

Federal Funding with State Flexibility: A Timely Look at Federalism and Health Care Reform

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Nicholas Bagley, [Federalism and the End of Obamacare](#), 127 *Yale L.J. F.* 1 (2017).

In our era of increasingly divisive politics and fiery rhetoric, particularly around Obamacare and efforts to repeal it, Nicholas Bagley's article, *Federalism and the End of Obamacare*, is a rare treat. It is a thoughtful, balanced look at the arguments for the respective roles of federal and state governments should play in the financing and regulation of health care.

Professor Bagley's article makes three key points that are highly relevant to the current debate about the future of Obamacare: First, only the federal government has the fiscal capacity to fund health care; second, states should be granted significant flexibility in regulating their health care markets, even if that means that they'll sometimes get it wrong; and third, current reform proposals do not empower states, but rather take power away from the states by deregulating (and defunding) health care.

Professor Bagley makes a strong case for the necessity of federal funding of health care. Providing health care to low-income individuals tends to be countercyclical; the need for such care is greatest when the economy is not doing well. For state governments, which must balance their budgets, this creates significant difficulty in funding health care for the low income because costs are likely to be highest when state revenues are depressed. The federal government is not constrained by balanced budget requirements and therefore can deficit spend in times of need.

Recognizing that the structural fiscal argument may not satisfy those who strongly favor state authority, Professor Bagley considers whether states that want to provide health care to their citizens could simply tax residents in order to pay for such care, even if such needs may be countercyclical. He argues, however, that taxing *individuals* to pay for such health care is problematic because some of the individuals taxed already receive lower take-home pay because they are offered employer-provided health care coverage. Essentially, a worker who has employer-provided coverage would pay twice: once to cover her own health care costs, and once to cover the costs of fellow state residents who do not receive employer-provided coverage and therefore enjoy higher wages as a result. The obvious answer to this inequity is to either require employers to offer employees coverage, or at least to tax those that do not. States, however, are largely powerless to do so, because the federal Employee Retirement Income Security Act of 1974 (ERISA) broadly preempts state laws that "relate to" employee benefit plans. As a result, only the federal government is able to level the playing field by requiring employers to either offer coverage or pay a tax.

The second significant contribution this article makes is to push back against the notion that states cannot be left to determine the terms of their health care markets because they will make suboptimal choices. For example, Professor Bagley discusses the ACA's strict rules regarding the premiums that health insurers may charge, noting that the ACA provides that older people may be charged no more than three times what younger people pay for coverage. Without this rating restriction, young people would pay less for coverage, while old people would pay more. It is in this type of normative judgment that he argues states should have more flexibility and input. He acknowledges in this discussion that states might get it wrong. They might make decisions that are harmful to some groups. But, he argues, this is the price we pay for federalism (which we should tolerate unless states' bad ideas turn on views about the inferiority of minority groups). As he succinctly puts it, "Sometimes federalism means letting the states wave their crazy flags." Professor Bagley does not, however, argue that the states should simply be given federal funding without limitation. He argues that the federal government can (and should) set broad conditions on the use of the federal funding but,

particularly where there are so many unknowns about how best to achieve universal coverage within our existing system, and so many disagreements about what burdens should be born and by whom, there is merit in letting fifty flowers bloom.

After making this case for increased state authority, Professor Bagley turns to examine current proposals to “repeal and replace” the ACA. And it is here that Professor Bagley makes one of his most important contributions because he explains that, while reformers rely heavily on states’ rights rhetoric, current proposals actually strip authority from states. In particular, reform efforts that seek to authorize interstate sale of health insurance prevent a state from regulating the health insurance market for its own residents, because those residents can simply opt out of that regulation by purchasing in another state. The home state no longer controls health insurance markets for its own citizens. Professor Bagley argues that this is an even greater infringement on state authority than federal regulation. It is, he argues, a clear attempt to deregulate health insurance, rather than shift regulatory control back to the states. He makes similar arguments regarding Medicaid block grants, which, under current proposals, would entail shrinking Medicaid to a degree that would prevent states from exerting much meaningful control of the program.

Professor Bagley’s article deserves attention and praise for many reasons. First of all, it is legal scholarship that is directly relevant to one of the major policy debates currently underway in our country, and it is written in a format, length, and style that can actually be read and digested by all stakeholders. But I also think it is powerful precisely because it is legal in orientation and not political. Professor Bagley’s arguments are likely to cause both sides of the political spectrum to bristle. The article may cause Democrats to rethink their assumptions that tight federal regulation of all aspects of health care markets is the only way to accomplish health care reform. And it may cause Republicans to rethink their arguments that the ACA must be dismantled in order to return power to the states.

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