



EMORY
LAW

Emory Corporate Governance and Accountability
Review

Volume 4
Issue 0 *Presidential Inauguration Issue*

2017

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Recommended Citation

Paul J. Zwier, *Challenges to Health Care Reform in 2017*, 4 *Emory Corp. Governance & Accountability Rev.* 327 (2017).

Available at: <https://scholarlycommons.law.emory.edu/ecgar/vol4/iss0/29>

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CHALLENGES TO HEALTH CARE REFORM IN 2017

*Paul J. Zwier**

Why has health care in the US been such a challenge to fix? Perhaps it is because there is a religious, even anti-secular reasoning to those who are resisting its reform. This article will briefly examine the problems the Affordable Care Act was trying to address. Next, it will describe the recent arguments in Congress against reform and what the nomination of Tom Price as head of the U.S. Department of Health and Human Services (DHHS) might portend for what is behind the Affordable Care Act's (ACA) repeal. Lastly, I will propose some potential policies that might be part of the reform that could help overcome this resistance.

After all, before the enactment of ACA, it was clear to the U.S. health care community that a crisis was brewing:¹

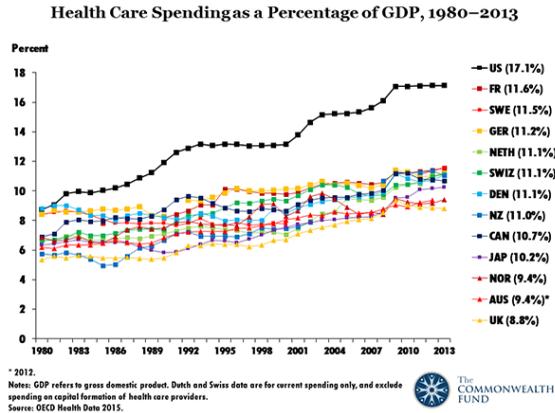
- Health outcomes in the U.S. compared to Europe and Canada didn't justify higher U.S. costs, (e.g. higher infant mortality rates, lower or equal life expectancy, rise of obesity and diabetes, higher rates of heart attacks and cancers).
- Year-to-year rises in the cost of health insurance in the years preceding the enactment of the ACA were running at 10%, and consuming an ever-increasing portion of the U.S. GDP.²
- More employers were ending lifelong health care coverage for their employees, compelling the need for changes in Medicare and Medicaid coverage.
- Medicare and Medicaid were not providing a sufficient safety net for children, the elderly, and the lower middle class.

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¹ THE COMMONWEALTH FUND, *Health Care Spending as a Percentage of GDP 1980–2013*, <http://www.commonwealthfund.org/interactives-and-data/chart-cart/issue-brief/us-health-care-global-perspectives-occd/health-care-spending-as-a-percentage-of-gdp>.

² *Id.* at 1998–2004.

- 29 million Americans lacked any health insurance and heartbreaking stories of those with pre-existing conditions not able to obtain coverage cried out for something to be done.³



The fix seemed sensible to many. The ACA was drawn from Republican plans that had been put forward during an early attempt at a more comprehensive reform during the Clinton administration. It was to use a model that rejected a single payer national health insurance plan (like Canada) in favor of a combination of employer plans provided by private insurers and Medicare and Medicaid. Of course, private employer insurance plans would continue to provide coverage and subsidized insurance exchanges by private insurers at the state level for individuals were supposed to be the final piece of the coverage puzzle. This model (a version of which is used by Germany) intended to use competitive market forces to help bring quality and service through contracting with private insurers and thereby avoid some of the perceived pitfalls of national single payer systems. However, the U.S. model (though still in the process of rolling out each of its provisions) has yet to uniformly deliver the savings in health care costs, at least as a percentage of GDP, that either the German or the Canadian systems have delivered. Despite its apparent success in states like Arkansas and Kentucky, general political sentiment seems to favor its repeal.

³ Lara Cooper, *Even with Obamacare, 29 Million People Are Uninsured: Here's Why*, THE FISCAL TIMES, May 10, 2016, <http://www.thefiscaltimes.com/2016/05/10/Even-Obamacare-29-Million-People-Are-Uninsured-Here-s-Why>.

While costs initially appeared to have leveled off,⁴ the overall cost reductions have yet to materialize. In some markets, costs have continued to rise. The new Republican leadership, when advocating for its repeal, frames the ACA as a wasteful and expensive imposition by the federal government into private choices of individuals. But if repealed, the country would be back to where it started, caught between the need to increase coverage and also control costs while still providing adequate patient choice.

Lacking access to data that would help individuals and employers understand the pricing forces behind the various coverage plans, the body politic continues to show skepticism about whether the ACA can control costs. News reports continue to emphasize its high costs (forgetting earlier cost increases) and it is difficult to measure the impact of the ACA's various successes, such as improving coverage for young adults⁵, preventive care services⁶, higher access⁷, or the increased availability of care outside a traditional hospital setting (e.g. community clinics, home care). There simply is not enough information yet to judge the net cost increases after tax credits for small businesses, or discounts for prescriptions for seniors, or the ability of the system to protect against fraud, or savings from the efficiencies required by better coding procedures. Moreover, despite this drumbeat concerning higher costs, only 25% of Americans are in favor of the ACA's repeal. Still, Congressional leadership presses for repeal, and behind efforts seems not to be just run-of-the-mill conservative politics but also a surprising partnership between "those who prefer things the way they were" and the religious right.

Take the example of "qualified" health plans requiring coverage for birth control. This coverage mandate has been portrayed as an unnecessary and costly example of government intrusion into one's own health care, which is ironic considering that the intrusion is exactly in the opposite direction—imposing outside values on a women's health care choices. (Why no outrage from the religious community over required coverage for Viagra?) Lost work days, mental health care and eventual child care difficulties that would result from unwanted or unplanned pregnancies are not costs easily measured, with

⁴ *Id.* at 2008–13.

⁵ For example, the benefits of fewer young people trapped by diseases in lives of poverty.

⁶ Patients are diagnosed earlier and treated sooner, thus avoiding high hospitalization costs.

⁷ For example, lower utilization of expensive emergency room use. *See e.g.*, Andre Jackson, *U.S. Needs Better Healthcare Rx*, ATLANTA J. CONST., (Dec. 4, 2016) <http://www.myajc.com/news/opinion/needs-better-health-care/L04UB1HwzajFcDzYjbKvCN/> (reporting that Arkansas had a reduction in uninsured emergency room visits of 35.5 percent).

ripple effects that may even increase the number of abortions and other family planning costs.

Instead, many religious conservatives simply seem to resent the intrusion on their freedoms they see in the ACA. Many have professed that they simply cannot afford the required health plans and prefer to take their own risks regarding the way they live their lives. This line of reasoning is oblivious to the costs of such behavior on their own children and their aging parents and seemingly ignores the inconsistency of fighting to discard mandatory health plans while conveniently overlooking the mandates already existing in form of Social Security taxes, Medicare and Medicaid taxes, and disability plans.

What could explain religious conservatives' amnesia and lack of apparent concern for consistency regarding the way that the U.S. pays for its social services? Perhaps the answers lie in between the lines of their reasoning, undergirding their opposition to the ACA. To solve health care reform in a way that will be embraced by a sufficient number of the voters, these foundational beliefs need to be examined.

The ACA fight seems to be a proxy for a broader fight between secular government on one side and religious and nationalistic populism on the other. As Karen Armstrong explains in her book, *FIELDS OF BLOOD: RELIGION AND THE HISTORY OF VIOLENCE*,⁸ there seems to be a correlation between the perception that a secular government is imposing itself on a religious community and the rise of fundamentalism. She documents the following correlations throughout history:

- Religious communities often view secular governments as having a poor track record when it comes to delivering on their promises. Too much government imposes order and restricts choice, thereby hurting the minority and favoring the governing elite.
- Whether monarchy, communist, socialist or fascist, government devoid of religious sensitivities end up causing great harm and violence.⁹
- Secular elites, including scientists, don't always get the legislation right and seemed to inevitably govern for the good of a few over the good of the community.¹⁰

⁸ KAREN ARMSTRONG, *FIELDS OF BLOOD: RELIGION AND THE HISTORY OF VIOLENCE*, 302-37 (2015).

⁹ *Id.*

¹⁰ *Id.*

Understanding the legitimate concerns behind the public's reaction to health care reform may provide a better starting point for the adoption of creative and lasting solutions.

One place to start is to confess that in all the efforts to try and pass the ACA, the unintended message was sent to some in the medical community that the Harvard medical elite was imposing reform on the entire profession. Despite the fact that its implementation was designed to be gradual and depended on creating data systems that would eventually support nuanced decisions consistent with modern medicine, it was seen as a monolithic power grab by government.

Whether intended or unintended, the impact on those slighted by the medical establishment is undeniable. Consider the rise of Georgia Representative Tom Price, the leading proponent of effort to repeal the ACA. He is a prime example of its perceived elitism. Price openly admits that part of his reason for resisting any efforts to fix the ACA flaws is because of his having been excluded from the process when it was first implemented. Yet this perceived "exclusion" ignores years of attempts to build bipartisan support for health care reform. As a physician, he resented the intrusion on his right to practice medicine the way he saw fit. He longed for the day when doctors could practice medicine unencumbered by those who might second-guess their decision-making. What could be seen as an argument for the arrogance of doctors instead gets wrapped in religious clothing. With his strong stance against abortion, Price embodies the Religious Right's rejection of the ACA.¹¹ What emerges is, as Armstrong notes, the predictable reaction to secularism—regardless of the facts, the religious right sees government programs as efforts by the elite, for the elite, that restrict religious devotion and purity. Thus, the movement to repeal the ACA may be founded on the perception that it disrespects religious communities. In response, religious communities continue their march towards fundamentalism and resistance even where it is self-destructive.¹²

What might our understanding of anti-ACA sentiments mean for health care reform going forward? Perhaps most of the resistance can be overcome

¹¹ This result comes despite deep divisions in the religious community over abortion and the importance of religious doctrines that require kindness to strangers (i.e. immigrants), the widow and the orphan.

¹² The question is whether the new head of the DHHS will make the same mistakes, but in the other direction. Will s/he assume that the Party has the superior answers for how to reform the system? Will it rely too heavily on foundational beliefs in the free market and personal choice, at the cost of compassionate caring for the poor, the elderly, and the orphan?

simply through Price's leadership and what he believes should replace the ACA. Perhaps his supporters will view whatever he proposes as both being consistent with their values, and given his character and earlier statements, will see proposals approaching universal coverage as being acceptable with religious obligations toward the poor. What facts, then, will Price have to work with in any attempts to better deliver health care to patients?

1) Free market forces generally spur research and development of new products, protect against government inefficiencies, and provide incentives to maintain quality and service through competition. However, the health care market is hampered by lack of transparency in pricing, the inability of patients and patient groups to bargain effectively in end-of-life situations, and the impact of patents that restrict competition for certain drugs and devices. Relying on the free market will not fix the previous market failures and will return us to pre-ACA levels of uninsured patients.

2) The free market has failed to find cures for major killers. A market approach results in profit-driven decision-making, and consequently, medical devices, procedures, and drugs are made to make money, not first and foremost to cure or prevent the disease from occurring in the first place. While death is certain, cancer, heart disease, diabetes and AIDS are not invented. These ailments are treated by drugs designed for profit rather than cure or prevention. Government funding for basic research seeking cures is still an important piece of the puzzle for delivering good health care. The market cannot do it on its own.¹³

3) Early policies have led to overbuilding of hospitals. There are too many hospital beds, and too many hospitals that rely on filled beds to generate payments from insurers to cover their employee costs and overhead. The U.S. will need to close many of the hospitals and transfer care to clinics and community centers. Path dependencies are hard for markets to overcome on its own. There are too many entrenched interests. Solutions for underserved markets do not include efforts or funding to build more hospitals. Rather, in providing alternative accesses to health care that incorporate modern standards of care and delivery methods, they may not also run through the physician.

¹³ Congress needs to provide funding for the CDC (to respond to Zika, and Ebola, and other health crises) and, more importantly for National Science Foundation and the National Health Agency. Some research needs to be conducted that is focused on prevention and cures rather than on controlling or treating symptoms or building hospitals. Reducing funding in these areas in reliance on the market misunderstands the market forces that disrupt decision-making towards profits and away from cures.

4) End-of-life settings create incentives for wasteful, expensive, and desperate decision-making. Doctors want to help and cure, but given free reign might prescribe unproven drugs and treatments. They do not want to be distracted by cost issues. Yet doctors are not immune from the influence of drug companies and profits, or even their own desires to be seen as the one curing the previous incurable. Patients are desperate to prolong life. Family members are focused on showing devotion to their loved ones.¹⁴ Drug manufacturers are over-incentivized to provide high cost treatments that often only cloud treatment decisions with cocktails of drugs, without knowing if they work, how they work, and why they might work. The law and courts need to exercise oversight. The profession itself will need to be closely monitored for fraud and abuse. It would be a mistake to trust the profession to regulate itself. There will need to be continued incentives (e.g. through anti-kickback statutes and the False Claims Act) to deter physicians and hospitals that lose sight of the main purpose of their care—making good medical decisions for their patients. Whistleblower lawsuits are an important part of this deterrence as they help insure the free market doesn't become the excuse for some to prey on the poor, children or the elderly. Restricting these lawsuits would be a grave mistake.

Market sensitive pricing oversight is also needed. Reference pricing works in Europe and Canada. It ties prices to legitimate R&D costs, not advertising, and real improvements caused by device, procedure or drug.

Fortunately, then, there is a way forward that respects the religious community and the need for patients to understand and control the cost of care, and their own need for care, and yet is responsible to the community at large. Indeed, Tom Price may be an important part of the solution, as he can be seen as respecting the religious communities' sensibilities. And, perhaps, if given the right support and respect, he can overcome his own elitism and physician's arrogance and argue for the need for community programs with requirements of sensible care where the market will otherwise fail on its own.

¹⁴ In addition, doctors need to reclaim their role as independent directors of quality health care. They need to weed out conflicts of interest and kickbacks that lead to bad decision-making.