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Unilateralism, Defunding, and the Shrapnel of Health Reform

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Introduction

In the shadow of a Presidential veto, it will be impossible to repeal health care reform completely—despite the overwhelming number of additional seats Republicans won in the 2010 election. Congress could, however, strip implementation funding from the Patient Protection and Affordable Care Act (PPACA)[1] and its companion bill, the Health Care and Education Reconciliation Act (HCERA),[2] known jointly among detractors as "Obamacare,"[3] and more properly as the Affordable Care Act (ACA). Defunding the health care bill has been advocated by Republican leaders such as Rep. John Boehner (R-OH) and Sen. John McCain (R-AZ),[4] who view the ACA as simultaneously unpopular[5] and counterproductive.[6] The economics of the bill do appear

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter PPACA].

2. Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 [hereinafter HCERA].

3. *See, e.g.*, *The Truth About Obamacare: What the Liberal Media Aren't Telling You About Obama's Healthcare Plans*, Media Research Center, http://www.obamacaretruth.org/ (last visited May 22, 2010).

4. Simmi Aujla, *Price: We'll Defund Health Reform*, Politico (Sept. 11, 2010, 3:13 PM), http://www.politico.com/news/stories/0910/42015.html.

5. The bill had only "lukewarm support" prior to passage, despite the fact that certain propositions were actually supported by most Americans. Frank Newport, Jeffrey M. Jones & Lydia Saad, *Americans on Healthcare Reform: Five Key Realities,* Gallup (Oct. 30, 2009), http://www.gallup.com/poll/123989/americans-healthcare-reform-five-key-realities.aspx. Recent polling has been more favorable. *See* Robert Pear, *Among Some, High Marks for Health Care Overhaul's Beginnings*,

unsustainable,[7] and the ACA may unravel American health insurance entirely.[8] This Essay, however, argues that because the bill functions as a single, coherent whole, even ardent opponents of the bill should avoid slashing funding. Stripping out certain provisions while leaving others intact would result in a vastly more destructive and incomprehensible package—and incalculable damage to the the party authoring the alterations.

Even if health care reform is viewed as a ticking time bomb, defunding would produce shrapnel that would be vastly more destructive than the bomb would have been on its own.

The ACA and its Detractors

Health care reform has been widely misunderstood by the public and politicians. The ACA has been demonized as promoting euthanasia,[9] and as being a conspiratorial government takeover of all health care.[10] At the same time, it has been lionized as a solution to rising insurance costs,[11] and lauded as providing a much-needed increase in the number of primary care physicians.[12] These claims range from completely false to severely exaggerated.

N.Y. Times, July 1, 2010, at A15, *available at* http://www.nytimes.com/2010/07/02/health/policy/02health.html ("[A] new poll suggests a small increase in favorable views of the measure since May.").

6. *See infra* text accompanying notes 24-39.

7. *Id.*

8. *See, e.g.*, Michael Lee, Comment, *Trends in the Law: Patient Protection and Affordable Care Act*, 11 Yale J. Health Pol'y L. & Ethics (forthcoming 2011); Michael Lee, Op-Ed, *For Better Health Reform*, Yale Daily News, Sept. 8, 2010, at 2, *available at* http://www.yaledailynews.com/news/2010/sep/08/lee-better-health-care-reform.

9. *See, e.g.*, Rachel Weiner, *Palin: Obama's "Death Panel" Could Kill My Down Syndrome Baby*, Huffington Post (Aug. 7, 2009, 6:19 PM), http://www.huffingtonpost.com/2009/08/07/palin-obamas-death-panel_n_254399.html.

10. *See, e.g.*, Karl Denninger, *Health Care: Arbitrage Obama and the Dems*, Market Ticker (Mar. 22, 2010, 1:23 PM), http://market-ticker.org/akcs-www?post=164597 ("[T]his is the end of the health industry in America.").

11. President Barack Obama, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/remarks-by-the-president-to-a-joint-session-of-congress-on-health-care (last visited Apr. 12, 2010).

12. For an explanation of this misconception, see Robert Moffitt, Obamacare: Impact on Doctors, The Heritage Foundation (2010), http://www.heritage.org/research/reports/2010/05/obamacare-impact-on-doctors ("In 2011, Medicare primary care physicians and general surgeons practicing in

In reality, the ACA centers on a single very simple idea: Insurance companies must offer the same policies—with the same services and premiums—to anybody regardless of their health status.[13] While these companies may charge different rates based on age,[14] they cannot charge different rates to, say, diabetics or cancer patients. Nor may they exclude those with preexisting conditions from purchasing policies.[15] Of course, this creates an obvious problem: It becomes rational to purchase health insurance only after the onset of illness.[16]

For that reason, the ACA imposes a mandate. Every American must buy health insurance or pay 2.5% of their income to the IRS as a fine.[17] In order to ensure that the mandate is affordable, the ACA also grants subsidies to certain families.[18] In order to pay for those subsidies, the bill ostensibly imposes a combination of new taxes, Medicare cuts, and other financial provisions.[19]

Opponents have raised three chief objections to the bill. First, some states have asserted in recently-filed lawsuits that the mandate is so intrusive to personal liberty as to be unconstitutional.[20] Second, opponents argue that the bill is unlikely to control medical costs and will in fact cause health insurance premiums to rise dramatically.[21] Third, they contend that the bill's projected budget-neutrality is an illusion and the bill will in fact worsen deficits considerably.[22]

'shortage' areas will receive a 10% bonus payment. . . . [But] [t]here is no provision for continued federal taxpayer funding beyond [2014].").

13. PPACA, Pub. L. No. 111-148, § 1201, 124 Stat. 119, 154 (2010).

14. *Id.*

15. *Id.*

16. The major exception would be a "zero-notice" catastrophe—after getting hit by a car, for example, a patient can hardly hope to sign up for insurance before surgery is necessary.

17. PPACA § 1501, 124 Stat. at 242-44, *modified by* § 10106, 124 Stat. at 907-11, *amended by* HCERA, Pub. L. No. 111-152, § 1002, 124 Stat. 1029, 1032-33 (2010).

18. PPACA § 1401, 124 Stat. at 213-20; HCERA § 1001(a)(1)(A), 124 Stat. at 1030-31.

19. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Hon. Nancy Pelosi, Speaker, U.S. House of Representatives, tbl. 2 (Mar. 20, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf.

20. Complaint, State of Florida vs. U.S. Dept. of Health & Human Servs. (N.D. Fl. 2010) (No. 3:10 Civ. 91), *available at* http://myfloridalegal.com/webfiles.nsf/WF/MRAY-83TKWB/$file/HealthCareReformLawsuit.pdf

21. *See infra* text accompanying notes 25-31.

22. *See infra* text accompanying notes 32-39.

While the constitutionality of the mandate is beyond the scope of this Essay,[23] the latter two objections appear to have some technical grounding and are explored briefly here.

First, the ACA is unlikely to control costs and is thus likely to raise premiums—a result that would thwart a large part of the reform's stated purpose. If health insurance premiums continue to rise, they will have severe ramifications on the ACA's intended results. The Congressional Budget Office (CBO) has generally issued favorable projections regarding the bill's finances,[24] but even the CBO estimates that premiums will double, rising from around $6,000 for an average family plan now[25] to more than $12,000 for a so-called "bronze" tier plan—effectively doubling the price for worse coverage.[26] This estimate can be confirmed by making a comparison to states that have previously imposed similar legislation.[27] Put simply, premiums are going to rise because total health expenditures are likely to rise. Insurers will seek to recover the cost of covering additional ill customers by raising rates for the healthy.

The reduction of total national health expenditures thus should have been a criticial component of the bill—but in and of itself, the ACA does not have any promising mechanism to reduce total costs. Empirical analysis has demonstrated that the provision of insurance, without other measures, does not reduce

24. *See* U.S. Const. art I., § 8, cl. 3 ("The Congress shall have Power . . . to regulate commerce . . . among the several States"). *See also* Jack Balkin, *A Tax Like Any Other*, N.Y. Times, Mar. 28, 2010, *available at* http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional ("The individual mandate . . . is a tax on behavior, like a tax on businesses that don't install anti-pollution equipment."); Timothy Stoltzfus Jost, *Health Bill Lawsuits Are Going Nowhere*, CNN.com, Mar. 24, 2010, *available at* http://www.cnn.com/2010/OPINION/03/24/jost.health.bill.challenges/index.html; Jacob Hacker, Professor of Political Science, Yale Univ., Address to Yale Law School American Constitution Society: What's Next? Implementing and Expanding the Health Care Law (Apr. 8, 2010) (characterizing the mandate as a tax).

25. Letter from Douglas W. Elmendorf, *supra note* 19.

25. *See* America's Health Ins. Plans Ctr. for Policy & Research, Individual Health Insurance 2009: A Comprehensive Survey of Premiums, Availability, and Benefits 4 (2009), *available at* http://www.ahipresearch.org/pdfs/2009IndividualMarketSurveyFinalReport.pdf (last visited Apr. 12, 2010).

26. A "Bronze" plan has an actuarial value—the percentage of projected medical expenses that is covered by a given plan—of 60%. They can be compared to the higher tier plans: Silver (70%), Gold (80%), and Platinum (90%). PPACA, Pub. L. No. 111-148, § 1302(d), 124 Stat. 119, 167 (2010).

27. *See, e.g.*, America's Health Ins. Plans Ctr. for Policy & Research, *supra* note 25, at 6 tbl.3 (2009), *available at* http://www.ahipresearch.org/pdfs/2009IndividualMarketSurveyFinalReport.pdf (demonstrating that New York and Massachusetts, two states with nondiscrimination requirements, have average premiums of $13,296 and $13,288, respectively).

total national medical spending even though it increases primary care delivery.[28] Just 5% of Americans are responsible for 50% of our nation's health care budget,[29] and the ACA has no core provisions designed to reduce the underlying expenditures by those 5%. Besides a few small "pilot programs," the bill has no serious cost control measures.[30]

Because total costs will certainly rise, insurance rates are likely to rise dramatically in turn. This will impact the way Americans make their purchasing decisions: While the ACA imposes a mandate, it also removes most of the incentive to purchase insurance prior to illness. Evidence suggests that most Americans essentially treat insurance as a traditional consumer purchase.[31] If prices rise as dramatically as predicted by the CBO, then the excess cost of a premium is very likely to be larger than the fine associated with the mandate—just 2.5% of a family's income with a substantial hardship exemption. While some consumers will continue to purchase insurance regardless of the extra costs, many will prefer to pay the fine and wait to purchase insurance until after becoming sick, driving the system into unsustainability. Economists refer to this pattern as the "adverse selection death spiral," and it is an all-too-real possibility.[32]

Second, the ACA seems likely to increase rather than decrease the deficit. According to the CBO's original estimates, the ACA was scheduled to impose $965 billion in new federal spending, offset by $563 billion in new taxes and $525 billion in spending cuts.[33] Even taking these projections at face value—and,

28. *See* Jack Hadley & John Holahan, *Covering the Uninsured: How Much Would It Cost?*, Health Affairs, June 4, 2003, at W3:250-65, *available at* http://content.healthaffairs.org/content/early/2003/06/04/hlthaff.w3.250.citation ("[T]he uninsured would use $33.9-$68.7 billion (in 2001 dollars) in additional medical care if they were fully insured."). This is, of course, an astonishingly low cost—but for the purposes of tracking expenditures, health insurance is *not* cost-reducing.

29. Mark W. Stanton, Agency for Healthcare Res. & Quality, Research in Action, The High Concentration of U.S. Health Care Expenditures 2 (2006), *available at* http://www.ahrq.gov/research/ria19/expendria.pdf.

30. *But see* Atul Gawande, *Testing, Testing*, New Yorker, Dec. 14, 2009, at 34, *available at* http://www.newyorker.com/reporting/2009/12/14/091214fa_fact_gawande (arguing that while there is "no master plan for curbing costs," the pilots themselves may be promising).

31. David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 Yale J. Health Pol'y L. & Ethics 23, 26 (2001) ("[T]he evidence is fairly clear that potential subscribers approach coverage decisions in *traditional economic terms*" (emphasis added)).

32. *See, e.g.*, Anemona Hartocollis, *New York Offers Costly Lessons on Insurance*, N.Y. Times, Apr. 17, 2010, at A1, *available at* http://www.nytimes.com/2010/04/18/nyregion/18insure.html (utilizing the term "adverse selection death spiral" and describing the death spiral in New York).

33. *See* Letter from Douglas W. Elmendorf, *supra* note 19.

indeed, CBO has already raised the spending estimate by $115 billion[34]—it remains to be seen whether Congress will actually implement the spending decreases and tax increases. The CBO's Director, Douglas Elmendorf, appointed jointly by Rep. Nancy Pelosi and then-Sen. Robert Byrd, expressed deep skepticism that Congress would implement these deficit reduction provisions. His original report—the very same one that projected a deficit reduction from the overall bill—conceded that several of the bill's deficit reduction provisions "would maintain and put into effect a number of policies that might be difficult to sustain over a long time."[35] Former CBO Director Douglas Holtz-Eakin was even more blunt in his criticism when he pointed out that the CBO was constrained by Congress's instructions: "fantasy in, fantasy out."[36] He argued in March that "Congress is likely to continue to regularly override scheduled cuts in payments to Medicare doctors"[37]—and, indeed, Congress did exactly that on June 24th.[38] Holtz-Eakin estimated that health reform would actually increase deficits by $562 billion over ten years.[39] Fortune Magazine separately estimated a $488 billion increase in the deficit.[40]

Several of the criticisms of the ACA, then, seem valid. Nevertheless, defunding the law will do nothing to fix these inherent flaws.

Unilateral Defunding

Congress retains control over annual appropriations spending and can pass an annual budget with a bare majority.[41] The President, of course, may veto

34. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Hon. Jerry Lewis, Ranking Member, U.S. House of Representatives, (May 11, 2010), *available at* http://www.cbo.gov/ftpdocs/114xx/doc11490/LewisLtr_HR3590.pdf.

35. *See* Letter from Douglas W. Elmendorf, *supra* note 19.

36. Douglas Holtz-Eakin, Op-Ed, *The Real Arithmetic of Health Reform*, N.Y. Times, Mar. 21, 2010, at WK12, *available at* http://www.nytimes.com/2010/03/21/opinion/21holtz-eakin.html.

37. *Id.*

38. Corey Boles, *Congress Passes Six-Month Medicare-Payment Fix*, Wall St. J., June 24, 2010, *available at* http://online.wsj.com/article/SB10001424052748704911704575327434173635988.html.

39. Holtz-Eakin, *supra* note 36. *But see* Peter Orszag, Dir. of Office of Mgmt. and Budget, *Fiscal Realities*, OMB Blog (Mar. 21, 2010, 3:05 PM), http://www.whitehouse.gov/omb/blog/10/03/21/Fiscal-Realities (arguing that overriding physician payment cuts "is not in this bill—so adding its costs to the legislation *posits a piece of legislation that doesn't exist*") (emphasis added).

40. Shawn Tully, *Health Care: Going from Broken to Broke*, Fortune, Mar. 12, 2010, http://money.cnn.com/2010/03/12/news/economy/debt_health_care.fortune/index.htm.

41. U.S. Const. art. I, § 7.

such a budget—but the *entire* budget would have to be vetoed.[42] If the President is unwilling to do so, then he has no choice but to approve Congressional spending decisions. Made famous by the 1995 federal government shutdown,[43] this tactic remains available to Congressional opponents of the ACA. They could defund implementation spending,[44] general enforcement spending, or both. But either path would be both destructive and foolish.

First, defunding enforcement would not change the underlying regulation. The laws regarding insurer nondiscrimination would remain on the books—possibly without certain elements of federal oversight,[45] but nonetheless the law of the land. Large insurers, subject to higher scrutiny, would probably still have to comply with the nondiscrimination requirements. However, an underfunded Department of Health and Human Services and Department of Justice would find it more difficult to enforce the insurance regulation components of the bill. Limited enforcement could ultimately permit less-scrutinized insurers to engage in now-illegal practices, which would actually *accelerate* adverse selection. That would result in the bankruptcy of the remainder of the insurance industry, including the larger players.

Second, the mandate would still be enforced through the Internal Revenue Service (IRS).[46] Mandate fines, like other taxes, will be self-reported. A failure to pay, if discovered on audit, would technically constitute tax evasion. As such, underfunding the IRS would not be a meaningful solution to the burden of the mandate. In fact, defunding would more likely cripple the IRS's ability to process the tax credits and refunds that ameliorate the ACA's impact on the economically disadvantaged, thus increasing rather than lessening the burden of the fines.[47]

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42. *See* Clinton v. City of New York, 524 U.S. 417 (1998) (ruling that a Presidential line-item veto is unconstitutional); Kevin R. Kosar, Cong. Research Serv., Shutdown of the Federal Government: Causes, Effects, and Process, 98-844 GOV, *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/98-844GOV11112003.pdf; Igor Volsky, *Can Republicans Simply Defund Health Reform in November?,* The Wonk Room (July 9, 2010, 03:50 PM), http://wonkroom.thinkprogress.org/2010/07/09/wilensky-defund.

43. *See* Kosar, *supra* note 42.

44. *See* Cong. Budget Office, Potential Effects of the Patient Protection and Affordable Care Act on Discretionary Spending (Mar. 15, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11307/Specified_Authorizations_HR3590.pdf.

45. *See* Stephanie Cutter, *What Defunding Really Means*, The White House Blog (Sept. 13, 2010, 01:34 PM), http://www.whitehouse.gov/blog/2010/09/13/what-defunding-really-means.

46. PPACA § 1501, 124 Stat. 119, 242-44, *modified by* § 10106, 124 Stat. at 907-11 (2010), *amended by* HCERA, Pub. L. No. 111-152 § 1002, 124 Stat. 1029, 1032-33 (2010).

47. PPACA § 1401, 124 Stat. at 213-20.

Third, most of the ACA's spending takes the form of nondiscretionary spending: Medicaid expansions[48] and mandatory tax credits.[49] Congress would not be able to reduce this spending via the budget process; it would have to pass new, specific legislation which would thus be subject to a specific Presidential veto. Mere appropriations defunding would therefore not touch the vast majority of deficit spending. The cuts that *would* take place under appropriations defunding might actually be destructive primarily of bipartisan reforms. Defunding would eliminate loan repayments for certain primary care physicians in underserved communities, rural physician training grants, funding for community health centers, and even pregnancy assistance funds.[50] Several pilot programs would be defunded, including a state-by-state pilot program to examine tort reform.[51]

Appropriations defunding, in other words, will not correct any of the ACA's flaws and is actually likely to exacerbate them. It cannot remove the truly counterproductive elements of the law: excessive regulation, spiraling costs, and increased deficits. Politically, defunding might temporarily provide a Republican Congress with a "signature achievement."[52] But it would also give them ownership of this tremendously flawed bill—a bill that cannot fix health care, but which, after alterations, will become *their* health reform package. When the bill's failure becomes apparent, Republicans will be charged with having implemented a flawed reform—or, worse, with having ruined the Democratic package. Democratic leaders such as Rep. Nancy Pelosi (D-CA) will surely charge: "Our bill would have worked." Instead of pursuing a counterproductive and politically-damaging defunding, opponents of the ACA ought to be crafting a plan which addresses cost control and reduces premiums through better management of chronic illness.[53]

Defunding cannot fix the problems with the ACA or even return us to the extraordinarily-flawed status quo. All it can do is turn "Obamacare" into "Republican-Care." Defunding may be a good sound bite, but in the long run it would prove a burden. Democratic leaders are currently holding a time-bomb: a much-trumpeted health reform package that is doomed to fail as rates double, healthy individuals drop coverage, and the system becomes unsustainable—all while government deficits rise dramatically. Republicans should be very wary of

48. *Id.* § 2001, 124 Stat. at 271-79.

49. *Id.* § 1401, 124 Stat. at 213-20.

50. *See* Cong. Budget Office, *supra* note 44.

51. *See id.*

52. This could easily backfire, considering that recent polls show mild increases in the ACA's popularity. *See* Pear, *supra* note 5.

54. *See* Ctrs. for Disease Control, The Power of Prevention: Chronic Disease . . . the Public Health Challenge of the 21st Century 1 (2009), http://www.cdc.gov/chronicdisease/pdf/2009-Power-of-Prevention.pdf (showing that 75% of all medical spending is on chronic illness).

snatching that explosive package away from Democrats. Since they cannot defuse it, they will find that they have merely put themselves in harm's way.