

How to Repeal the Affordable Care Act through Reconciliation

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Entering a February, 2010 Massachusetts special election to fill the seat of the late Senator Ted Kennedy, America's two houses of congress had been unable to reach an agreement on the contents of a health reform bill. Both houses had passed bills, but the bills had important fiscal and structural differences. Republicans thought that the near impossible election of a 41st Republican senator in Kennedy's special election had granted them a newly powerful seat at the negotiating table. Within only a month, though, they were proven wrong. On March 30, 2010, President Obama signed the "Health Care and Education Reconciliation Act of 2010," bringing the debate over the President's healthcare overhaul proposals to a close. The Democrats had won the day, and had done so using the powerful budget tool of 'Reconciliation.' Now that the same tactic is being raised as a possible method for repealing Obama's signature health law, a review of the history, the capabilities, and the limitations of this tool are well in order for opponents of the Affordable Care Act.

This paper will first review some of the history of the reconciliation process, its rules and traditions, and the ways it can and cannot be used according to Senate and House rules. Then it will evaluate some of the past precedent for using reconciliation to pass or repeal comprehensive legislation, and ask how significant such precedent is to the present debate. It will conclude with a thorough investigation of the reconciliation method's applicability to the Affordable Care Act, identifying which specific sections of the law would be easiest to repeal with it, and proposing arguments for a more sweeping repeal.

The Reconciliation Process

Budget Reconciliation was established in 1974, introduced as a method for escaping laborious debate over the implementation of budget resolutions. When new budgets were passed, they often called for changes in law to accommodate the changes in outlays. The Reconciliation process in the Congressional Budget Act of 1974 helped bring these inefficient struggles under control by, among other things, lowering the requirement for passing these law changes in the Senate from a supermajority to a simple majority. Reconciliation bills originate in the House of Representatives, with relevant suggestions made by each committee whose outlays or revenues are affected by that year's budget and is authorized by the budget's reconciliation instructions to participate. A unified omnibus bill (containing all the relevant committees' suggestions) is then simultaneously considered and voted on in both houses of congress. Debate in the Senate is limited to only 20 hours.

However, the new reconciliation method became not only an expedient for freeing important budget matters from endless filibuster. Reconciliation also, not surprisingly, became an enticing option for lawmakers seeking to pass laws that were not entirely budget-related with less need for bipartisan support. Reconciliation's ability to enact legislation with only a simple majority in each house of congress meant that it became a sort of pretext for circumventing the regular legislative process. In 1982, for example, a Democrat congress used the process for the reinstatement of food stamps and government farm subsidies.¹ Reconciliation became a repository for all sorts of legislative wishes. The result of this sort of practice was the 1985 Byrd Rule, sponsored by West Virginia Senator Robert Byrd. It sought to limit the

scope of what reconciliation could do to strictly deficit-friendly, fiscally relevant measures. The rule contains six major standards that must be met in order for a reconciliation measure to be eligible, and four major caveats. These are detailed in Table 1. Since its passage in 1985 and being made permanent in 1990, the Byrd Rule has remained, along with reconciliation itself, a Senate institution.

Table 1: Provisions of the Byrd Ruleⁱⁱ

PROVISIONS IN BYRD RULE: SECTION (b)(1)	CAVEATS IN BYRD RULE: SECTION (b)(2)
<ol style="list-style-type: none"> 1. Every item must affect levels of revenue or spending. 2. A reconciliation bill must obey the reconciliation instructions given in the budget. 3. Policy changes cannot be outside of the jurisdiction of the house or senate committee that submitted them. 4. Any policy change in a reconciliation bill must actually be connected to the changes in outlays or revenues used to justify it. 5. A reconciliation bill cannot raise the federal deficit beyond the budget window (typically five or ten years). 6. It cannot affect Social Security spending. 	<p><i>Items in violation of Rule 1 can still stand if:</i></p> <ol style="list-style-type: none"> 1. The item helps offset the negative effects of a tax hike or spending cut. 2. The provision leads to a reduction of the deficit outside the budget window. 3. The provision will probably raise revenue or cut spending, but is not scored by the Congressional Budget Office. 4. The exact effects of the provision are impossible to predict, but will definitely lead to a net deficit reduction.

Despite the clarity of these rules, as is the case with many rules in the House and Senate, the choice to exercise the Byrd Rule has been ostensibly political. The rule can only be enforced through a *point of order* in the Senate, meaning that in order for it to be used to strike a provision from a reconciliation bill, the point must be specifically demanded by a senator. The point of order is then considered by the Senate Parliamentarian, who reviews the objection on its merits and decides whether it should be rejected or sustained. Historically, due to legislators’ persistent problem with staying on topic in legislation, 55 out of a total 65 points of order called have been sustained.ⁱⁱⁱ

Regardless of the Parliamentarian’s opinion, however, senators can raise a motion to *waive* the Byrd Rule in reference to the provision in question and allow the provision to stay in the bill. Unlike the vote for reconciliation provisions in general, approval of waiver motions requires a supermajority. Of the 52 motions that have been offered to waive the rule, though, only nine have been successful.^{iv} As the numbers indicate, waiver motions are only sometimes used to counter Byrd Rule points of order. They can also be entered preemptively and not in response to an objection.^v

The Rule’s requirements for fiscal relevance and impact, despite being ignored in numerous cases, have generally become stricter over the years. In the political aftermath of the Bush Tax Cuts, congressional Democrats changed House rules in order to prevent further tax cutting through reconciliation. In January 2007, Robert Keith of the Congressional Research Service explains, “the House included a ban against the consideration of a budget resolution containing reconciliation directives that would increase the deficit (or reduce the surplus) over the six-year or 11-year periods beginning with the current fiscal year.”^{vi} In an ensuing Budget Resolution these restrictions were expanded to include not only reconciliation instructions in the budget but reconciliation bills themselves. Additionally, rather than containing a ‘sunset provision,’ the new Senate rule, replicating that just passed in the House, did not impose an end date. In the

coming fiscal era, congresses would be forced to be far more judicious than previously when considering reconciliation bills' effect on the deficit.

The Byrd Rule does, of course, leave a lot of room for the interpretations of the Senate Parliamentarian. While the neutral Parliamentarian always renders a Byrd Rule ruling, he is only able to impose his important judgment calls in the absence of a supermajority. How much power the Parliamentarian really has over the process is less than one would think. Though parties rarely remove a parliamentarian over a disagreement in interpretation, it is easily within their authority to do so. Robert Dove, a parliamentarian in the early 2000s, would testify to that effect – senate Republicans overruled Dove's objection to the eligibility of the Bush Tax Cuts for reconciliation by firing and replacing him.^{vii} Even without replacing him, though, the Vice President of the United States, as acting president of the senate, has the authority to overrule the parliamentarian and force certain interpretive decisions. Though no administration has ever resorted to this tactic for fear of its political repercussions, as Dove himself claims, "the parliamentarian can only advise. It is the vice president who rules."^{viii}

The current Senate Parliamentarian, Elizabeth MacDonough, is known for her capacity for "stepping back and looking at what the whole body of precedents means."^{ix} Even the impartial umpire, though, is still an employee of the senate – she can be terminated at any time. If conservatives trying to overturn the Affordable Care Act resort to this 'nuclear option,' though, doing so can be politically dangerous and dangerous to the decorum of the Senate. The Senate is a body which relies on comity and the observance of tradition – normally, the word of the Parliamentarian is the last word.

Naturally, due to the Byrd Rule's looseness on implementation and the inherent limitations on the parliamentarian's authority, bipartisan or popular pieces of legislation, whether or not they are truly in compliance with the Byrd Rule, tend to be given a free pass. As one would predict with such an arrangement, the rule has been used to strike many only marginally violating provisions over the years, while popular but fiscally irrelevant violations have been allowed to stand. However, to anyone in congress or the senate seeking to promote comprehensive law changes through reconciliation, particularly in a hostile political environment, Byrd rule objections can have important repercussions, politically and otherwise.

Historical Precedent

As the advantages of the reconciliation strategy and the non-binding nature of the Byrd Rule suggest, the method has often been used for more than its original intention of implementing budgets through the law. Reconciliation's rich history of use for a variety of different purposes, though, also attests to the fiscal impact of such a large portion of what the federal government does.

Many of the greatest exhibitions of reconciliation power have occurred in the post-Byrd Rule era, and form a potential precedent for big legislative steps like the repeal of the Affordable Care Act. However, it is important to remember that precedent in this case is not always weighty – if there is broad-based, bipartisan support for a legislative measure in reconciliation or a supermajority in the senate, the measure can pass regardless of its compliance. Past uses of reconciliation, though, merit a look – they foreshadow the types of arguments for fiscal relevance and deficit reduction that Republicans trying to repeal the ACA will have to make. They also foreshadow how the Senate Parliamentarian may think about such proposals.

A brief but informative investigative article was published in 2009 in *The New Republic* magazine, when America was unsure whether Democrats would have the supermajority necessary to pass health reform by traditional means. The article states that had the Democrats tried to pass most of a health reform bill through reconciliation, such a move

(using reconciliation to pass comprehensive legislation) would not be without precedent. It was still assumed, though, that there would be provisions in health care reform that could not be couched in ‘Byrd-friendly’ terms. These would be put in a separate bill needing a supermajority to pass.^x

Table 2: Historical Precedent for Big Legislation Passed with Reconciliation^{xi}

Bill	Major Purposes	Change in Revenue	Change in Outlays	Net Effect on Deficit
Omnibus Budget Reconciliation Act of 1981	Made significant cuts to discretionary programs, including welfare and food stamps.		-\$130 billion	-\$130 billion; 1981-1984
Consolidated Omnibus Budget Reconciliation Act of 1985	Mandated an insurance program giving some employees the ability to continue health insurance coverage after leaving employment (COBRA) and amended the Internal Revenue Code to deny income tax deductions to employers for contributions to a group health plan unless such plan meets certain continuing coverage requirements.	\$9 billion	-\$15.9 billion	-\$24.9 billion; 1986-1989
Omnibus Budget Reconciliation Act of 1987	Created federal standards for nursing homes under Medicare and expanded Medicaid eligibility	\$23.2 billion	-\$16.4 billion	-\$39.6 billion; 1988-1989
Personal Responsibility and Work Opportunity	Clinton’s welfare reform bill	\$1.9 billion	-\$52.2 billion	-\$54.1 billion; 1997-2002

Act (1996)				
Balanced Budget Act of 1997	Contained first portion of Clinton’s plan to balance the federal budget by FY 2002. Created the Children’s Health Insurance Program. Made changes to Medicare hospital payment policy.	\$8.6 billion	-\$118.6 billion	-\$127.2 billion; 1998-2002
Taxpayer Relief Act of 1997	Clinton’s tax cut package	-\$88.9 billion	\$11.5 billion	\$100.4 billion; 1997-2002
Economic Growth and Tax Relief Reconciliation Act of 2001	First Bush 43 tax cuts	-\$512 billion	\$40 billion	\$552 billion; 2001-2006
Jobs and Growth Tax Relief Reconciliation Act of 2003	Second Bush 43 tax cuts	-\$314 billion	\$29.5 billion	\$342.9 billion; 2003-2008

One precedent immediately relevant to healthcare came in 1985, immediately following the passage of the Byrd Rule. That year congress passed COBRA, a law imposing portability for health insurance. While such a rule does obliquely affect revenues and outlays, its provisions that “amended the Internal Revenue Code to deny income tax deductions to employers for contributions to a group health plan unless such plan meets certain continuing coverage requirements”^{xii} move in a different direction. This attachment of insurance-providing strings to the passage of COBRA invites accusation that it violates Part 4 of the newly-passed Byrd Rule. Whether or not the insurance requirements were “incidental,” though, to the changes in outlays and revenues, did not matter – the popular provision passed without a point of order.^{xiii}

Perhaps the most significant precedent for comprehensive legislative change through budget reconciliation, one Republicans remember well, is 1996 Welfare Reform. Though the vote was not even considered close, Republicans still chose the reconciliation option to pass their list of reforms – the reconciliation bill garnered a 74-24 victory in the senate. Reconciliation was, according to analysts, employed in order to bridge an enthusiasm gap between zealous Republican reformers in Newt Gingrich’s House of Representatives and a more cautious Republican majority in the Senate.^{xiv} By limiting a filibuster, Republicans were able to expedite their reform measures. However, that expedience came at a cost – Republicans lost an important provision of the Reform bill (the ‘family cap’)¹ to a fiscal impact point of order.^{xv} The rest of Republicans’ monumental legislation to limit the duration of welfare payments, shift federal welfare

¹ This was a measure intended to prevent extra cash awards to needy families for each child they have

cost sharing to block grants, and create the new TANF (Temporary Assistance to Needy Families) program, though, was all passed through reconciliation.^{xvi}

In 1997, congress passed a new health entitlement program (the Children’s Health Insurance Program) into existence through budget reconciliation. Use of reconciliation in this way was not ever challenged through the Byrd Rule, and any spending increases from CHIP were more than offset by cuts to Medicare reimbursement schedules.^{xvii} At the time of the package’s passage, the offsetting Medicare cuts were estimated to total over \$393 billion in ten years, the largest cuts the program had ever experienced.^{xviii} The creation of the CHIP program illuminated a growing trend toward using the pretext of deficit-cutting and changing of outlays and revenues to enact big policy changes. The text of the bill is carefully written to reflect its need to effect outlays and revenues, but it uses that pretext to enact an entirely new program.

The Bush Tax Cuts in 2001 also set an important new precedent for reconciliation. President Clinton’s Tax Cuts, passed through reconciliation four years earlier, did not invoke the Byrd Rule’s prohibition on deficit expansion because there was no deficit to expand – the government ran a surplus. However, in 2001, when enacting large tax cuts threatened to flip the government surplus back to a deficit, “there was controversy in the Senate regarding the appropriateness of using reconciliation procedures under circumstances that worsened the federal government’s fiscal posture.”^{xix} This controversy ended in the insertion of a ‘sunset provision’ into the tax cuts, causing the cuts to last only for the ten-year window of that year’s budget, and requiring reauthorization at the end of that period. The new 2007 regulations discussed earlier barring deficit increases within the budget window, as well as beyond it, will make such programs even more difficult in the future.

A highly relevant question on reconciliation precedent for repealing the ACA is whether the process has ever been used to repeal, rather than enact, major legislation. There are a few times when this has happened, but they have been repeals of far more modest scope than the ACA. Welfare Reform in 1996, while introducing Temporary Assistance for Needy Families (TANF), repealed a long-ineffective welfare program dating from Lyndon Johnson’s ‘Great Society’ – Aid for Families with Dependent Children (AFDC). Smaller regulatory laws have also been removed on the pretext of raising government revenue: in 1996, environmental restrictions such as a moratorium on oil drilling in the Arctic National Wildlife Refuge were lifted, and national forests were sold to private owners. These changes in regulation were ‘Byrd-friendly’ by generating tax revenue.^{xx} As always, they were couched in enough fiscal language to recommend their passage through reconciliation. In the section selling forests to ski resorts, for example, the law’s text reads: “The Secretary may retain 50 percent of the funds generated through sales under this section to acquire other high priority lands identified for acquisition in any forest land and resource management plan. The remaining 50 percent of such amount shall be deposited in the Treasury as miscellaneous receipts.”^{xxi}

While precedent exists both for enacting and repealing big legislation through the reconciliation process, that precedent also advises caution. While there has historically been leeway in how Part 4 of the Byrd Rule is defined (the ‘merely incidental’ clause), it is clear from reviewing past reconciliation legislation that such bills cannot be successful without a clear fiscal justification in compliance with the rest of the Byrd Rule. While perhaps the exact structure or purposes of the new TANF or CHIP programs may not affect outlays or revenues in a predictable fashion, the fiscal impact of such programs is always considered as part of the legislation. In using this process to repeal the ACA, lawmakers will be entering into relatively uncharted territory – while there are plenty of provisions in the law that both have clear fiscal impact and would reduce deficits through removal, many of the ACA’s sections most unpopular with the law’s opponents may run afoul of these rules. But, lawmakers and their staffs are professionals at painting potential

reconciliation provisions in the most ‘Byrd-friendly’ light. Opponents of the ACA who hope to strike at its core through reconciliation will need to make a good case.

Reconciliation and the Affordable Care Act

‘Repeal’ of the ACA through reconciliation is not a substitute for full repeal. The law contains countless parts that cannot, even through a wide interpretation by legislators or parliamentarians, be tied in with fiscal matters. If lawmakers tried to repeal the whole ACA through reconciliation, these parts would certainly be exploited by opponents and successfully raised as Byrd Rule violations, gutting the attempted reconciliation bill. Those who push, though, for a piecemeal repeal of the law through reconciliation, understand one very important thing: the ACA, like so many other huge federal programs, runs on an engine of money. Reconciliation gives opponents of the law another tool, beyond simply denying discretionary funding through budgeting, to surgically remove the ACA’s foundation.

Strategies for repealing the ACA through reconciliation are currently developing alongside other methods, such as weakening the bill through the appropriations process (denying discretionary funds). Though these proposals need a supermajority to be enacted, they can be popular in tough fiscal times even if they cut spending programs vital to the functioning of the ACA. Such a proposal is currently being considered among congressional Republicans with sights set on next year.^{xxii} However, the advantage of using reconciliation is that it both allows for greater policy leeway than appropriations (it can also deal with taxes and more obliquely fiscal-related matters) and does not require the same level of political support. For that reason, Republicans would be well-served by generating a strategy for a partial reconciliation repeal.

As mentioned previously, fiscal impact, for the purposes of the Byrd Rule or the recent Senate updates to reconciliation rules, relies on Congressional Budget Office scores. While economic climate or regulations may lead to slight changes in these scores, the most recent CBO scores of their impact can serve as a viable roadmap for what the future will look like. Indeed, the CBO itself acknowledges that its baselines will change – it is impossible to exactly make such complex projections.

In Table 3, the most recent (March 2012) CBO scores are given for the cost or savings generated by some of the law’s best-known provisions. Because of the 2007 Senate regulations on reconciliation mentioned previously, scores are given for this year, a five year window, and a ten year window (a year is removed from the six and eleven-year periods from the scores to adjust for the upcoming fiscal year). These exact numbers might be used if a reconciliation measure is to be introduced this year, depending on the type of repeal it attempts. Because it will probably be introduced next year, these scores will change.

Table 3: Fiscal Impact of Selected Provisions in the ACA that are Concretely Measurable^{xxiii}

<i>Deficit-Increasing by Repeal</i>	FY 2013	2013-2017	2013-2022	<i>Deficit-Cutting by Repeal</i>	FY 2012	2012-2016	2012-2021
Individual Mandate Penalty	0	16	54	Exchange Subsidies ² (with full Medicaid)	4	232	805

² According to a report by the American Action Forum, the Supreme Court Decision will greatly change these estimates for both subsidies and Medicaid. The study projects that subsidy spending from the phenomenon of those who would be covered by the Medicaid expansion entering exchanges could add an extra \$500 billion over ten years to the above exchange subsidy estimate.

Employer Mandate Penalty	0	35	113	Employer Tax Credits	2	12	23
Other Taxes (as considered in recent repeal package)	1	205	651	Medicaid Expansion (full participation)	1	331	931
Cuts to Medicare (IPAB), DSH Cuts, Other Savings	-	-	732 (2012-2021)	Projected Appropriations to HHS & IRS	-	-	10-20*
TOTAL	1	256	1550	TOTAL	7	575	1759

(numbers in billions)

*: Probably weighted toward initial years, not factored into total

Spending Increases:

I will try to make some broad-based speculations about which parts of the law will be the easiest to repeal through reconciliation and why – they are, of course, contingent on how the reconciliation bill is written – something very difficult to predict.

Certainly the easiest measures to remove from the ACA through reconciliation are those that are both obviously fiscally relevant and increase deficits: its spending provisions. Two of these, the Medicaid expansion and the subsidies for private insurance, form perhaps the most important insurance coverage provisions in the entire ACA. Aside from making an enormous fiscal impact (saving about \$1.7-2.2 trillion over ten years, depending how zealously the Medicaid expansion is implemented), removing these two items also destabilizes the individual mandate. Though we will comment momentarily on arguments for repealing the mandate and other revenue-increasing measures through reconciliation, it seems that a requirement to buy insurance could not last long (economically) without a means of assisting those who could not afford to buy it. Keeping the mandate would therefore become enormously politically unpopular (imposing a flat tax on those who can hardly afford to pay it but are still above hardship exemption). Additionally, the Medicaid expansion - the means of forcibly satisfying the mandate for the lowest income Americans, could be scrapped.

Unfortunately, though, cutting spending without a proportional cut in taxes is one of the most politically unpopular things a politician can do. While cutting the subsidies and Medicaid expansion only would perhaps give much of the ACA a lethal wound and are easy and not ‘Byrd-able’ under reconciliation, doing so would be politically difficult for those who passed it. Such a realization begs the question of whether some of the less popular measures in the bill - particularly its onerous taxes on individuals and small businesses and deep cuts in the existing health safety-net - could be brought down through reconciliation as well. These questions are more complicated but deserve investigation.

Taxes and Spending Cuts:

When the reconciliation bill to pass the Affordable Care Act was passed, its fiscal provisions were carefully calculated to subtract at least \$2 billion from the deficit (per the budget’s reconciliation instructions). Lawmakers also needed deficit neutrality to comply with the new 2007 regulations, and to prevent a Byrd rule requirement to include sunset provisions. It turned out, after its proposal, that the bill would be even more deficit-friendly than anticipated – by a combination of tax hikes the reconciliation bill increased revenues by \$52.3 billion over ten years.^{xxiv} However, not

(<http://americanactionforum.org/topic/american-action-forum-analysis-finds-supreme-court%E2%80%99s-ruling-medicaid-will-add-hundreds-billion>)

everything in the reconciliation bill increased revenues (there were five important revenue-decreasing measures in the bill).^{xxv} Similar to the healthcare reconciliation bill passed a few years ago, the Affordable Care Act's tax increases can be added to a repeal bill with the spending measures (subsidies and Medicaid) and be more than offset.

Studies predict that healthcare costs overall (and therefore insurance costs) will continue to grow during the five and ten-year budget windows and beyond.^{xxvi} Therefore, cutting the ACA's taxes is very unlikely to cause revenue cuts to close in on those outlay reductions in or beyond the budget window, because increasing healthcare costs will increase outlays for both subsidies and Medicaid at breakneck pace. Reconciliation can be used, with appropriate offset, to repeal all of the ACA's taxes, including the *penalty* associated with the individual and employer mandates. As Table 3 indicates, both very appreciably affect government revenues. After the Supreme Court decision, now that the 'individual mandate' is, as a whole, authorized under the constitution's taxing power, the individual mandate may, once its financial teeth are removed, fall altogether legislatively. Such decisions are not within the purview of the parliamentarian. Other strategies for removing the mandate through reconciliation are detailed in the 'Insurance Reforms' section.

The ACA's \$700 billion of unpopular cuts to Medicare (Medicare Advantage, 'quality controls,' and others) can also easily be struck by reconciliation with the appropriate offsets. However, precedent for repealing the Independent Payment Advisory Board itself is not as good. This is both because the ACA, according to one analysis, authorized the new rationing organization for Medicare until 2017 without repeal being allowed,^{xxvii} and also because it is not logically necessary that just because IPAB's cost-cutting directives are severed by reconciliation, the organization as a whole must be. While IPAB may be repealable through a full repeal of the ACA by regular legislative means, reconciliation, due to the Byrd Rule, is unlikely to offer this option.

Before advancing to the more abstract case to be made for repealing the ACA's insurance reforms, a word on the CLASS Act, (the last high-profile revenues and outlays part of the ACA) is in order. The CLASS Act, scored as a net zero by the CBO,^{xxviii} will not take effect due to its rocky actuarial footing. While the law is still on the books and deals in spending and taxes, the fact that it will not be implemented means that any repeal effort through reconciliation would be Byrd-able. The law will remain on the books until a full repeal of the ACA.

Insurance Reforms:

When looked at outside of their individual vacuums, the potential for repealing measures with a less concrete fiscal connection becomes clearer. For example, the individual mandate causes both a revenue increase and an outlay increase in the context of the rest of the ACA. Although the penalty helps offset some of the subsidy costs, the mandate's main effect is to serve as a prerogative for increasing government-subsidized insurance coverage. Due to the mandate, otherwise healthy young adults making little money will be pushed into government-subsidized private insurance, at premium rates inflated by the ACA's 'community rating' and 'guaranteed issue' provisions.^{xxix} The mandate is a precursor to massive spending, and therefore may be able to be repealed through reconciliation.

Though private insurance reforms in the Affordable Care Act are obliquely linked to revenues and outlays in countless ways, it is unclear whether this is enough to make them impervious to a Byrd Rule challenge. Guaranteed issue is perhaps the clearest. By requiring insurance companies to cover anyone, regardless of their preexisting health status, premiums are raised for everyone. This will directly lead to an increase in outlays for insurance subsidies.

An important semantic argument can be raised here, however. If the ACA's subsidy provisions are struck from the law, this fiscal justification for striking the guaranteed issue requirement becomes redundant – if the subsidies are no longer going to be paid out, there will be no outlays left for the repeal of guaranteed issue to affect. The same principle applies

to guaranteed issue's effect on the premium tax, projected to collect over \$78 billion over the next five years.^{xxx} The revenues collected through that tax are, of course, directly dependent on guaranteed issue. The more expensive beneficiaries are added to the private insurance pool, the more the government will spend on subsidies, and the more it will collect in taxes. If all the factors that are fiscally dependent on guaranteed issue, though, are scrapped, that may leave guaranteed issue liable for Byrd Rule violation. Depending on the drafting of the bill, a good strategy for repealers to avoid this pitfall can be to leave one of these fiscal measures (preferably a tax) standing, so that insurance reforms like guaranteed issue still demonstrate tangible fiscal impact. Such abstractions are difficult, though. If Republicans chose to try and strike guaranteed issue with both the taxes and subsidies still intact, it would probably escape the Byrd Rule. The provision is both highly fiscally relevant, and would most likely lead to deficit reduction, because the government hands out far more money in subsidies than it takes in through premium taxes. The revenue and outlay effects of guaranteed issue, though, as Caveat 4 of the Byrd Rule allows for, are probably too complex to reliably score.

Guaranteed issue represents a disturbing paradox about the insurance reforms: the more one repeals, the less is left behind to give the reforms being repealed influence over revenues and outlays. Legislators putting together a repeal package will have to keep this well in mind. After the individual mandate and guaranteed issue, reconciliation repeal of the rest of the well-known 'insurance reforms' may become more difficult and abstract. Community rating, for example – the method by which the ACA prescribes a pricing scale for private insurance based on local risk. It is highly unlikely that legislators will be able to get a repeal of this section passed through reconciliation – it will most likely have to wait.

The last part of the ACA I would like to discuss is its marketplace: insurance exchanges. Because HHS funding is discretionary, anti-ACA budgeters can cut off funding for ACA implementation at any time through appropriations. The ACA, rather than forcing states to establish insurance exchanges, threatens to have the HHS establish them if states do not act. Not budgeting the HHS money for these activities is the best way, in the short term, to prevent the agency from fulfilling this threat and hold off exchanges through the 2014 start of many ACA provisions. However, the law will still be on the books waiting for a subsequent congress to implement it. Exchanges are authorized to receive federal funding until and no later than January 1, 2015.^{xxxi} Therefore, because the Byrd rule requires effects on outlays and revenues within the *budget window*, not only the current fiscal year, exchanges will need to be repealed in 2014's budget to be repealed through reconciliation. There are other more complex challenges such a measure will face in reconciliation as well. If congress is able to act fast on this, though, it may be able to strike not only at the financial lifeblood of the ACA, but also at its 'market' framework.

Conclusion

The last point to be made has more to do with health policy than the legislative process. When Democrats were considering passing the Affordable Care Act through reconciliation, they used a profoundly fallacious argument. They argued that because the crisis health reform claimed to address was grounded in uncontrollable rising health costs, reconciliation (a deficit-cutting mechanism) was the ideal theater for reform.^{xxxii} This premise is so wrong because the Affordable Care Act eschews the opportunity for real reform and does *nothing* to address the underlying cost problem – rather, it subsidizes its continuation. The ACA both leaves the problem of medical cost to fester and does little to promote meaningful deficit-cutting entitlement reform. While Medicare is cut, Medicaid explodes.

Surprisingly, it was Henry Aaron of the Brookings Institution who claimed, during the 2010 reconciliation debate: "The more substantive objection to the use of reconciliation for passing health care reform derives from the fact that, according to polls, more Americans oppose than support what they think is in the reform bills."^{xxxiii} Aaron goes on to describe how this objection, though, carries no weight because the American people are wrong about what's in health reform. Now that they have been vindicated, though, surrounded by the Affordable Care Act's rising premiums^{xxxiv} and

unsustainable costs,^{xxxv} that argument will and should be used by opponents instead. The moral high-ground of reconciliation, if to anyone, should be given to those repealing the Affordable Care Act.

Respect of the institution of reconciliation and the comity of the Senate are vital for success in using the tool to repeal such a monumental piece of legislation. While it is clearly within the power of the leading party in the Senate to fire parliamentarians and strong-arm the legislative agenda, it is tactless to do so. While zealous opponents of the ACA may seek to bring it down by any means necessary, the precedent set by ignoring the decorum of Senate process is dangerous.

Though it is not possible to repeal the entire law through reconciliation, it is very possible to make a significant, perhaps crippling, start. With clear precedent for the repeal of the inherently fiscal new mandatory spending, historical examples supporting the offset repeal of new taxes, and shrewd arguments to make for repealing the mandates and guaranteed issue, all that will be left of the ACA is a bundle of red tape for insurance companies and doctors. While the repeal of these items are very important too, they will have to wait. After a well-crafted reconciliation bill, though, the Affordable Care Act will be no more, and ground will be broken for new, fiscally-responsible, patient-focused reform.

ⁱ Mann, Thomas, Molly Reynolds, and Norm Ornstein. "Truth and Reconciliation." *The New Republic*. 20 Apr. 2009.

ⁱⁱ Adopted from: "Informed Budgeteer" Committee on the Budget (Republican Staff). Judd Gregg, Chairman. *Budget Bulletin*. 12 Sept. 2005

ⁱⁱⁱ Congressional Research Service. *The Budget Reconciliation Process: The Senate's "Byrd Rule"*. By Robert Keith. 2 July 2010. (10)

^{iv} Ibid. 11

^v Ibid. 8

^{vi} Ibid. 18

^{vii} Stein, Sam. "Biden Can Single-Handedly Run The Reconciliation Process: Parliamentarian Experts." *The Huffington Post*. 1 May 2010.

^{viii} Ibid.

^{ix} Rogers, David. "Elizabeth MacDonough Is Senate's First Female Parliamentarian." *Politico*. 6 Feb. 2012.

^x Strickland, Ken. "A Primer on Reconciliation." *First Read*. NBCNews.com, 29 Sept. 2009.

^{xi} Ibid.

^{xii} Congressional Research Service. *The Budget Reconciliation Process: The Senate's "Byrd Rule"*. By Robert Keith. 2 July 2010. (23)

^{xiii} Noah, Timothy. "Unreconciled: The GOP Resolves to Forget How It Passed Welfare Reform." *Slate*. 24 Feb. 2010.

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- ^{xiv} Congressional Research Service. *The Budget Reconciliation Process: The Senate's "Byrd Rule"*. By Robert Keith. 2 July 2010. (26)
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