Cato Handbook *for* Policymakers

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4. Repealing Obamacare

States should

- refuse to implement the Patient Protection and Affordable Care Act's Medicaid expansion if they have not already implemented it, or withdraw from it;
- conduct randomized, controlled experiments measuring the effects of Medicaid on existing enrollee populations; and
- liberalize government licensing of clinicians, government licensing of health insurance, and medical malpractice liability rules.

Congress should

- conduct oversight hearings at which Americans can testify to the failure of the ACA to provide quality, affordable coverage;
- repeal the ACA, no matter how long that takes;
- replace the current tax exclusion for employer-paid insurance premiums with an exclusion for contributions to "large" health savings accounts (see Chapter 37);
- convert Medicare to a system of cash payments to enrollees (see Chapter 38);
- convert federal funding for Medicaid and the State Children's Health Insurance Program to a system of block grants (see Chapter 39); and
- prevent states from blocking market entry by clinicians and insurers licensed by another state (see Chapters 35 and 36).

Despite the good intentions of its authors, the Patient Protection and Affordable Care Act of 2010 (ACA) is failing the sick. It is making access

to care for the sick increasingly less secure. It is drawing workers and their families out of relatively secure and comprehensive private insurance into government programs. It is blocking innovations that would make access to care more secure. It is making health insurance and medical care increasingly unaffordable. It is not covering as many uninsured Americans as promised. It is making the United States a less wealthy nation, eliminating jobs, increasing the burden of government, and trapping Americans in poverty. The actions its defenders have taken to preserve it have strained comity and the rule of law, leaving the ACA a law with no legitimacy. The ACA has been consistently unpopular with the American people for more than seven years.

Congress should not rest until it has repealed the ACA. A Republican Congress and President Barack Obama have jointly repealed portions of the law. Congress has already approved legislation that would repeal a majority of the ACA and then force Congress to reopen or repeal the rest. Any repeal bill can provide a safety net for those who would not be able to afford health insurance after enactment. Repealing the ACA will create an opportunity for real reform that makes health care better, more affordable, and more secure for all Americans—and thus reduces the need for a safety net, the expense of a safety net, and the controversy surrounding it. Little will improve for consumers under age 65 so long as the ACA's new health insurance regulations, mandates, and subsidies remain on the books.

Insecure Coverage

The ACA has failed to make health insurance secure. Before he signed it into law, President Obama repeatedly assured Americans, "If you like your health care plan, you'll be able to keep your health care plan, period. No one will take it away, no matter what." The president and other supporters knew this was not true. The ACA has thrown millions of Americans out of their health plans for various reasons, none of them good. It will continue to do so until Congress repeals it.

When the ACA took effect in 2014, as many as 12 million Americans lost their individual-market plans and the guaranteed-renewability protection those plans offered. The *Washington Post* reported, "The Department of Health and Human Services estimated in 2010 that up to 80 percent of small-group plans, defined as having fewer than 100 workers, could be discontinued by the end of 2013," affecting up to 100 million workers. The cancellations are ongoing.

The ACA is causing Americans to lose their coverage because the law gave taxpayer dollars to incompetent people. Seventeen of the 23 health insurance "co-ops" that the ACA launched with taxpayer funding went bankrupt by 2017. More than 800,000 Americans lost their coverage when those plans folded. The remaining co-ops are on shaky ground.

The ACA is throwing Americans out of their health plans by literally punishing insurers who offer coverage attractive to the sick. The law replaced market innovations that make comprehensive coverage more secure with a system that punishes insurers unless they make coverage progressively worse for the sick.

Before Congress enacted the ACA, individual-market policies included an innovative feature called guaranteed renewability. This feature allows enrollees who develop expensive conditions to pay the same premiums as healthy people. Research shows that guaranteed renewability made individual-market coverage more secure than employer-sponsored coverage, even for people with high-cost conditions. Guaranteed renewability made stable access to comprehensive coverage possible.

Markets didn't stop there. While Congress was debating the ACA, UnitedHealthcare secured approval from 25 states to sell an innovative and low-cost product that allows *uninsured* people who develop expensive medical conditions to purchase insurance at the same premiums as healthy people.

Innovators developed guaranteed renewability and preexisting-conditions insurance in the individual market because it was the only market without government-imposed price controls. The ACA put an end to the innovations when it imposed community-rating price controls on the individual market.

The result has been a race to the bottom. Many ACA exchange plans are Medicaid-based plans that offer narrow networks of doctors and hospitals and lower premiums. These plans are attractive to the healthy, who care more about low premiums than about broad provider networks. Sicker enrollees are the opposite: they care about comprehensive coverage and a broad choice of providers. Sicker enrollees therefore find these plans unattractive. They instead opt for plans that offer a broader choice of providers and more coverage for specialty drugs.

The ACA rewards Medicaid-based plans like Molina Healthcare and Centene Corp. that offer narrow coverage networks. At the same time, it punishes carriers that offer the sort of health plans sick people actually want. Under the ACA, comprehensive plans end up paying claims well

in excess of premium revenues, which drives those plans from the marketplace. Citing such losses, UnitedHealth Group announced it would go from participating in 34 states to just 3, canceling coverage for most of its 750,000 exchange enrollees. Humana announced it would go from selling exchange coverage in 1,351 counties to 156 counties or fewer in 2017, canceling coverage for most of its 500,000 exchange customers. Blue Cross and Blue Shield of Minnesota is withdrawing from that state's exchange, canceling coverage for 103,000 enrollees.

The ACA offers still more ways for Americans to lose their coverage. It offers coverage that can disappear when their employer changes how much it pays for their benefits; when enrollees turn 19, or 26, or 65; when they become disabled; when they get arrested; when their income falls; when their income *rises*; or when courts or elections put an end to the taxpayer subsidies propping up their plan. Economist Casey Mulligan describes the arcane and unpredictable ways Americans can lose their ACA coverage:

> A family could have calendar year income below the poverty line but for parts of the year have income above its state Medicaid threshold and for that part of the year fail to be eligible for either Medicaid or exchange subsidies. Or it could have calendar year income above the poverty line and above its state's Medicaid threshold but have income during part of the year below the latter and therefore be eligible for Medicaid during part of the year and for exchange subsidies for the rest of the year.

Every time a patient loses her health insurance, including when she switches between Medicaid and exchange coverage, her coverage can be interrupted, threatening her access to her doctors and other providers.

Rather than providing a path to secure, continuous coverage, the ACA creates countless gaps in coverage and punishes insurers who offer coverage attractive to the sick until there isn't any choice at all. The Kaiser Family Foundation estimates 664 counties will have only one exchange carrier in 2017, up from 225 in 2016.

Low Enrollment

The ACA has failed to reach its enrollment goals. Enrollment in the ACA's exchanges is about half what supporters expected. The Congressional Budget Office projected 21 million exchange enrollees in 2016. Instead, there were 11 million. It projected 17 million additional Medicaid enrollees. Instead, there were fewer than 13 million—a product of the

countervailing effects of 19 states refusing to implement the Medicaid expansion, and enrollments (and costs) vastly exceeding projections in the 31 states that have. (See below.)

Exchange coverage is unattractive even to those eligible for subsidies. An estimated 24 million people are eligible for subsidized exchange coverage. Only 40 percent of those eligible have enrolled. Sixty percent of people eligible for subsidies still think ACA coverage isn't worth it. Those who do enroll appear to be the sickest among that group, who then learn the ACA punishes insurers who provide the coverage they want.

Excessive Costs

The ACA has failed to contain the cost of health insurance. Premiums for exchange plans have been climbing at a rate consistent with adverse selection and possibly a death spiral. That comes on top of past increases. Economist Amanda E. Kowalski estimated, "Across all states, from before the reform to the first half of 2014, enrollment-weighted premiums in the individual health insurance market increased by 24.4 percent beyond what they would have had they simply followed state-level seasonally adjusted trends." A study of unweighted premiums found the ACA increased premiums by an average of 49 percent. Premiums for commonly purchased plans rose an average 22 percent in 2017. In Oklahoma, they rose an average 76 percent. Many enrollees saw their premiums double.

ACA supporters respond that many enrollees receive subsidies and therefore do not feel the full effects of those increases. Yet the majority (52 percent) of consumers subject to the ACA's individual-market rules get no subsidies. Even when they do, subsidies do not make the costs of ACA coverage disappear. They merely shift them to taxpayers. The ACA's subsidies create problems for taxpayers, the economy, and the subsidy recipients themselves.

In addition, the Medicaid expansion is costing taxpayers far more than projected. In 2015, the expansion cost $6,366 per enrollee, almost 50 percent higher than the government projected. In some states, the cost of the Medicaid expansion has exceeded projections by billions of dollars. The expansion hit implementing states with a double whammy of higher-than-projected per-enrollee spending and higher-than-projected enrollment. In states that provide data, enrollment has exceeded projections by an average 91 percent and exceeded maximum-enrollment projections by an average 73 percent.

The 19 states that refused to participate in the Medicaid expansion are looking wiser all the time. Indeed, according to projections by the Urban Institute, by refusing to implement the Medicaid expansion, those 19 states will reduce federal spending, deficits, and debt by $349 billion by 2022.

A Drag on the Economy

The ACA imposes a series of explicit and hidden taxes that inhibit economic productivity and trap Americans in low-wage jobs. Economist Casey Mulligan writes:

> The ACA makes health care more affordable for segments of the population, but in doing so it makes health care less affordable for the nation as a whole. The ACA will have the nation working fewer hours, and working those hours less productively, so that its nonhealth spending will be twice diminished: once to pay for more health care and a second time because the economy is smaller and less productive.

The ACA imposes $1.2 trillion in new explicit taxes through 2022. Some will not take effect until 2020. According to one estimate, the ACA's explicit taxes alone could reduce economic output by as much as $750 billion in just the first six years. The Congressional Budget Office estimates the ACA will eliminate roughly 800,000 jobs. The law has caused employers to cut hours for everything from waiters to college professors.

A Low-Wage Trap

Rather than freeing workers to pursue their dreams, the ACA traps workers in low-wage jobs. The ACA withdraws health insurance subsidies as earnings rise. The prospect of losing subsidies discourages workers from increasing their earnings in the same way an explicit tax does.

Mulligan estimates the combined effect of the ACA's explicit and implicit taxes is a six percentage point increase in the average implicit marginal tax rate that workers face. For some workers, the ACA creates implicit marginal tax rates of 100 percent or more. If those workers increase their earnings—if they get a college degree, work more hours, or take a better paying job—they pay so much more in taxes and lose so much in government subsidies that their incomes fall. All told, the ACA creates larger disincentives to work than any other piece of legislation Congress

enacted in the previous seven decades. Under the ACA, many workers get less when they work more and can increase their incomes by working less.

An Illegitimate Law

Together with the law's content, the conduct of its supporters has made the ACA one of the most unpopular and divisive laws in recent history. Supporters used calculated deceptions to secure its passage. The executive branch and Supreme Court stepped outside the law to protect the ACA from constitutional infirmities and democratic accountability. Those actions deepened partisan divisions, hardened opposition to the ACA, sowed distrust in government broadly and the Court in particular, strained the rule of law, and make repeal all the more imperative.

During President Obama's 2008 inauguration, at which point he still opposed an individual mandate, polls showed that voters broadly approved of his plans to reform health care. Public opinion began to turn as more details emerged. When House Democrats released the first draft of the ACA in June 2009, public support turned to opposition. The ACA has been consistently unpopular with the American public since its authors first introduced it as legislation.

Supporters both blunted and fueled opposition to the ACA by using calculated deceptions to secure passage. President Obama and others repeatedly promised that all Americans could keep their health plans—a promise they knew to be untrue. Well after enactment, ACA architect Jonathan Gruber admitted that he and other architects deliberately wrote the law in a manner that hides its costs from those who are paying them, and that those deceptions were crucial to passage. ACA supporters often claim, "The more [people] find out about it, the more they like it." Gruber admitted the opposite is true: if people had known more about the ACA, the opposition would have been greater, and it would not have passed Congress.

The ACA triggered a backlash that led to Republican gains in 2010 and 2014 and led many states to refuse to implement an exchange or the Medicaid expansion. Congress has held dozens of votes to repeal the ACA in whole or in part. A Republican Congress and President Obama together repealed the law's long-term care entitlement, repealed various burdens it imposed on employers, and curtailed its bailouts of taxpayer-financed health-insurance "co-ops" and private insurance companies. In 2016, two years after the ACA supposedly became politically invulnerable, Congress sent to President Obama a bill that repealed a majority of the law's major

provisions, and that would have effectively forced Congress to reopen or repeal the remaining provisions.

The durability of public opposition to the ACA is even more remarkable when we consider its authors crafted the law to purchase, with taxpayer dollars, the support or silence of every concentrated industry group that might have opposed it. Supporters believe the ACA makes health care more affordable and sides with consumers against greedy pharmaceutical and insurance companies. In fact, the ACA is a $2 trillion special-interest bonanza for "Big Pharma," private insurance companies, and providers. To an extent, the strategy worked. No corner of the health care sector opposes the ACA.

Still, for the ACA to survive, the Supreme Court had to alter it twice to save it from unconstitutionality, and a third time to save it from the voters. In *NFIB v. Sebelius*, the Supreme Court found the ACA on its own terms was unconstitutional in two different respects. Rather than strike down the admittedly unconstitutional law, the Court stepped into Congress's shoes and altered the law's terms. In *King v. Burwell*, a unanimous Supreme Court acknowledged the executive branch was taxing and spending billions of dollars to prop up the ACA contrary to the terms of the act. Rather than uphold the terms of the law Congress approved, the Court again assumed Congress's role and altered those terms.

The executive branch continues to violate the law in order to prop up the ACA. A federal court has ruled the Obama administration "violate[d] the Constitution" by sending billions of dollars to private insurance companies participating in the exchanges. The Government Accountability Office ruled the executive branch diverted a further $3 billion to insurers in a manner "inconsistent with the plain language of the statute."

If the government is not bound by the express terms of the ACA, it is difficult to argue that the people should be. The ACA's illegitimacy makes repeal all the more imperative.

States

As discussed in Chapter 39, there is little reliable evidence that Medicaid improves the health of enrollees and no reliable evidence that it is a cost-effective way of doing so. States that have not implemented the Medicaid expansion should continue to refuse. States that have expanded Medicaid should withdraw from the expansion. All states should petition the federal government for greater flexibility in the use of Medicaid and State Children's Health Insurance Program funds, including the authority to conduct

large, randomized studies of the effects of Medicaid coverage on health and other outcomes for existing eligibility groups.

Furthermore, all states should adopt reforms that will make health care better, more affordable, and more secure. These reforms include liberalizing the licensing of clinicians and health insurance and reforming medical malpractice liability rules (see Chapter 35).

Congressional Oversight Hearings

The more the public hears from victims of the ACA, the more support for repealing the ACA will grow. Congress can educate the public about the ACA by holding oversight hearings. Witnesses should include Americans whose coverage was canceled (for the various reasons discussed here), whose premiums make health insurance unaffordable, and—especially—patients with high-cost conditions whom the ACA subjects to narrow networks and high cost-sharing designed to be unappealing to the sick.

Repealing the ACA

Repealing the ACA should be the first item on Congress's health reform agenda, and Congress should not stop trying until it succeeds. The ACA may not be the most harmful way the government has intervened in the health care sector—even with all the damage it is causing. That distinction could belong to Medicare (see Chapter 38), the tax exclusion for employer-sponsored insurance (see Chapter 37), or quite possibly government licensing of clinicians (see Chapter 35). Nevertheless, repeal of the ACA deserves the immediate attention of Congress because the law is the most politically unpopular and vulnerable of any major government intervention in health care.

Americans under age 65 will never have secure access to health care as long as the ACA's health insurance regulations, mandates, and subsidies remain on the books. Congress need not eliminate the ACA's other provisions—its spending cuts and tax increases—though including those provisions in a repeal bill may be necessary to expand the repeal coalition.

Suggested Readings

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