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OPINION | COMMENTARY

How to End ObamaCare in Two Pages

Call John Roberts's bluff by disavowing the taxing power.

By James F. Blumstein

Sept. 18, 2017 6:49 p.m. ET



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The GOP's push to repeal the Affordable Care Act is running out of steam—and time. Unless Republicans can agree by Sept. 30, they won't be able to pass a bill without 60 Senate votes. So here's a wild idea: Instead of repealing ObamaCare, make it unconstitutional.

Recall how the Supreme Court split when it upheld ObamaCare in 2012. Four justices thought the law's individual mandate—

the requirement that Americans buy health insurance or pay a penalty—was unconstitutional. Another four thought it was hunky dory. What broke the tie was a novel opinion by Chief Justice John Roberts, who upheld the penalty by declaring it a tax.

With good lawyering, the GOP can take advantage of that premise. Republicans could pass a two-page bill clarifying that Congress did not intend to use its taxing power to enforce the individual mandate and disavows the same going forward. Congress could state that it intends ObamaCare to contain no severability provision—meaning that, as the four dissenting justices agreed in 2012, the entire law must fall if the mandate is unconstitutional.

The Senate considered a “skinny” repeal bill in July, and this would be even skinnier—call it the “twiggy” repeal. But given that it clearly relates to taxes, it ought to be able to pass with 51 votes under budget reconciliation.

What would happen next? The Justice Department could declare the Affordable Care Act unenforceable in its entirety, relying on the new legislation and the 2012 decision. This would be within the executive branch's power to enforce the law in a proper, constitutional manner. Congress could provide a phase-out period by revoking the taxing authority for ObamaCare effective, say, in two years.

This would reset the baseline of the health-care debate. Once the spinach of repeal is swallowed, the conversation would turn to adding back benefits, albeit structured in a better way. Lawmakers in both parties would be motivated to implement real reforms.

The ObamaCare model simply doesn't work. The law substitutes an unpopular and unworkable system of coercion for market incentives. Because insurers are required to cover pre-existing conditions, people can wait to take out policies until they become sick. That's like letting people buy fire insurance after their homes are ablaze. The individual mandate was supposed to prevent such gaming, but the weakness of the penalties and the mandate's unpopularity have undermined that strategy.

A better approach is to assign people with pre-existing conditions to a high-risk pool that government subsidizes directly, perhaps by committing to these pools a fixed portion of Medicaid or any other funds allocated to the states. Society would be making a judgment to help these people, and then it would do so transparently.

Passing "twiggy" repeal may not be easy. There is tension in the GOP ranks between hard-liners who want straight ObamaCare repeal and moderates who fear upsetting the apple cart. But the ground may have shifted since the Senate's failed July vote-a-thon. Or a phased-in "twiggy" repeal could be added to the Graham-Cassidy bill that seems to be gaining some momentum. There's no way to know until Republicans try—and as Sept. 30 nears, this might become the only option remaining.

Mr. Blumstein is the director of Vanderbilt University's Health Policy Center.

Appeared in the September 19, 2017, print edition.

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