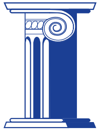

INSTITUTE BRIEF

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Health Care: A Constitutional Question

by John Hendrickson

The progressive movement or modern liberalism received an historic victory in late March as Congress passed and President Barack Obama signed into law sweeping health-care reform. Universal health care has long been a policy objective of the progressive movement since the early twentieth century. Progressives have long championed an aggressive federal government that has expansive regulatory powers and the ability to provide economic security to individuals through entitlements. In fact, in 1944 President Franklin D. Roosevelt issued a "second Bill of Rights," which included, among other things, the right to health care. The debate over health-care policy is part of a larger debate over constitutional interpretation. The Democrat health-care reform bill is not only bad policy and will significantly add to the already dangerous fiscal crisis, but it is also a serious defeat for limited constitutional government that the Founders intended when drafting the Constitution.

The economy is still struggling to emerge out of a recession, and unemployment still remains a serious issue as job creation is slow. The federal government is also confronted with a major fiscal crisis as the nation faces a $12 trillion debt and a projected deficit of $1.6 trillion for 2010. Entitlement programs — Social Security, Medicare, and Medicaid — are in fiscal trouble. These entitlement programs consume most of the federal budget and these programs "will consume all tax revenues by 2052" unless Congress reforms entitlements.[1] The staggering fiscal cost of unfunded liabilities, if not addressed, will result in bankrupting the nation.

The health-care bill is an additional future entitlement that has been added — unless Republicans repeal the legislation — to the federal budget. The CATO Institute estimates that the legislation will cost at least $3 trillion and "increase federal deficits by $59 billion over the next ten years."[2] The plan will also cost states more as additional people will be added onto Medicaid rolls. The history of federal programs, such as entitlements, prove that government programs always cost more than expected and usually do not fulfill the intended policy result. As Michael Tanner of CATO Institute wrote:

> For example, when Medicare was instituted in 1965, it was estimated that the cost of Medicare Part A would be $9 billion by 1990. In actuality, it was seven times higher — $67 billion. Similarly, in 1987, Medicaid's special hospitals subsidy was projected to cost $100 million annually by 1992, just five years later; it actually cost $11 billion, more than 100 times as much. And in 1988, when Medicare's home-care benefit was established, the projected cost for 1993 was $4 billion, but the actual cost in 1993 was $10 billion.[3]

Tanner also noted that "once an entitlement is in place, it becomes virtually impossible to take away." As an example, he made reference to the small number of co-sponsors in Congress who have supported Representative Paul Ryan's (R-WI) landmark entitlement reform plan — A Roadmap for America's Future — which is a serious proposal based on constitutional principles to reform entitlements, as evidence that repeal would not be likely.[4]

Jeffrey T. Kuhner, President of the Edmund Burke Institute, recently wrote that "FDR's New Deal, Big-Government liberalism has been on the march — Social Security, Medicare, Medicaid, the Environmental

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Protection Agency, and the U.S. Department of Education."[5] In addition, Kuhn correctly argued that the Republican Party has failed to roll back the welfare state, and unfortunately many GOP administrations have increased the size and scope of the federal government.[6]

Although the economic and policy impacts of the health-care law are important and a substantial part of the debate, these concerns should not overlook the constitutional implications of this progressive reform initiative. Conservatives and libertarians must not forget that this is a constitutional debate. Currently, 13 states have filed lawsuits against the health-care law as being unconstitutional. Serious constitutional questions have been raised over the law such as whether it violates the 10th Amendment and if it is an unconstitutional use of the Commerce Clause by Congress. The Founders intended that the Constitution be a document that limited the powers of government and protected the states through federalism. In addition, the Framers also believed in the protection of economic liberties and property rights.

During the early phase of the New Deal, the Supreme Court, under the leadership of four conservative justices, defended limited constitutional government and economic liberty by striking down New Deal laws as unconstitutional. Although the Court was able to uphold the Constitution in the early years of the New Deal, by 1937 President Roosevelt was able to remake the Court in his own image and the result was a victory for the progressive "living" Constitution and expanding the powers of Congress, especially through the Commerce Clause.[7] Professor Gary M. Galles of Pepperdine University recently wrote that "if the Supreme Court follows the Constitution as written, federal health 'reform' will be rejected."[8] Ken Cuccinelli, who serves as Attorney General for Virginia, is one of many state Attorneys General that have brought suit against federal health care reform and who also challenges the constitutionality of the law. "The states, as sovereign entities, granted express and limited powers to the federal government by way of the United States Constitution," noted Cuccinelli in referring to the Founders' original intent view of federalism.[9] "In particular, does Congress have the power to force people to buy health insurance — to override non-commerce (choosing not to buy) in the name of regulating commerce?" wrote Galles.[10]

Judge Robert H. Bork described the New Deal as an "economic and governmental upheaval," and the same comparison can be applied to the current Democrat Administration aided by the Congress.[11] It is essential that policymakers return to principles and policies that are based on limited government and economic liberty. The responsibility for upholding the Constitution is not just for policymakers and judges, but also citizens. "The salvation of our form of government, in the last analysis, rests with the people, and the most discouraging sign of the times is their indifference to constitutional questions."[12]

Endnotes:

[1]The Heritage Foundation, "Heading For a 10,000-Foot Cliff: Why Budget Reform is Needed Now," *Fact Sheet #6*, March 26, 2010, <www.heritage.org/Initiatives/Entitlements> (March 27, 2010).
[2]Michael F. Cannon, "Do the Math-Obamacare would increase deficits by $59 billion," CATO Institute, March 22, 2010, <http://www.cato.org/pub_display?php?pub_id=11591> (March 27, 2010).
[3]Michael D. Tanner, "Our future under Obamacare," CATO Institute, March 22, 2010, <http://www.cato.org/pub_Display.php?pub_id=11596> (March 27, 2010).
[4]Ibid.
[5]Jeffrey T. Kuhner, "Will America break up?" *The Washington Times*, March 25, 2010, <http://www.washingtontimes.com/news/2010/mar/25/will-america-break-up> (March 26, 2010).
[6]Ibid.
[7]See *Wickard v. Filburn*, 1942.
[8]Gary M. Galles, "A chance to refine the Commerce Clause," *The Washington Times*, March 27, 2010, <http://www.washingtontimes.com/news/2010/mar/27/a-chance-to-refine-the-commerce-clause-> (March 27, 2010).
[9]Ken Cuccinelli, "Founders would cheer Virginia's anti-Obamacare bill," *The Washington Examiner*, February 10, 2010, <http://www.washingtonexaminer.com/opinion/OpEd-Contributor/Ken-Cuccinelli-Founders-would-cheer-Virginias-anti-Obamacare-bill-84053887.html> (April 29, 2010).
[10]Galles.
[11]Robert H. Bork, *The Tempting of America: The Political Seduction of the Law*, The Free Press, New York, 1990, p. 53.
[12]James M. Beck, "Our Changing Constitution," lecture, The College of William and Mary, Williamsburg, Va., November 18, 1927, p. 27.

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