

American Thinker

April 17, 2012

Via RomneyCare: Do States Have Unlimited Powers?

By Daniel Smyth

[T]he action of the state legislature is said to be valid and constitutional unless it comes into conflict with some provision of either [the] state or national Constitution.

*-[W.F. Dodd](#), *Yale Law Journal*, 1919*

Do state legislatures have unlimited powers? It would seem so given much recent commentary on ObamaCare and RomneyCare, both of which mandate that individuals purchase private health insurance plans. For instance, during the Supreme Court's oral arguments over ObamaCare last month, Chief Justice John Roberts [said](#) that, unlike the federal government, "... the States are not limited to enumerated powers." Justice Antonin Scalia even [said](#), "[T]he vast majority of powers remain in the States." Also, in a recent discussion of RomneyCare, the Massachusetts law that helped inspire ObamaCare (see [here](#) for my discussion of ObamaCare), Doug Bandow of the Cato Institute [alleged](#) that RomneyCare is constitutional according to Massachusetts' constitution "since states ... [may] regulate most anything within their jurisdiction."

Of course, [Article 1, Section 8](#) of the U.S. Constitution limits the U.S. Congress to exercising enumerated powers, such as the powers to "regulate commerce ... among the several states," "punish piracies ... committed on the high seas," and "raise ... armies." Also, the U.S. Constitution's [10th Amendment](#) reads as follows (emphasis added):

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

However, although the U.S. Constitution never lists the "powers ... reserved to the States," how many and what types of powers did the Founders believe they "reserved to the States"? According to constitutional scholar Robert Natelson in his [2003 article](#) "The Enumerated Powers of States," we find the Founders' understanding of what would be the "powers ... reserved to the States" in Founders' writings and speeches before the Founding. Natelson documents how

such Founders as Alexander Hamilton, James Madison, and John Marshall collectively articulated that states would essentially have the following 11 powers:

1. The power to train state militias and appoint their officers¹
2. The power to institute local governments, such as county governments
3. The power to regulate real property such as land titles, land transfers, descents, and other aspects of real estate
4. The power to regulate personal property outside commerce, including the power to inspect goods
5. The power to regulate domestic and family affairs, including the regulation of marriage and divorce
6. The power to create and enforce criminal laws
7. The power to administer civil justice (contract, tort, and property disputes)
8. The power to govern religion (sic) and education, including the establishment of religious institutions and schools
9. The power to provide social services
10. The power to regulate agriculture, including control over fisheries
11. The power to regulate aspects of non-agricultural businesses, such as manufacturing

Nevertheless, no state constitution has limited its legislature to these 11 or other enumerated powers². However, [all](#) state constitutions have declarations of rights similar to the U.S. Constitution's Bill of Rights and specific legislative commands³, all of which protect state citizens from certain state powers. For instance, the [Constitution of the Commonwealth of Massachusetts](#) lists numerous individual rights and legislative commands in its Declaration of Rights, such as the following:

- [The] right to keep and to bear arms for the common defence (sic)
- The right to receive compensation for private property appropriated to public use
- The right of access to ... courts of justice
- Freedom of the press
- No law shall be passed prohibiting the free exercise of religion
- No measure that relates to religion, religious practices or religious institutions ... shall be proposed by an initiative petition

So are Roberts, Scalia, and Bandow correct in insinuating that state legislatures have unlimited powers? No!

What about RomneyCare? Is its mandate to purchase health insurance constitutional according to Massachusetts' constitution, ratified in 1780? I'm afraid not: as [Terence Jeffrey](#) and [Paul Rahe](#) have argued, the Declaration of Rights in Massachusetts' constitution provides that, among the other rights listed above, "[a]ll people ... have ... the rights ... of *acquiring, possessing[,] and protecting property,*" rights that RomneyCare's mandate to *acquire and possess* health insurance violates. Lest we forget, [Samuel](#)

[Johnson's A Dictionary of the English Language \(1755\)](#), the most widely used dictionary at the Massachusetts constitution's ratification, defined "[to acquire](#)" as, in part, "[t]o gain by one's own labor or power." Of course, Massachusetts citizen George Fountas sued the commissioner of the Massachusetts Department of Revenue in the case [Fountas v. Dormitzer](#) over this [property issue](#) and other issues, but the Superior Court of Essex County ruled in RomneyCare's favor, [declaring](#) that " ... the Act is a proper exercise of police power." Appeals courts [upheld](#) the ruling. Regardless, Jeffrey's and Rahe's argument is strong, and such decisions as in *Fountas v. Dormitzer* depend on who's the judge.

If the Supreme Court overturns ObamaCare, liberals may try to pass versions of RomneyCare's mandate to purchase health insurance in states where it's politically feasible, which [include](#) Rhode Island, California, and Colorado. Conservatives and libertarians in these states: start scanning your state constitutions for declarations of rights the same as or similar to the Massachusetts constitution's rights to acquire and possess property! Follow Fountas' lead and challenge any future version of RomneyCare according to your state constitution. Remember: even though your state constitution doesn't have Natelson's "enumerated powers of states," your state has power limits! Just find a sympathetic judge.