

Forbes

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The Apothecary is a blog about health-care and entitlement reform.

PHARMA & HEALTHCARE

2/07/2012 @ 3:32PM | 734 views

The Tortuous History of Conservatives and the Individual Mandate

Mitt Romney, as we know, has been catching a lot of flak from conservatives for Romneycare, because Romney's signature legislative achievement served as the model for Obamacare. But as Romney said in a debate in Las Vegas last October, "we got the idea of an individual mandate...from [Newt Gingrich], and [Newt] got it from the Heritage Foundation." Politically, it's an important point, because Romney is inaccurately being portrayed as some kind of left-wing outlier, when in fact there were some major conservative institutions (like Heritage) and figures (like Gingrich) who supported the mandate. Last weekend, long-time Heritage health-policy chief Stuart Butler took to *USA Today* to explain his past support for the mandate. I took the occasion to dig into the topic, and found that the mandate's provenance is more complicated than most people think.

The origins of the "free rider" problem

Before we get to Stuart's piece, let's first step back and discuss the history of the individual mandate. It all started with a piece of legislation passed in 1986 by a Democratic House and a Republican Senate and

signed by Ronald Reagan, called the Emergency Medical Treatment and Active Labor Act, or EMTALA. (EMTALA was passed as part of a larger budget bill called the Consolidated Omnibus Budget Reconciliation Act, or COBRA, which is best known for allowing those who have lost their jobs to continue buying health insurance through their old employer's group plan.)

EMTALA, one of the great unfunded mandates in American history, required any hospital participating in Medicare—that is to say, nearly all of them—to provide emergency care to anyone who needs it, including illegal immigrants, regardless of ability to pay. Indeed, EMTALA can be accurately said to have established universal health care in America—with nary a whimper from conservative activists.

In response, many health policy types worried about a “free rider” problem, in which people would intentionally go without health insurance, knowing that federal law required hospitals to care for them anyway.

The employer mandate as an alternative to single-payer

In addition, in those days, most proposals for universal health care that were to the right of government-run single-payer were based upon forcing employers to sponsor private-sector health coverage for all of their employees. For example, under the Comprehensive Health Insurance Plan proposed by Richard Nixon in 1974, “every employer would be required to offer all full-time employees the Comprehensive Health Insurance Plan. Additional benefits could then be added by mutual agreement.”

Bill Clinton's 1993 proposal for universal health care revolved around an idea called “managed competition,” based on the work of a group of academics and industry figures called the Jackson Hole Group. That group, led by Paul Ellwood, Alain Enthoven, and Lynn Etheredge, building on years of work by its participants, had in 1992 proposed a plan which included an employer mandate.

But the Jackson Hole group was also concerned that an employer mandate didn't address health insurance for the unemployed, so they also included sliding-scale subsidies for the unemployed. (In 2006, The Netherlands adopted a managed competition approach closely modeled after Enthoven's work.)

The individual mandate as an alternative to the employer mandate

There are five obvious, and large, problems with an employer mandate. The first is that an employer mandate massively drives up the cost of hiring new employees, discouraging new hiring and increasing unemployment. The second is that forcing employers to pay for health costs increases the costs of running a business, and these increased costs are passed onto consumers in the form of higher prices for goods and services.

The third problem is that an employer mandate does nothing to address the health needs of the unemployed. The fourth is that the employer-based system insulates consumers from the value of the health care they are paying for, giving them no incentive to economize, thereby driving up the cost of health insurance. The fifth is that the employer-based system leads to "job lock," whereby people are afraid to leave their jobs if they fall ill on the job, because switching plans could mean higher premiums or denial of coverage.

Hence, some conservatives, seeking a more market-oriented path to universal coverage, began endorsing an individual mandate over an employer mandate. An individual mandate would address the "free rider" problem caused by EMTALA, by requiring people to buy their own insurance. In addition, moving to a more individual-based system from the employer-based one would significantly increase the efficiency of the health-insurance market.

With these considerations in mind, in 1989, Stuart Butler of the Heritage Foundation proposed a plan he called "Assuring Affordable Health Care for All Americans." Stuart's plan included a provision to

“mandate all households to obtain adequate insurance,” which he framed explicitly as a way to address the “free rider” problem and employer mandates (emphasis added):

Many states now require passengers in automobiles to wear seatbelts for their own protection. Many others require anybody driving a car to have liability insurance. But neither the federal government nor any state requires all households to protect themselves from the potentially catastrophic costs of a serious accident or illness. Under the Heritage plan, there would be such a requirement.

This mandate is based on two important principles. **First, that health care protection is a responsibility of individuals, not businesses.** Thus to the extent that anybody should be required to provide coverage to a family, the household mandate assumes that it is the family that carries the first responsibility. Second, it assumes that there is an implicit contract between households and society, based on the notion that health insurance is not like other forms of insurance protection. If a young man wrecks his Porsche and has not had the foresight to obtain insurance, we may commiserate but society feels no obligation to repair his car. But health care is different. **If a man is struck down by a heart attack in the street, Americans will care for him whether or not he has insurance.** If we find that he has spent his money on other things rather than insurance, we may be angry but we will not deny him services—even if that means more prudent citizens end up paying the tab.

A mandate on individuals recognizes this implicit contract. Society does feel a moral obligation to insure that its citizens do not suffer from the unavailability of health care. But on the other hand, each household has the obligation, to the extent it is able, to avoid placing demands on society by protecting itself...

A mandate on households certainly would force those with adequate means to obtain insurance protection, **which would end the problem of middle-class “free riders” on society’s sense of obligation.**

Republican support for the individual mandate

As far as I have been able to find, Stuart’s 1989 brief is the first published proposal of an individual mandate in the context of private-sector-managed health systems. In 1991, Mark Pauly and others [developed a proposal for George H.W. Bush](#) that also included an individual mandate. While [others](#) credit Stanford economist Alain Enthoven with the idea, Enthoven’s earliest published reference to an individual mandate was an indirect one in the 1992 Jackson Hole paper.

In 1992 and 1993, some Republicans in Congress, seeking an alternative to Hillarycare, used these ideas as a foundation for their own health-reform proposals. One such bill, the Health Equity and Access Reform Today Act of 1993, or HEART, was introduced in the Senate by John Chafee (R., R.I.) and co-sponsored by 19 other Senate Republicans, including Christopher Bond, Bob Dole, Chuck Grassley, Orrin Hatch, Richard Lugar, Alan Simpson, and Arlen Specter. Given that there were 43 Republicans in the Senate of the 103rd Congress, these 20 comprised nearly half of the Republican Senate Caucus at that time. The HEART Act proposed health insurance vouchers for low-income individuals, along with an individual mandate.

Newt Gingrich and Rick Santorum, who were both House backbenchers in 1993, were also in favor of an individual mandate in those days. (Gingrich continued to support a federal individual mandate as recently as May of last year. We don't know much about the timing of Santorum's change of heart.)

It would seem that 1990s conservatives weren't concerned with the constitutional implications of allowing Congress to force people to buy a private product. "I don't remember that being raised at all," Mark Pauly told Ezra Klein last year. "The way it was viewed by the Congressional Budget Office in 1994 was, effectively, as a tax...So I've been surprised by that argument."

Stuart Butler's *USA Today* op-ed

Last October, prompted by a *Wall Street Journal* piece by James Taranto, I recounted how the Heritage Foundation was once the leading conservative advocate of the individual mandate. In response to various articles of this stripe, Stuart has published an op-ed in *USA Today*, in which he describes as a "myth" the idea that Heritage invented the mandate. "I headed Heritage's health work for 30 years," he writes. "And make no mistake: Heritage and I actively oppose the individual mandate, including in an amicus brief filed in the 11th Circuit Court of Appeals to the Supreme Court." He notes that his proposal struck a

contrast with Hillarycare, and that Milton Friedman also called for an individual mandate:

The confusion arises from the fact that 20 years ago, I held the view that as a technical matter, some form of requirement to purchase insurance was needed in a near-universal insurance market to avoid massive instability through “adverse selection” (insurers avoiding bad risks and healthy people declining coverage)*. At that time, President Clinton was proposing a universal health care plan, and Heritage and I devised a viable alternative.

My view was shared at the time by many conservative experts, including American Enterprise Institute (AEI) scholars, as well as most non-conservative analysts. Even libertarian-conservative icon Milton Friedman, in a 1991 Wall Street Journal article, advocated replacing Medicare and Medicaid “with a requirement that every U.S. family unit have a major medical insurance policy.”

My idea was hardly new. Heritage did not invent the individual mandate.

Stuart says that Heritage’s version of the individual mandate contained “three critical features” that distinguish it from Obamacare’s mandate: (1) it required people to buy catastrophic coverage, rather than more expensive comprehensive coverage; (2) it was primarily financed “through the carrot of a generous health credit or voucher...rather than by a stick”; (3) Heritage’s mandate “was actually the loss of certain tax breaks...not a legal requirement.”

In fairness to Heritage’s critics, it’s worth pointing out that: (1) Heritage proposed the individual mandate in 1989, well before Bill and Hillary Clinton were on anyone’s political radar screen; (2) Obamacare and Romneycare both finance individual insurance purchases through generous vouchers (via the exchanges); (3) Obamacare’s mandate is “enforced,” weakly, by withholding tax refunds.

Why has Heritage changed its mind?

Stuart goes on to give four reasons why he and Heritage no longer support the mandate: (1) a mandate isn’t necessary because “the new field of behavioral economics taught me that default auto-enrollment in employer or nonemployer insurance plans can lead many people to buy coverage without a requirement;” (2) “advances in ‘risk-adjustment’ tools are improving the stability of voluntary insurance,” as illustrated

by the Federal Employees Health Benefits Program; (3) Obamacare's mandate forces people to buy comprehensive coverage rather than catastrophic coverage; (4) Obamacare's mandate is unconstitutional.

Stuart, of course, is perfectly entitled to change his mind, and the reasons he gives for having done so are ones I'd agree with. (I would also point out, as I do repeatedly in this space, that the "free rider" problem is grossly exaggerated, and that an individual mandate actually *increases* free-riding.)

Many conservatives opposed the individual mandate

The fact that many prominent Republicans and conservatives supported the mandate does not, by any stretch, mean that conservatives did as a whole. Peter Ferrara, a Heritage Foundation alumnus, takes credit for "killing" the Heritage plan after he left the think-tank.

Ferrara correctly points out that a key flaw with the individual mandate is that the government is then required to define what types of insurance qualify for the mandate, and government will always be tempted to require costly, comprehensive insurance:

I had been close friends up until then with Stuart Butler, even double dating a couple of times with our girlfriends and then wives. Before he became Director of Domestic Policy [at the Heritage Foundation], Heritage had offered the job to then another friend of mine, Tony Pellechio. But I wanted Stuart to get it, because I thought Stuart was more hard core. So I talked Tony out of taking the job when he came to me to ask what I thought he should do. Sure enough, Stuart was next in line. Stuart does not know about this history almost 30 years ago to this day.

Stuart had no response to my objections to the individual mandate. But he was passionately devoted to the brilliance of the Heritage health plan. I told him it was so close to the Hillary plan, and so poorly framed as an alternative, that I predicted that President Clinton would come to point to it as the GOP alternative plan, and seek to get the Hillary plan passed as a compromise just ironing out the differences (employer pays or worker pays, generous health insurance or cheap health insurance).

Sure enough, a year later, as the Hillary plan was about to go down to defeat, President Clinton arose to point to the Heritage plan as the true GOP alternative, and offer to pass health reform by just ironing out the differences. Fortunately by then, I had already killed the Heritage health plan.

Well, I guess I won't be going to Peter for job advice, but his policy critique of the individual mandate was correct then, and is correct now. And Stuart agrees with it.

In 1994 Sen. Don Nickles (R., Okla.) and Rep. Cliff Stearns (R., Fla.) turned the Heritage plan into a bill. Peter Ferrara and others, such as [Tom Miller at the Cato Institute](#), rallied other conservatives against the plan. “By endorsing the concept of compulsory universal insurance coverage,” wrote Miller, “Nickles-Stearns undermines the traditional principles of personal liberty and individual responsibility that provide essential bulwarks against all-intrusive governmental control of health care.”

Ferrara convinced 37 leaders of the conservative movement, including Phyllis Schlafly, Grover Norquist, and Paul Weyrich, to sign a petition opposing the bill. “To this day,” Peter writes, “my relationship with Stuart Butler and Heritage has never recovered.”

How all this relates to Obamneycare

This intra-conservative division between the pro-mandate and anti-mandate camps lasted until around 2009. Pro-mandate conservatives were concentrated in the health-policy field, where they were tasked with providing alternatives to Democratic initiatives, while anti-mandate conservatives were concentrated outside of it.

Hence, when Mitt Romney designed his health plan in Massachusetts, he did so in large part with the assistance of the Heritage Foundation, especially Bob Moffit and Ed Haislmaier. “I want to begin by saying thank you to Bob Moffit and Ed Haislmaier,” said Romney at a [Heritage event in 2006](#). “Bob and Ed worked very extensively with our team as we were developing our plan for health care.” Replied Moffit, “We’ve been honored by your request—myself and my colleague Ed Haislmaier, who’s done a lot of the work on this bill—to participate in giving our best advice and our technical assistance in designing a new and different kind of health insurance market.”

But there was one twist: Romneycare, as passed by the Massachusetts legislature, included both an individual mandate and an employer mandate, making it more like Enthoven's "managed competition" plan than Heritage's individual-market plan. Romney vetoed the employer mandate, but the legislature, which was 80 percent Democratic, overrode his veto.

Hence, while it's accurate to say that Obamacare was modeled after Romneycare, one difference between the two situations was that the Democrats behind Obamacare were quite comfortable with dual mandates upon employers and individuals, whereas Mitt Romney had favored an individual mandate but opposed an employer mandate.

Hindsight is 20/20

Today, there is near-unanimity on the right that the individual mandate is an egregious violation of individual liberty. But liberal critics are right to point out that that wasn't always true. Based on my research, I see no contravening evidence to the claim that Stuart Butler and Heritage were the first people to advocate the individual mandate, in the context of a private-sector health-care system. (Obviously, single-payer plans also contain individual mandates, but to buy government-run health care.)

It's a fitting coincidence that, while many activists portray Mitt Romney as a conservative traitor for advocating the individual mandate, his two leading rivals for the nomination—Newt Gingrich and Rick Santorum—have also supported it. The difference is that Mitt Romney continues to defend the mandate, whereas Gingrich and Santorum have changed their minds. As is often the case, it was the libertarians at the Cato Institute and the *Wall Street Journal* who were right at the beginning, and right in the end.

Think tankers can make mistakes, just as politicians can. The Heritage Foundation was mistaken in its support of the individual mandate. Advocates of the individual mandate were misguided in their concern about the free rider problem, and underappreciated the degree to which government is incentivized to enact an expansive, and expensive,

mandate. It's worth noting that Heritage has been a major advocate of some of the key conservative health-care initiatives of the past generation, including consumer-driven health plans and health insurance tax credits for the poor.

Conservative opposition to the mandate is sincere

It's important to note, also, that the liberal critique of conservatives is partially correct—and partially false. There is something to the fact more conservatives oppose the individual mandate today in part because it was proposed by a Democratic President. The same happens in the other direction—just ask Republican advocates of premium-support-based Medicare reform, an idea that originated with left-of-center health wonks, but is now opposed by the very same people.

However, the liberal critics, like Ezra Klein, overstate the degree of political opportunism, and understate the degree of genuine change-of-heart, that has accompanied the evolution of conservative thinking on the individual mandate. Stuart Butler's op-ed is emblematic of this evolution.

Unless conservatives coalesce around a free-market vision of health reform, they will always find themselves rushing headlong into tactical policy proposals—like the individual mandate—that they haven't fully thought through. Conservatives are always playing defense, instead of offense, when it comes to improving our health-care system. For various reasons having to do with the way in which the modern conservative movement arose, health reform just hasn't been a priority for the Right. If you want to blame conservatives for something, blame them for that.

UPDATE: Grace-Marie Turner of the Galen Institute, a health policy think tank, had this to say on the 1990s history of the individual mandate:

Former Speaker Newt Gingrich repeatedly insists that most conservatives once supported an individual mandate for health insurance.

I beg to differ, Mr. Speaker. The Galen Institute, and I in particular, along with many other colleagues, including the CATO Institute, NEVER have supported an individual mandate.

One of the key responsibilities of think tanks is to think through public policy initiatives and analyze their likely impact before they become law. We advise lawmakers all the time about the likely consequences of their policy ideas to help them develop good policy and avoid mistakes.

We knew from the beginning that an individual mandate was an affront to our Constitutional liberties and that it would lead to government determining what kind of health insurance we must buy, huge taxpayer-funded subsidies to help people purchase the expensive new government-mandated coverage, invasions of our privacy so the government can find out if we are complying, and a slew of mandates and regulations...

No, Newt, most conservatives never have supported an individual mandate. We thought this through and saw exactly where it would lead.