individual he is responsible for our modern conception of federalism." Carey, *In Defense of the Constitution,* p. 75.
19. Alexander Hamilton, John Jay, and James Madison, *The Federalist* (Indianapolis: The Liberty Fund, 2001). This edition of *The Federalist*, prepared with commentary by George W. Carey and James McClellan, was originally edited by Jacob Gideon in 1818, with corrections to the text provided by Madison; hereafter, references to all numbers of *The Federalist* are based on this edition.
20. On the nature of the federal union, as outlined in *The Federalist,* Hamilton and Madison agree on "all of the salient points" at issue. Carey, *In Defense of the Constitution*, p. 79.
21. The commentaries of the Greek historian Polybius (200–118 B.C.) influenced the delegates at the Philadelphia Convention of 1787. Polybius praised the Roman Republic's "mixed constitution," particularly the balancing of aristocratic and democratic elements. Concerning Baron Charles De Montesquieu (1689–1755) on the division of power, Madison writes in *Federalist* No. 47, "The oracle who is always to be consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind."

> security to the people. If one encroaches on their rights they will find powerful protection in the other. Indeed they will both be prevented from overpassing their constitutional limits by a certain rivalship, which will ever subsist between them.[22]

Given our increasingly distant and centralized governance, the Founders' initial rationale for federalism is more pertinent than ever. Americans should thus encourage their state officials to launch a consequential counteroffensive in defense of their freedom and the legitimate interests of their states.

How To Oppose Washington's Intrusions

The Constitution is a political document as well as a legal charter of government, and the relationship between the states and the national government is a political as well as a legal relationship. In 1788, John Dickinson of Pennsylvania, a delegate to the Philadelphia Convention and a champion of the Federal Constitution, emphasized the crucial role of state government: "It is to be subordinate barely in those matters that relate to the whole; and *it will be their own faults*, if the several states suffer the federal sovereignty to interfere in things of their respective jurisdictions."[23]

Beyond challenging national power in the federal courts, state governors and legislators should also respond *politically* to Washington's regulatory excesses. The Founders indeed expected state officials to do precisely that in those instances where the national intrusions were "unwarranted." In *Federalist* No. 46, Madison explains how the various "means" of state opposition can be politically persuasive:

> The disquietude of the people; their repugnance, and perhaps refusal, to co-operate with the officers of the union; the frowns of the executive magistracy of the state; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any state, difficulties not to be despised; would form, in a large state, very serious impediments; and where the sentiments of several adjoining states happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

In *Federalist* No. 26, Hamilton described state legislatures as "suspicious and jealous guardians of the rights of the citizens" against national encroachments. Madison envisioned state officials objecting to national measures in defense of their citizens in a variety of ways.[24] He proposed, as a defensive measure, that the states "interpose" themselves between the national government and state citizens. He described this state "interposition" in political terms: educating public opinion, issuing formal protests, and enacting memorials or resolutions declaring state opposition to unjust or unconstitutional measures.[25]

Today, state officials face a variety of conflicts with Washington over federal regulations on their citizens. These battles cover a variety of policy areas, such as marriage and domestic relations, gun control and criminal justice, energy and the environment, education and health care. State officials then must educate their own citizens on the issues at stake and the consequences of failure.

How should governors and state legislators prepare their citizens for their political battles with Washington?

First, get an attitude adjustment. A personal recollection: Last year, a state official told me how pleased she was that her governor was to be able to secure a meeting not with the Secretary of the United States Department of

22. Cited in Matthew Spalding, ed., *The Founders' Almanac: A Practical Guide to the Notable Events, Greatest Leaders and Most Eloquent Words of the American Founding* (Washington: The Heritage Foundation, 2002), p. 155.
23. John Dickinson, writing under the *nom de plume* Fabius*, Letter III,* 1788, in Colleen A. Sheehan and Gary L. McDowell, eds., *Friends of the Constitution: Writings of the "Other" Federalists, 1787–1788* (Indianapolis: The Liberty Fund, 1998), http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=2069&layout=html.
24. While he encouraged state political opposition to federal encroachments, Madison sought a consensual resolution of national-state conflicts. "Put otherwise, the views of the states would have to be taken very seriously because state reactions, even those far less extreme than Madison pictures in *The Federalist,* could well have an adverse affect on the effectiveness of national policy. Indeed, we can well imagine, given the terms in which Madison writes, that what a majority of common constituents want might have to be severely modified or even abandoned in the face of potential opposition by several states, particularly those comprising a contiguous geographical area." Carey, *In Defense of the Constitution*, p. 116.
25. So that there is no misunderstanding on this point, the word "interposition," as Madison used it, did not justify a state's "nullification" of federal law. For an excellent discussion of Madison's views on this issue, outlining his opposition to the doctrine of nullification, see Christian G. Fritz, "Interposition and the Heresy of Nullification: James Madison and the Exercise of Sovereign Constitutional Powers," Heritage Foundation *First Principles Series Report* No. 41, February 21, 2012, http://report.heritage.org/fp41.

Health and Human Services, but with an HHS functionary, on how her state could organize a health insurance exchange in accordance with the terms and conditions of the Affordable Care Act.

THE VERY NOTION OF AN ELECTED GOVERNOR OF A STATE BEING THE SUPPLICANT OF AN UNELECTED, LOWER-LEVEL FEDERAL OFFICIAL IS, OR SHOULD BE, A REPULSIVE THING.

The fundamental problem here is psychological, not constitutional. The very notion of an elected governor of a state being the supplicant of an unelected, lower-level federal official is, or should be, a repulsive thing. Yet too many Americans, including even state officials themselves, seem to be under the false impression that the relationship between the national government and the governments of the states is somehow a *vertical* one: The national government is at the top of some imaginary totem pole, and the states are at the bottom.

Once again, *The Federalist* and the Founders' related writings show that this is not the case. The relationship between the national government and that of the states is, as Madison and Hamilton both emphasized, a *horizontal* relationship; each is equal to the other in its own sphere of authority.

State officials should be unflinching in defense of the rights of their citizens and the legitimate interests of their states. Once again, as Chief Justice John Roberts reaffirmed in *National Federation of Independent Business v. Sebelius*, "The states are separate and independent sovereigns. Sometimes they have to act like it."[26]

Second, invite federal officials to explain their rules. State legislatures are legitimate "organs of civil power," to use Hamilton's language, to defend state citizens against an abusive national government. When a federal department or agency oversteps its bounds or imposes excessive burdens on the people of the individual states, there is no reason why state officials, particularly legislators, cannot take political steps to confront federal officials.

Federal rules often have a disparate impact on the personal and economic lives of state citizens. State legislators, particularly in the coal regions, should focus on the impact of the EPA's regulations on the coal industry. In Texas, in response to the latest EPA emission rules, the Chase Power Company cancelled its power plant project at a cost of an estimated 3,900 jobs.[27] Federal rules on drilling for natural gas would also generate intense local interest not only on energy costs, but also on employment in the affected states.

Congress may or may not act, but state legislatures can gather the relevant data on these federal regulatory initiatives, publish it with appropriate public distribution of the findings, and then hold high-profile public hearings to educate the press, the public, and even their own congressional delegations. But they should do one more thing: They should invite federal rulemakers themselves to appear and explain their regulatory decisions. Given the avalanche of rules coming out of Washington, there is no shortage of topics: the additional cost of gasoline and natural gas; the loss of employment and the retardation of job growth; the cost and access to health coverage and medical care; the new taxpayer obligations and their impact on the states' businesses, industries, employers, and employees.

Pull back the veil of mystery. If federal officials wish to impose detailed and minute regulations on state and local businesses, then they should have no rational objection to testifying in an open forum explaining the reasons for their actions. We can eagerly await their robust defense of their rulemaking, and they, in turn, can listen quietly and patiently to the views of those whose lives and livelihoods they will directly impact with their rules. This exercise, conducted by one of America's "organs of civil power," will introduce at least a degree of accountability in an otherwise distant and murky process.

Those who make the rules directly affecting millions of Americans should be called to account for the rules they make. Where Washington's reach is so extensive and its consequences so grave, the old process of simple notice and comment, taking the temperature of the rent-seeking "stakeholders" and then rushing to publication in the *Federal Register*, should no longer suffice. Unpopular or harmful measures may survive congressional scrutiny or be studiously ignored by the national media, but state legislators can make a "federal case" out of them and generate more intense coverage in state and local media.

Outside of Congress blocking onerous federal rules, full transparency is

26. *National Federation of Independent Business v. Sebelius,* 132 S.Ct. 2566 (2012).
27. Conn Carroll, "Obama EPA Kills Power Plant, 3900 Jobs in Texas," *The Washington Examiner,* January 24, 2013.

a strong antidote to administrative excesses. State legislators can ask questions and demand answers. Will federal officials appear? Who knows? Probably not. Either way, more extensive public debate on Washington's edicts will be assured. A state release of official data, the hearings, the press conferences, and even the prospect of whether or not the witness chair will be empty or occupied will add drama to the dry and opaque process that nourishes the growth of the administrative state. Federal officials can decide whether they want to compound their problems by making an issue of their invisibility.

OUTSIDE OF CONGRESS BLOCKING ONEROUS FEDERAL RULES, FULL TRANSPARENCY IS A STRONG ANTIDOTE TO ADMINISTRATIVE EXCESSES.

Third, invite U.S. Senators to address state legislatures. Senators represent the states. Direct election of U.S. Senators under the Seventeenth Amendment changed the method of election from state legislatures to popular vote. That does not at all make U.S. Senators any less the official representatives of their states. Since Senators still represent their states as civic entities, state legislators can still invite them to attend special sessions of the state legislature or open hearings, whichever venue seems best, and account for their stewardship of state interests.[28]

U.S. Senators, after all, may be required to vote on relevant appropriations to enforce or block federal rules of direct interest to their states or to approve or disapprove certain major federal rules under the Congressional Review Act of 1996. Federal environmental and energy rules, health and education regulations, among other federal initiatives, may have a powerful impact on the state's employment and economic growth. Such areas are ripe for robust public discussion and debate.

As with executive branch officials, Senators may very well refuse to participate in such forums. That's fine. Their non-cooperation would only fuel even more intense political opposition to unpopular federal policies that injure state citizens. Indeed, state political parties might wish to make such senatorial appearances a condition of formal party endorsement for a Senator's re-election under their party rules.

Finally, forge coalitions with other states. In *Federalist* No. 28, Hamilton observes 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." Likewise, Madison, writing in *Federalist* No. 46, predicts:

> [A]mbitious encroachments of the federal government, on the authority of the state governments, would not excite the opposition of a single state or of a few states only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate the conduct of the whole.

While it is unlikely that "every" state would espouse a "common cause" in today's polarized political environment, more than enough states find themselves in unified opposition to Washington's policies that interstate cooperation on common policies and a coordinated response to national measures is feasible. In *National Federation of Independent Business v. Sebelius*, 26 very diverse states joined as plaintiffs in the historic litigation challenging the health law's constitutionality. Thus far, 25 states have also refused to create the insurance exchanges under its terms and conditions, and Oklahoma is challenging the lawfulness of the Administration's rules—at variance with the plain language of the law—that enrollees in federal exchanges administered by HHS can be eligible for taxpayer subsidies.[29]

AS THE FOUNDERS RIGHTLY ANTICIPATED, STATES CAN BECOME INSTITUTIONAL BASES OF CONCERTED OPPOSITION TO WASHINGTON'S EXCESSES.

As the Founders rightly anticipated, states can become institutional bases of concerted opposition to Washington's excesses. Governors can appoint special commissions, staffed by respected private-sector policy experts, and share their policy expertise and findings with the

28. Warns Madison in *Federalist* No. 62: "It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust."
29. Oklahoma Attorney General E. Scott Pruitt observes, "Congress passed a law that says one thing, but the Internal Revenue Service promulgated a rule that says another thing altogether.... Congress provided a choice for Oklahoma and other states in implementation of the law. The IRS is attempting through this rule to take away that choice." Quoted in Thomas Howell, "Oklahoma Risks IRS Penalties on Health Care," *The Washington Times,* January 28, 2013, p. A3.

governors of other states. State legislators can pass formal resolutions of disapproval of federal laws or rules they determine injurious to their citizens and share these memorials with their congressional delegations as well as with their sister states.[30]

In hotly contested areas of public policy—particularly if there is an extended time line for the implementation of a federal law such as the Affordable Care Act—it is not the legal or moral duty of governors or state legislators to sit patiently and wait for Washington to tell them what they can and cannot do or, worse, what they should or should not do. Passivity exacts a high price both in policy and politics. They should instead forcefully tell Washington what they *are* going to do and seize every possible inch of policy territory in the interim. That kind of action, changing the facts on the ground, will at least give Washington pause and possibly even lead it to backtrack or change course.

Consider Utah's bold decision to create and defend its innovative market-based health insurance exchange:

> Utah Governor Gary Herbert ... has opted for a sort of mild civil disobedience, saying that his state will continue to pursue "our version of an exchange based on defined contribution, consumer choice, and free markets"—a type of exchange that is rather plainly banned by Obamacare.[31]

Curiously, HHS Secretary Kathleen Sebelius granted Utah a "conditional" approval for its unique health insurance exchange even though there is no statutory authority for a "conditional" approval. Whether Utah gets a "final approval" remains to be seen. In any case, Utah officials have demonstrated that they are prepared to defend their policies and their citizens' freedom.

Washington's Comandeering: Just Say No

Pursuant to the Affordable Care Act, the Obama Administration has been feverishly trying to get state officials to create health insurance exchanges, extending compliance deadlines, and granting "conditional approvals." The exchanges are supposed to be up and running by January 1, 2014, the statutory deadline. As Henry Aaron, a senior fellow at the Brookings Institution who favors the health law, has remarked, "Nothing approaching the complexity of this 'roll out' has ever taken place in U.S. peacetime history."[32]

Under the Affordable Care Act, these exchanges will be the central vehicles for federal regulation of health insurance in the states. Only a minority of states have thus far agreed to comply with HHS rules.[33] Utah, for example, will not enforce the federal mandate on individuals to purchase federally designed insurance policies or administer the law's federal taxpayer subsidy program. Norm Thurston, Utah's health reform coordinator, says, "Those are clearly federal responsibilities. We are not enthusiastic about enforcing federal tax policy"[34]

Thurston is right. Enforcement of federal rules is the job of federal officials. Beginning in the 1990s, a series of major Supreme Court decisions reaffirmed the independence of the states in this matter while curbing certain abuses of congressional power under the Commerce Clause. The message for state officials: Keep federal lawyers busy.

- In *New York v. United States* (1992), the Court struck down a provision of the Low Level Radioactive Waste Policy Amendments Act of 1995 as unconstitutionally coercive: It would have forced states either to comply with federal rules or to take ownership of radioactive waste. The requirement that state officials "take title" to the waste amounted to "commandeering" of state officials by forcing them to execute federal regulations. Writing for the majority, Justice Sandra Day O'Connor declared:

  > While Congress has substantial powers to govern the

30. In *Federalist* No. 46, Madison observes, "A local spirit will infallibly prevail much more in the members of the Congress, than a national spirit will prevail in the legislatures of the particular states."
31. Jeffrey H. Anderson, "The Sebelius Coverup," *The Weekly Standard,* December 10, 2012, p. 11.
32. Henry Aaron, "Health Reform: The Political Storms Are Far From Over," The Brookings Institution, Blog, December 27, 2012, http://www.brookings.edu/blogs/up-front/posts/2012/12/27-health-reform-aaron.
33. New Jersey Governor Chris Christie surely echoed the sentiments of many state governors: "I will not ask New Jerseyans to commit today to a state-based exchange when the federal government cannot tell us what it will cost, how that cost compares to other options, and how much control they will give the states over this option that comes at the cost of our state's taxpayers." Mary Katherine Ham, "Nope: We Won't Be Building a State Exchange in New Jersey," Hot Air, Blog, December 6, 2012, http://hotair.com/archives/2012/12/06/christie-nope-we-wont-be-building-a-state-exchange.
34. Robert Pear, 'States Will Be Given Extra Time to Set Up Health Insurance Exchanges," *The New York Times,* January 14, 2013.

> Nation directly, including areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. The Court has been explicit about this distinction.[35]

- In *Printz v. United States* (1997), the Court struck down a provision of the Brady Act, a gun control measure that would have required state officials to conduct background checks on prospective handgun buyers. Writing for the majority of the Court, Justice Antonin Scalia ruled:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[36]

- The most recent reaffirmation of the limits of federal power over the states is embodied in *National Federation of Independent Business v. Sebelius* (2012). Under the new health law, Congress specified that if states refused to expand Medicaid coverage up to 138 percent of the federal poverty level (FPL),[37] they would lose all of their Medicaid funding. While the Court upheld the individual mandate to purchase health insurance as a constitutionally permissive exercise of the congressional taxing power under the Affordable Care Act, by a 7 to 2 majority, it struck down the law's mandate on the states to expand Medicaid coverage as unconstitutionally coercive.[38] Writing for the majority of the Court, Chief Justice John Roberts ruled:

> Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with the accompanying conditions, but the States must have a genuine choice whether to accept the offer.[39]

The Court has been explicit on Washington's attempts to "commandeer" state and local officials to carry out federal regulations: It's unconstitutional. So the message to state governors, legislators, and attorneys general should also be clear: Target federal "commandeering" at every opportunity. Keep federal lawyers busy.

Competing Visions

President Obama must be counted among the master builders of the modern administrative state. He is also a Progressive, the most visible champion today of one of America's oldest and most successful political movements.

In the early 20th century, the Progressives added four amendments to the Constitution, secured direct government involvement in both economic and social life, and effected an impressive consolidation of power in Washington. They also provided ideological justification for a powerful public administration, a special form of elite rule based on "scientific" expertise and insulated from interference by democratically elected officials.[40]

The modern administrative state is the legacy of Presidents Theodore Roosevelt and Woodrow Wilson; it was expanded with Franklin D. Roosevelt's New Deal of the 1930s, Lyndon Johnson's Great Society of the 1960s, and President Richard

35. *New York v. United States,* 505 U.S.144 (1992).
36. *Printz v. United States,* 521 U.S. 898 (1997).
37. Based on the Obama Administration's 2013 budget estimates, the proposed expansion would cost the states as much as $3.4 billion annually. Drew Gonshorowski, "Medicaid Will Become More Costly to The States," Heritage Foundation *Issue Brief No. 3709,* August 30, 2012, http://report.heritage.org/ib3709.
38. "While prior Supreme Court precedents had recognized the theoretical possibility that Spending Clause legislation could unconstitutionally commandeer recipient states, no spending legislation had actually been struck down on coercion grounds. Few observers expected the state challengers to succeed on their coercion argument, particularly by a 7 to 2 vote. Thomas A. Lambert, "How the Supreme Court Doomed the ACA to Failure," *Regulation,* Winter 2012–2013, p. 32.
39. *National Federation of Independent Business v. Sebelius,* 132 S.Ct. 2566 (2012).
40. For an overview of the impact of Progressivism on American political science and public administration, see Thomas G. West and William A. Schambra, "The Progressive Movement and the Transformation of American Politics," Heritage Foundation *First Principles Series Report* No. 12, July 18, 2007, http://www.heritage.org/research/reports/2007/07/the-progressive-movement-and-the-transformation-of-american-politics.

Nixon in the 1970s. Where the Founders wished to secure a division of powers and fix firm constitutional limits on government power to protect liberty at the expense of efficient administration, the Progressives sought to entrench a system of scientific administration to secure their vision of an evolving public good within the ever-changing parameters of Woodrow Wilson's concept of a "living" Constitution.[41] Observes DeMuth, "The regulatory agency—developed in the Progressive and New Deal eras and upgraded in the 1970s—has proved to be the most potent institutional innovation in American government since the Constitution."[42]

President Obama is a proud heir to that legacy and arguably its most ambitious champion.[43] Today, his HHS Secretary has sweeping control over Americans' health care coverage and benefits, and his Treasury Secretary has unprecedented control over the nation's financial system.[44] Neither President Obama nor his Progressive allies, however, have cornered the political market on transformational change. In fact, many American citizens and their elected representatives, both in Congress and in our statehouses, wish to restore the Founders' vision of constitutional government.

It is not enough to oppose Washington's bureaucratic power. Americans need to embrace and understand the Founders' rich and revolutionary thought. When they do, they will come to realize that the modern administrative state, entrenched in the Washington bureaucracy, is the most serious challenge to the Founders' vision of a balanced constitutional order.

THE MODERN ADMINISTRATIVE STATE, ENTRENCHED IN THE WASHINGTON BUREAUCRACY, IS THE MOST SERIOUS CHALLENGE TO THE FOUNDERS' VISION OF A BALANCED CONSTITUTIONAL ORDER.

Today, the power of Washington's administrative state may be ascendant. Its bureaucracy may be metastasizing. And its steady stream of rules, regulations, guidelines, and related paperwork has become a gusher. State and local politics has thus become a battleground over federal, not just state and local, policy. Today, states are struggling with the cost and impact of the Affordable Care Act, the power of the EPA, and the latest Washington initiatives on gun control and domestic energy production. Tomorrow, expect more controversies.

But political power ebbs and flows, reflecting the changing sentiments and temper of the times. States are reasserting themselves not only in pushing the limits of their own powers, but also in testing Washington's limits. Reinvigorated states can demand and secure more accountability in Washington, pressure their congressional delegations to remember the folks back home, and help to restrain some of the excesses of the bureaucratic behemoth that is exercising so much control over the everyday lives of ordinary Americans.

That is how federalism is supposed to work. That is the way the Founders expected it to work. The task of state officials, as Chief Justice Roberts reminds us, is to act like the representatives of the sovereign people. If Washington's ruling class really wants a "living" Constitution, let's give it to them.

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41. "Wilson's argument that the Constitution has meaning that evolves over time and can mean different things in different ages has become widely accepted, especially in the academy and intellectual circles. But much like the idea of the Constitution meaning only what the judges say it means, to accept Wilson's principle is to render the Constitution on its own almost meaningless—or at the very least meaning whatever one wants it to mean. It is to embrace a notion of 'constitutional relativism' that dismisses out of hand those principles of government that were central to the creation of the document." Hickok, *Why States? The Challenge of Federalism,* p. 59.
42. DeMuth, "The Regulatory State," p. 71.
43. "Obama has a century of modern American liberalism to draw on, and in a strange way his administration has recapitulated that history." Charles R. Kesler, *I Am the Change: Barack Obama and the Crisis of Liberalism* (New York: HarperCollins, 2012), p. 179.
44. "The ability of the Treasury Secretary to seize any financial firm if he or she believes that its failure might cause instability in the U.S. financial system is an unprecedented power in the hands of a government official. The seized firm has virtually no opportunity for judicial review. If the company objects, the secretary can apply to a court, but the court is not allowed to grant a stay or an injunction and must decide the issue in one day. Appeals are not permitted." Wallison, *Bad History, Worse Policy,* p. 518.