

HEALTH CARE REFORM IN WASHINGTON: PAST, PRESENT AND FUTURE

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INTRODUCTION

In January 2019, Washington Governor Jay Inslee, a Democrat, announced he would pursue a “public option” to “ensure consumers in every part of the state will have an option for high-quality, affordable coverage.”¹ It was reported that “14 Washington counties only have one insurance option offered on the exchange, according to Jason McGill, senior policy adviser for Inslee.”²

A public option had long been a progressive objective. In 2009, in a joint address to Congress, President Barack Obama had promised health care reform would include a public option: “I will not back down on the basic principle that if Americans can't find affordable coverage, we will provide you with a choice.”³ He asserted that:

[B]y avoiding some of the overhead that gets eaten up at private companies by profits, excessive administrative costs and executive salaries, it could provide a good deal for

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¹ Press Release, Wash. Governor’s Off., Inslee announces public option legislation to promote health care for all (Jan. 8, 2019), <https://medium.com/wagovernor/inslee-announces-public-option-legislation-to-promote-health-care-for-all-47bd01010a82>.

² Ryan Blethen & Joseph O’Sullivan, *Inslee Proposes ‘Public Option’ Health-Insurance Plan for Washington*, SEATTLE TIMES (Jan. 22, 2019).

³ *Text of President Obama’s Address to Congress*, ABC NEWS (Sept. 9, 2009), <https://abcnews.go.com/Politics/HealthCare/transcript-president-obama-address-joint-congress-health-care/story?id=8527252>.

consumers. It would also keep pressure on private insurers to keep their policies affordable and treat their customers better⁴

Inslee’s 2019 proposal generated some progressive fanfare, with *Vox* reporting that if Inslee were successful “Washington would be the first state to implement a public option.”⁵

There was only one problem with this statement: What Inslee was proposing was *not* a traditionally conceived “public option”; i.e., “a public competitor to private health-insurance companies.”⁶ Even if that *had* been what he was proposing such an idea is not necessarily beloved by those advocating a single-payer, or “Medicare-for-All” system.⁷

For example, the Physicians for a National Health Program warn that “a public plan option does not lead toward single-payer, but toward the segregation of patients, with profitable ones in private plans and unprofitable ones in the public plan.”⁸ But Inslee did not even propose a “public plan.” What he actually proposed was to “contract with an *insurance carrier* to offer

⁴ *Id.* Although Obama put up no real fight for a public option in 2009, he renewed a call for it in 2016. See Sarah Kliff, *President Obama Wants Congress to “Revisit” a Public Option for Obamacare*, VOX (July 16, 2016), <https://www.vox.com/2016/7/11/12123492/obama-obamacare-public-option>.

⁵ Sarah Kliff & Dylan Scott, *Blue-State Governors are Picking Up Where Obamacare Left Off*, VOX (Jan. 10, 2019), <https://www.vox.com/health-care/2019/1/10/18175331/single-payer-public-option-newsom-inslee-deblasio>. Perhaps not coincidentally, Inslee, known better for his environmental views, was positioning himself as a presidential candidate. See, e.g., Edward Isaac-Dovere, *Jay Inslee Is Betting He Can Win the Presidency on Climate Change*, ATLANTIC (Jan. 2, 2019), <https://www.theatlantic.com/politics/archive/2019/01/washington-governor-jay-inslee-running-president/579217/>. Inslee achieved some notoriety by officiating over the largest state tax break in U.S. history—for Boeing—then, along with legislators, watching “powerlessly” as the corporation cut its Washington workforce anyway. Michael Hiltzik, *Boeing Got a Record Tax Break from Washington State and Cut Jobs Anyway. Now the State Wants to Strike Back*, L.A. TIMES (May 3, 2017, 2:20 PM), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-boeing-washington-20170503-story.html>.

⁶ Ronald Brownstein, *The Democratic Push for a ‘Public Option on Steroids’*, ATLANTIC (Apr. 26, 2018), <https://www.theatlantic.com/politics/archive/2018/04/health-care-public-option-medicare/558965/>.

⁷ See Shefali Lufthra, *CBO’s Report on Single-Payer Health Care Holds More Questions Than Answers*, KAISER HEALTH NEWS (May 1, 2019), <https://khn.org/news/cbos-report-on-single-payer-health-care-holds-more-questions-than-answers/> (“The term ‘single-payer’ generally refers to a system in which health care is paid for by a single public authority.”).

⁸ The “Public Plan Option”: Myths and facts, PHYSICIANS FOR NAT’L HEALTH PROGRAM, http://www.pnhp.org/change/Public_Option_Myths_and_Facts.pdf (last visited Feb. 28, 2020).

a health plan that would be available across the state.”⁹ Although over half of the Senate Democrats—the majority caucus—had signed onto a bill to study how to bring about universal coverage, it was reported that Inslee “was cool to the prospect of implementing universal coverage anytime soon.”¹⁰

Although Inslee’s bill, as it finally passed the Washington Legislature, was still misleadingly described as a “public option,”¹¹ it required the state to “contract with one or more health carriers to offer qualified health plans on the Washington health benefit exchange for plan years beginning in 2021.”¹²

This further revealed the disconnection between a national appetite for single-payer health insurance among the Democratic Party’s base and the play-it-safe tendencies of its state leaders. For example, in California, Democratic Governor Gavin Newsom began his tenure in 2019 by pushing an individual mandate to buy private insurance instead of proposing the single-payer legislation he had said he supported during his 2018 campaign.¹³

⁹ Alison Bruzek, Amina Al-Sadi & Bill Radke, *Governor Jay Inslee Pushes for ‘Public Option’ Health Plan in Washington State*, KOUW (Jan. 9, 2019), <https://www.kuow.org/stories/gov-jay-inslee>. (emphasis added).

¹⁰ Joseph O’Sullivan, *Should the Legislature Bring Universal Health Care to Washington?*, SEATTLE TIMES (Feb. 19, 2019), <https://www.seattletimes.com/seattle-news/politics/should-the-legislature-bring-universal-healthcare-to-washington/>. Yet, as one family medicine physician practicing in Seattle writes:

I am growing tired of practicing two versions of medicine: one for well-insured patients who receive all the doctor visits and prescriptions they want, and another for poorly insured patients who pay more out-of-pocket and work harder to get health care. If we want to address the moral crisis in our health-care system, it’s time we sign America’s much-needed prescription: single-payer now.

Devesh Madhav Vashishtha, *Single-Payer Health Care Is the Only Moral Prescription for America*, SEATTLE TIMES (Feb. 19, 2019), <https://www.seattletimes.com/opinion/single-payer-health-care-is-the-only-moral-prescription-for-america/>.

¹¹ See, e.g., Dan Diamond, *‘Medicare for All’ Poised for Its Moment*, POLITICO (Apr. 29, 2019, 10:00 AM), <https://www.politico.com/newsletters/politico-pulse/2019/04/29/medicare-for-all-poised-for-its-moment-600458> (“Washington state passes first public option legislation.”).

¹² ESSB 5526 §(3)(1), 66th Leg., Reg. Sess. (Wash. 2019).

¹³ See Victoria Collier, *Newsom Makes Health Care the Centerpiece of California’s Resistance to Trump*, POLITICO (Jan. 27, 2019, 6:54 AM), <https://www.politico.com/story/2019/01/27/california-gavin-newsom-health-care-1096727> (“Newsom is wagering the requirement will prod more middle-class residents into the state’s Obamacare exchange, Covered California.”). Vermont, the only state to try a single-payer approach, saw it blow up on the launch-pad. See, e.g., Abby Goodnough, *In Vermont, Frustrations Mount Over Affordable Care Act*, N.Y. TIMES (June 4, 2015) (“To many Vermonters, the new federal law

A top aide to House Speaker Nancy Pelosi (D., Calif.) reportedly urged health care industry lobbyists to come up with talking points against a single-payer approach.¹⁴

In marked contrast, U.S. Senator Kamala Harris (D., Calif.), a presidential candidate and “Medicare-for-All” advocate, had in one debate said “she would be OK with cutting insurers out of the mix. She also accused them of thinking only of their bottom lines and of burdening Americans with paperwork and approval processes.”¹⁵ In contrast to such criticisms of insurers, Inslee’s proposal could be viewed as retrograde, because it would further enmesh health care consumers with private insurance.¹⁶ It is not as if insurers have been good actors with the bounty bestowed upon them by the

complicated a state system that had already provided good coverage and muddied the route to an even better model.”).

¹⁴ Adam Cancryn, *Pelosi Aide Sought to Undercut Medicare for All*, POLITICO (Apr. 2, 2019), <https://www.politico.com/story/2019/04/02/pelosi-medicare-for-all-1311167> (“Democratic leaders, he said, could use more research focused on the risks and tradeoffs of Medicare for All.”).

¹⁵ Tammy Luhby & Gregory Krieg, *Harris Backs ‘Medicare-for-All’ and Eliminating Private Insurance as We Know It*, CNN (Jan. 29, 2019), <https://www.cnn.com/2019/01/29/politics/harris-private-insurance-medicare/index.html>. Harris substantially walked this back. See Jennifer Rubin, *Harris’s Health-Care Retreat Shows It Never Pays to Follow the Herd*, WASH. POST (Aug. 20, 2019), <https://www.washingtonpost.com/opinions/2019/08/20/it-never-pays-follow-herd/>. Showing the evolution of the health care debate, moderate Democrats have framed a public option as the more palatable alternative to doing away with private insurance. See, e.g., Sean Sullivan, *Biden Unveils Health Plan, Sharpening Fight Among Democrats*, WASH. POST (July 15, 2019), https://www.washingtonpost.com/politics/biden-plans-to-unveil-health-plan-monday-sharpening-fight-amongdemocrats/2019/07/14/1dc446da-a67f-11e9-a3a6-ab670962db05_story.html (reporting that former Vice President Joe Biden has characterized Medicare-for-All as an attack on “Obamacare”). Interjecting alarmism into the debate, one Democratic presidential candidate, former U.S. Rep. John Delaney, falsely claimed during a presidential debate that every hospital would close were single-payer to be enacted. See Salvador Rizzo, *Would Medicare-for-All Mean Hospitals for None?*, WASH. POST (July 3, 2019), <https://www.washingtonpost.com/politics/2019/07/03/would-medicare-for-all-mean-hospitals-none/>.

¹⁶ This was not inconsistent with Inslee’s past actions. Inslee achieved some notoriety by officiating over the largest state tax break in U.S. history—for Boeing—then, along with legislators, watching “powerlessly” as the corporation cut its Washington workforce anyway. Hiltzik, *supra* note 5. Previously a U.S. House member, it was reported that Inslee “used his time in the House to position himself as a moderate and member of the pro-business New Democrat Coalition.” Sharon Bernstein & Ginger Gibson, *Washington Governor Inslee Runs for U.S. President on Climate Change Platform*, UNION LEADER (Mar. 2, 2019, 5:04 AM), <https://www.businessinsider.com/washington-governor-inslee-runs-for-us-president-on-climate-change-platform-2019-3> (“He was considered an ally of companies from his state, including Boeing Co, Microsoft Corp and Amazon.com, and cast votes viewed as pro-business.”).

Affordable Care Act (ACA).¹⁷ Under the now-defunct individual mandate,¹⁸ the uninsured could be “forced into the unloving embrace of a largely-unfettered insurance industry—with the government acting as industry leg-breaker and imposing fines if citizens do not pay the industry’s inflated prices.”¹⁹ But after getting Democrats to force consumers to buy their product, insurers then worked to rally Republicans to repeal a tax on their profits imposed by the ACA that was intended to pay for consumer subsidies.²⁰ This occurred despite the fact that tax breaks signed into law by President Trump in December 2016 boosted profits for UnitedHealth Group alone by \$1.7 billion.²¹

There is little argument that something needs to change. As Robert Samuelson wrote: “We’d all like both cheaper health insurance and higher wages, but the way the health-care system is operating today, we might get neither. As insurance premiums get more expensive, inflation-adjusted (‘real’) wages will continue to stagnate or decline.”²²

The state of Washington was a national leader on health care reform.²³ Can it still be? If there is to be a path forward, states will likely provide the

¹⁷ PUB. L. 111-148.

¹⁸ The individual mandate requires that “[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.” 26 U.S.C. § 5000A(a) (2018). Confusing to the average person might be the fact that *this mandate still exists*—it was only the penalty for violating it that was zeroed out by the 2017 Tax Cuts and Jobs Act. See Tax Cuts and Jobs Act, PUB. L. 115-97 § 11081(a).

¹⁹ Brendan Williams, *Health Care Deform?*, SEATTLE POST-INTELLIGENCER (Dec. 21, 2009), <https://blog.seattlepi.com/brendanwilliams/2009/12/21/health-care-deform/>.

²⁰ See, e.g., Ethan DeWitt, *Sununu Joins Governors Urging Repeal of Obamacare Taxes*, CONCORD MONITOR (Dec. 13, 2018), <https://www.concordmonitor.com/New-Hampshire-Chris-Sununu-joins-governors-urging-repeal-of-Obamacare-taxes-22128334>.

²¹ See Nathaniel Weixel, *UnitedHealth Expects \$1.7B Windfall from Tax Law*, THE HILL (Jan. 16, 2018), <https://thehill.com/policy/healthcare/369147-unitedhealth-expects-17b-windfall-from-tax-law> (highlighting that for insurers, it’s *never* enough—despite its windfall, “the company is continuing to advocate for a delay—and ultimate repeal—of the health insurance tax”).

²² Robert J. Samuelson, *Where Did Our Raises Go? To Health Care.*, WASH. POST (Sept. 2, 2018), https://www.washingtonpost.com/opinions/health-care-rules-the-labor-market/2018/09/02/05d13672-ad2f-11e8-b1da-ff7faa680710_story.html.

²³ See, e.g., David Gutman, *Dismantling of State’s Health Reforms in 1993 May Offer Lessons for Obamacare Repeal*, SEATTLE TIMES (Jan. 13, 2017, 10:19 AM), <https://www.seattletimes.com/seattle-news/politics/dismantling-of-states-health-reforms-in-1993-may-offer-lesson-for-obamacare-repeal/> (“What began as the most ambitious health-care overhaul in the nation was hacked away to the point where it became impossible to buy individual health insurance anywhere in the state.”).

inspiration—just as Massachusetts did for the ACA.²⁴ This article examines Washington’s past, current, and future paths on health care reform and recommends two approaches to address the state’s health insurance costs and set an example for other states.

I. THE 1987 BASIC HEALTH PLAN

Washington’s experiment with health care reform began with the establishment of a Basic Health Plan (BHP) under Governor Booth Gardner, a Democrat, in 1987. The program was described as “the first of its kind in the country.”²⁵ In its early days, it provided coverage for dislocated timber workers,²⁶ among others. According to one researcher, it provided coverage to roughly 24,000 uninsured residents by the early 1990s, with an enrollment cap of 27,000.²⁷ In 1995, in passing a law substantively repealing the state’s 1993 health care reform law, legislative Republicans committed “that the basic health plan enrollment be expanded expeditiously. . . with the goal of two hundred thousand adult subsidized basic health plan enrollees and one hundred thirty thousand children covered through expanded medical assistance services by June 30, 1997. . . .”²⁸

However, research suggests that peak enrollment in the BHP was “more than 128,000 individuals” in 1996.²⁹ Clearly the Republican’s “goal” had failed.³⁰

²⁴ See, e.g., Liz Halloran, *A Tale Of Two Health Plans: Romney Versus Obama*, NPR (Oct. 17, 2011), <https://www.npr.org/2011/10/14/141357505/a-tale-of-two-health-plans-romney-versus-obama> (“[T]here remains great discomfort among a wide swath of [Republican] party members over the striking similarity of the Massachusetts health care reform legislation Romney signed in 2006 as governor, and the federal health care overhaul President Obama put his signature on last year.”).

²⁵ *Former Wash. Governor Booth Gardner Dies*, USA TODAY (Mar. 16, 2013), <https://www.usatoday.com/story/news/nation/2013/03/16/gov-gardner-obit/1993061/>.

²⁶ See 1991 Wash. Sess. Laws § 22 (“The administrator, when specific funding is provided and where feasible, shall make the basic health plan available to dislocated forest products workers and their families in timber impact areas.”).

²⁷ Peter D. Jacobson, *Washington State Health Services Act: Implementing Comprehensive Health Care Reform*, HEALTH CARE FIN. REV. (1995), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4193508/>.

²⁸ See 1995 Wash. Sess. Laws ch. 265 § 1(2).

²⁹ Basic Health Plan Washington, Off. of Senator Maria Cantwell (May 2, 2016), <https://www.cantwell.senate.gov/imo/media/doc/5-2-16%20Basic%20Health%20Plan%20Report.pdf>.

³⁰ *Id.*

In 2001, voters passed Initiative 773 (I-773), stating “[i]t is the intent of the people to improve the health of low-income children and adults by expanding access to basic health care and by reducing tobacco-related and other diseases and illnesses that disproportionately affect low-income persons.”³¹ The objective was to substantially expand the BHP. An analysis by the progressive Economic Opportunity Institute concluded that “[w]ithin two years, funding from the new tax will increase enrollment by 50,000 to cover 175,000 people.”³²

In passing I-773, voters overcame an opposition campaign that argued “any additional enrollment that would be funded is a windfall for certain providers, like HMOs, which stand to gain millions of dollars in premiums without being required to improve accessibility or quality of medical services.”³³ One writer at the conservative Washington Policy Center acknowledged:

For many people taxing cigarettes to pay for the Basic Health Plan has a certain poetic attraction, but a careful examination of the initiative text reveals the flaws in this idea. As written, the initiative works against itself. It seeks to reduce tobacco use, while at the same time relying on smokers to help fund a major public health program.³⁴

It turned out, however, that the real fatal flaw in I-773 was that the legislature could freely divert the money, as it did in 2003 by passing into law a bill that deleted I-773’s language requiring the additional revenue generated by higher tobacco taxes to “supplement, and not supplant, the level of state funding needed to support enrollment of a minimum of one hundred twenty-five thousand persons for the fiscal year beginning July 1, 2002, and every fiscal year thereafter.”³⁵ Indeed, any BHP enrollment objectives were deleted altogether from the measure.³⁶ As if the diversion of funding were not

³¹ WASH. REV. CODE § 70.47.002 (2001).

³² Impacts of Initiative 773, ECON. OPPORTUNITY INST. (Aug. 1, 2001), <http://www.opportunityinstitute.org/research/post/impacts-of-initiative-773/>.

³³ Tom Huff & Valoria Loveland, *INITIATIVE 773: More taxes for tobacco?*, KITSAP SUN (Nov. 4, 2001), https://products.kitsapsun.com/archive/2001/11-04/0053_initiative_773_more_taxes_for_to.html.

³⁴ Paul Guppy, *The Internal Flaws in Initiative 773*, WASH. POL’Y CTR. (Oct. 18, 2001), <https://www.washingtonpolicy.org/publications/detail/the-internal-flaws-in-initiative-773>.

³⁵ 2003 Wash. Sess. Laws ch. 259 § 1(c).

³⁶ *See id.*

enough, the 2003 law stated it was “intended to apply retroactively to January 1, 2002.”³⁷ In retrospect, this makes rather poignant a *Seattle Times* editorial in support of I-773:

The Basic Health Plan desperately needs financial shoring. It hangs on a precipice because the state Legislature has been reluctant or unable to fund it adequately.

Authors of I-773 have written a solid proposal with *strict earmarking* that will allow money raised to be used only for smoking-prevention programs and new health insurance enrollees.³⁸

In December 2008, at the directive of Governor Christine Gregoire, a Democrat, the state began to drastically cut BHP enrollment, which at that time covered “105,000 low-income people.”³⁹ It was reported that “[t]he state Health Care Authority plans to lower that number by 7,700 over the next seven months.”⁴⁰

In early 2010, with the ACA having just passed, it was reported that the BHP, “crippled by budget cuts, now covers about 69,000 people, with 100,000 on the waiting list.”⁴¹ The BHP came to an end with the advent of the ACA,⁴² even though Senator Maria Cantwell (D., Wash.) was among those who supported it so strongly that she helped incorporate it into the ACA⁴³ and tried to encourage the state to bring it back.⁴⁴

³⁷ *Id.* at § 2.

³⁸ Editorial, *I-773: Make Smokers Pay for Basic Health Plan*, SEATTLE TIMES (Oct. 17, 2001), <https://archive.seattletimes.com/archive/?date=20011017&slug=lunged17> (emphasis added).

³⁹ *State to Cut Number of Low-Income People on Basic Health*, SEATTLE TIMES (Dec. 4, 2008), <https://www.seattletimes.com/seattle-news/state-to-cut-number-of-low-income-people-on-basic-health/>.

⁴⁰ *Id.*

⁴¹ Carol M. Ostrom, *Washington ‘A Step Ahead’ of Health Law*, SEATTLE TIMES (Apr. 2, 2010), <https://www.seattletimes.com/seattle-news/washington-a-step-ahead-of-health-law/>.

⁴² In 2011, the Legislature predicated the BHP’s continued existence upon “recommendations from its joint select committee on health reform regarding whether the basic health plan should be offered as an enrollment option for persons who qualify for federal premium subsidies under the federal patient protection and affordable care act of 2010.” 2011 Wash. Sess. Laws ch. 205 §2.

⁴³ See Ostrom, *supra* note 41 (noting that the language can be found at 42 U.S.C. § 18051 (2019)).

⁴⁴ See Press Release, Off. of Wash. Senator Maria Cantwell, Cantwell Introduces Legislation to Expand Basic Health Program to Cover More People at Lower Cost (Sept. 24, 2018),

II. 1993 HEALTH CARE REFORM

During the 1992 legislative session, his last year in office, Governor Gardner sought major health care reform. Yet, as one article noted: “Lawmakers and the business community greeted Governor Booth Gardner’s clarion call Monday for healthcare reform with broadly different views. But one thing seemed clear: The idea is already on its death bed in the Republican Senate.”⁴⁵ What came as a shock is that it did not take Republicans to kill Gardner’s idea: “The measure was expected to face strong opposition in the Republican-controlled Senate, but the 39–55 defeat in the Democratic House was unexpected. It left supporters of state-controlled health costs dazed but vowing to secure backing for a new vote next week.”⁴⁶

Still, the battle lines were drawn: “House Health Care Chairman Dennis Braddock, D-Bellingham, said the House will settle for nothing less than ‘universal access’ to health care, a uniform benefits package, and a ‘very strong entity of non-financially interested individuals who will have the authority to define the benefits.’”⁴⁷

In 1993, a Democratic legislature, and a new Democratic governor, Mike Lowry, took up health care reform at the state level at the same time President Bill Clinton was trying to enact it federally.⁴⁸ The Washington effort, however, passed into law after an incredible battle.⁴⁹

The action started with unanimous Senate support for renewing the BHP, which was set to “sunset.”⁵⁰ It was reported that “[f]or the average family of four, the cost is about \$69 a month” for premiums.⁵¹ In 1992, the House had held up the renewal of the BHP because the then-Republican

<https://www.cantwell.senate.gov/news/press-releases/cantwell-introduces-legislation-to-expand-basic-health-program-to-cover-more-people-at-lower-cost> (“According to a 2012 report by the Health Policy Center at The Urban Institute, more than 160,000 Washington state residents would be eligible for coverage under a Basic Health Plan. With Cantwell’s bill to expand BHP, this option could make coverage available to a majority of the individual insurance market in many states.”).

⁴⁵ *GOP Quickly Dooms Gardner’s Plan*, KITSAP SUN (Jan. 14, 1992). [hereinafter *GOP*].

⁴⁶ Jeff Brody, *Vote Blocks Control of Health Costs*, KITSAP SUN (Feb. 13, 1992).

⁴⁷ *GOP*, *supra* note 45.

⁴⁸ See Lowry, *Legislators Revive Last Year’s Plans for Health Care Reform*, KITSAP SUN (Jan. 22, 1993), https://products.kitsapsun.com/archive/1993/01-22/279780_lowry__legislators_revive_last_.html.

⁴⁹ See 1993 Wash. Sess. Laws ch. 492.

⁵⁰ Hal Spencer, *Senate Speeds Health Bill Repeal to House*, OLYMPIAN (Jan. 15, 2013), at C3.

⁵¹ *Id.*

Senate did not support comprehensive health care reform, but it also unanimously supported the 1993 renewal.⁵² It was reported that “[i]n signing the bill, Lowry said it was the first step toward health-care reform, an issue he has given top priority.”⁵³

The Democratic Senate passed comprehensive reform first, in a 30–19 vote.⁵⁴ Senate Republicans argued the bill would prove more expensive than anticipated, because “many companies would not be able to afford to cover employees, and the state would be left to pick up the tab.”⁵⁵ The Senate-passed bill was then beset in the House by insurance lobbying, with the bill’s prime sponsor, Senator Phil Talmadge (D., 34th District) denouncing “fearmongering” and, in House Health Care Committee testimony, “holding aloft a fistful of letters from Blue Cross to clients.”⁵⁶ While the committee heard from insurance lobbyists that Talmadge referred to as a “bunch of piranhas,” the committee also took testimony “from Dr. Anna Chavelle, president of the Washington State Medical Association. She said the road ahead is ‘fraught with unknowns . . . but this bill moves the system in the right direction.’”⁵⁷

Spokane’s newspaper, the *Spokesman-Review*, editorialized in support, writing that “now is the time for legislators to make the tough decisions.”⁵⁸ Accordingly, they stated, “let the cannon balls fly. Reform, by definition, will have to cause pain, especially among those who have profited from the current system’s inequities. If lawmakers make too many compromises, reform will prove ineffective and that, in turn, would be an economic, humanitarian, and political disaster.”⁵⁹

In passing the Senate bill, the House actually took the extraordinary step of locking all lobbyists out of the chamber.⁶⁰ It was reported that

⁵² Lowry *OKs Renewal of Health Plan*, OLYMPIAN (Jan. 28, 1993), at C3.

⁵³ *Id.*

⁵⁴ Mindy Chambers, *War of Words Escalates*, OLYMPIAN (Mar. 19, 1993), at C3.

⁵⁵ *Partisan Split Over Health Care*, OLYMPIAN (Mar. 3, 1993), at C3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Editorial, *Do Whatever It Takes to Reform Health Care*, SPOKESMAN-REVIEW (Mar. 14, 1993), at A18.

⁵⁹ *Id.*

⁶⁰ *House Passes Health-Care Reform*, KITSAP SUN (Apr. 9, 1993), https://products.kitsapsun.com/archive/1993/04-09/281978_house_passes_health-care_reform.html (“The House early today signed on to a major overhaul of the state’s health care system after leaders locked the doors to block communication between lawmakers and lobbyists.”).

“[e]arlier, a fleet of high-priced lobbyists for insurance and business interests mobbed the House doorways and sent in notes imploring legislators to step outside to hear arguments against the much-amended Senate measure.”⁶¹ Those lobbyists represented big interests: “Boeing is among forces opposing the bill, along with Blue Cross and the state's Blue Shield Plans. Also opposed is the Association of Washington Business, whose members contend it will fail to control costs while burdening businesses with requirements they cannot afford.”⁶² The 185-page bill passed at 2:20 a.m. after debate “over more than 60 amendments.”⁶³

Among the Legislature’s findings in the Health Care Services Act of 1993:

The legislature finds that too many of our state’s residents are without health insurance, that each year many individuals and families are forced into poverty because of serious illness, and that many must leave gainful employment to be eligible for publicly funded medical services. Additionally, thousands of citizens are at risk of losing adequate health insurance, have had insurance canceled recently, or cannot afford to renew existing coverage.⁶⁴

Accordingly, the intent section stated that “[t]he legislature intends that state government policy stabilize health services costs, assure access to essential services for all residents, actively address the health care needs of persons of color, improve the public’s health, and reduce unwarranted health services costs to preserve the viability of nonhealth care businesses.”⁶⁵

Like the ACA,⁶⁶ the law defined “essential health services” to include:

(a) Primary and specialty health services; (b) inpatient and outpatient hospital services; (c) prescription drugs and medications; (d) reproductive services; (e) services necessary for maternity and well-child care, including preventive dental

⁶¹ *Id.*

⁶² *Id.*

⁶³ *House OKs Health Bill*, OLYMPIAN (Apr. 10, 1993), A2.

⁶⁴ 1993 Wash. Sess. Laws ch. 492. § 101.

⁶⁵ *Id.* at § 102.

⁶⁶ *See* 42 U.S.C. § 18022(b) (2019).

services for children; and (f) case-managed chemical dependency, mental health, short-term skilled nursing facility, home health, and hospice services, to the extent that such services reduce inappropriate utilization of more intensive or less efficacious medical services.⁶⁷

The progressivism of this at the time, in its scale of coverage, cannot be overstated. It would not be until 2005 that the Legislature would pass a mental health parity law,⁶⁸ for example.

As one *Seattle Times* article noted: “The 1993 law, passed when Democrats controlled both houses and the governor’s seat, was then the most ambitious overhaul effort in the nation.”⁶⁹ It came 13 years before the 2006 passage of the “Romneycare” reform law in Massachusetts that would eventually inspire the ACA.⁷⁰ A *Washington Post* article described the effort:

Starting on July 1, 1993, health insurance companies were required to accept all state residents who applied for coverage — and it barred health plans from charging sick subscribers more, a practice known as underwriting. The requirement to purchase coverage, meanwhile, was not slated to take effect until five years later, in 1998.⁷¹

The *New York Times* reported:

The plan would require all employers to pay at least half the cost of health insurance premiums for their employees. By promoting a managed competition system, in which people and businesses would buy health care from a network of doctors and hospitals, the bill is closer than the reform efforts

⁶⁷ 1993 Wash. Sess. Laws ch. 492 § 449(2).

⁶⁸ See 2005 Wash. Sess. Laws ch. 6.

⁶⁹ Carol M. Ostrom, *Why Washington State’s Health Reform Faltered After Loss of Mandates*, SEATTLE TIMES (Mar. 28, 2012), <https://www.seattletimes.com/seattle-news/why-washington-states-health-reform-faltered-after-loss-of-mandates/>.

⁷⁰ See Jessica Taylor, *Mitt Romney Finally Takes Credit for Obamacare*, NPR (Oct. 23, 2015), <https://www.npr.org/sections/itsallpolitics/2015/10/23/451200436/mitt-romney-finally-takes-credit-for-obamacare>.

⁷¹ Sarah Kliff, *Washington State Provides Case Study on Effects of Health-Care Reform*, WASH. POST (June 16, 2012).

of any other state to the plan mentioned most frequently by the Clinton Administration.⁷²

The article stated that “[w]hile the Clinton task force had antagonized the medical establishment early on, Washington began by enlisting the support of the leading doctor group in the state, which became a crucial ally.”⁷³

A Health Services Commission began fleshing out the benefits for the 1995 Legislature to consider. It was reported that “there would be no deductibles for the package, nor would there be annual or lifetime dollars limitations.”⁷⁴ Co-pays would be nominal in many cases—no more than \$15 for surgical services, for example (and “no co-payment if inpatient”).⁷⁵

Yet the law never got its chance to work. Upon taking legislative control in 1995, legislative Republicans repealed the mandate, but not the “guaranteed-issue” requirement, in a law that Lowry signed.⁷⁶ The law had already been weakened because “Congress refused to give the state permission to impose what backers said was the heart of the law: a requirement that all employers pay half the cost of health insurance for workers and dependents by mid-1998.”⁷⁷ According to one article:

Business and insurance interests here and in Washington, D.C., also dumped tens of thousands of dollars into lobbying

⁷² Timothy Egan, *State Health Bill Interests Clinton*, N.Y. TIMES (May 2, 1993), <https://www.nytimes.com/1993/05/02/us/state-health-bill-interests-clinton.html>.

⁷³ *Id.*

⁷⁴ Mindy Chambers, *Health-Care Reform at Crossroads*, OLYMPIAN (Oct. 9, 1994), at C4.

⁷⁵ *Id.*

⁷⁶ See 1995 Wash. Sess. Laws ch. 265. According to one article, “Lowry became convinced he could not hold onto the reform law.” Lynda Mapes & Jeannete White, *House Reverses Health Care Reform Lowry Agrees To Compromise; Critics Fear Higher Costs*, SPOKESMAN-REVIEW (Apr. 18, 1995), <http://www.spokesman.com/stories/1995/apr/18/house-reverses-health-care-reform-lowry-agrees-to/>.

⁷⁷ Hal Spencer, *New Prescription for Health Reform Legislature Ready to Rewrite State Law, Including Cutting Package of Core Medical Benefits*, SPOKESMAN-REVIEW (Jan. 3, 1995), <https://www.spokesman.com/stories/1995/jan/03/new-prescription-for-health-reform-legislature/>. As one article reported, the state wanted “Congress to revise the Employee Retirement Income Security Act, known as ERISA, because it impedes a central tenet of Washington’s plan—that employers pay at least half their workers’ health care premiums. Under ERISA, states cannot regulate companies that self-insure, a loophole through which many companies would escape reform.” *HEALTH CARE: Lowry: State Health Reform Will Not Be Crippled by Federal Inaction*, KITSAP SUN (Sept. 1, 1994), https://products.kitsapsun.com/archive/1994/09-01/299392_health_care_lowry_state_healt.html.

this session to kill the 1993 health-reform bill, state records show.

The Health Insurance Association of America in Washington, D.C., contributed about \$23,427 to the \$58,316 so-called “grass roots” lobbying effort launched by the Association of Washington Business to repeal the 1993 law.

The campaign included about \$19,427 the Washington, D.C., insurance association spent on Kentucky telemarketers who called Washington state employers to warn them against “government-run health care.”⁷⁸

Insurers should have been careful about what they asked for. As the *Los Angeles Times* reported:

Coming off historic electoral gains, the GOP legislators scrapped much of the law while pledging to make health insurance affordable and to free state residents from onerous government mandates.

It didn't work out that way: The repeal left the state's insurance market in shambles, sent premiums skyrocketing and drove health insurers from the state. It took nearly five years to repair the damage.⁷⁹

Washington became a cautionary tale. As the *Los Angeles Times* related, “health insurers sought a series of double-digit rate hikes in 1995 and 1996. The health plans warned that with no requirement to have coverage,

⁷⁸ Lynda Mapes, *Insurance Industry Calls Shots GOP Lawmakers Gave Lobbyists Free Rein in Helping Roll Back Regulations*, SPOKESMAN-REVIEW (Apr. 30, 1995), <http://www.spokesman.com/stories/1995/apr/30/insurance-industry-calls-shots-gop-lawmakers-gave/> (noting that “[r]eform proponents were pitifully outgunned by comparison. Consider Washington Citizen Action, a statewide, grass-roots consumer group. Its total arsenal deployed this session: two lobbyists paid \$11.50 an hour, state records show.”). A *Spokesman-Review* editorial lamented that “[t]he current session of Washington’s Legislature has been a lobbyist’s heaven.” Editorial, *Lobbyists Running The Olympia Show*, SPOKESMAN-REVIEW (May 4, 1995), <https://www.spokesman.com/stories/1995/may/04/lobbyists-running-the-olympia-show/> (at the time, the paper credited authors of its editorials, and John Webster wrote this one).

⁷⁹ Noam N. Levey, *In Washington State, A Healthcare Repeal Lesson Learned the Hard Way*, L.A. TIMES (May 31, 2017), <https://www.latimes.com/politics/la-na-pol-obamacare-washington-state-20170531-story.html>.

people were signing up for insurance only when they got sick, sending costs skyrocketing.”⁸⁰ Beset with cost, and with consumers free to opt into and out of coverage at will, insurers ceased coverage until “Washington state’s individual market was essentially dead.”⁸¹ That was true even though the 1995 law also allowed insurers to “impose a three-month benefit waiting period for preexisting conditions for which medical advice was given, or for which a health care provider recommended or provided treatment within three months before the effective date of coverage.”⁸² Such a delay could allow untreated cancer to run its course.

A change of course appeared necessary and to lure back the insurers who fled the individual market. Then-Governor Gary Locke, a Democrat, signed a law in 2000, under which “insurers could charge whatever they wanted, bypassing the rate review normally done by the insurance commissioner’s office. They could also force patients to wait nine months to be covered and exclude the most expensive patients.”⁸³

The power of Washington’s insurance commissioner to review health insurance rates in the individual market would not be restored until 2008.⁸⁴

Another abortive health care reform effort came in 2006, when the legislature passed a law creating a “health insurance partnership” for small businesses.⁸⁵ It had a grand intent section: “The legislature intends, through establishment of a small employer health insurance partnership program, to remove economic barriers to health insurance coverage for low-wage employees of small employers by building on the private sector health benefit plan system and encouraging employer and employee participation in employer-sponsored health benefit plan coverage.”⁸⁶ There was, however, a fatal caveat: “*To the extent funding is appropriated in the operating budget for this purpose, the small employer health insurance partnership is established.*”⁸⁷

⁸⁰ *Id.*

⁸¹ Kliff, *supra* note 71.

⁸² 1995 Wash. Sess. Laws ch. 265 § 6.

⁸³ Ostrom, *supra* note 69. Among other things, the law stated that “[t]he commissioner may not disapprove or otherwise impede the implementation of the filed rates.” 2000 Wash. Sess. Laws § 3(4).

⁸⁴ *See* 2008 Wash. Sess. Laws ch. 303.

⁸⁵ 2006 Wash. Sess. Laws ch. 255.

⁸⁶ *Id.* at § 1(2).

⁸⁷ *Id.* at § 3 (emphasis added). One conservative commentator wrote that “[r]ather than immediately establishing a government-run health insurance market like that in

In the 2007 session, the date by which applications for premium subsidies could be submitted was changed from July 1, 2007 to September 1, 2008.⁸⁸ Yet it seemed as if the law was going to be implemented—its 2007 changes reportedly passed “despite opposition from a swarm of business lobbyists.”⁸⁹ A Health Insurance Partnership Board was established.⁹⁰ Among the board’s directives was to “[d]evelop policies for enrollment of small employers in the partnership, including minimum participation rules for small employer groups.”⁹¹ By December 2008 it was to “submit a preliminary report to the governor and the legislature that includes an implementation plan to incorporate the individual and small group health insurance markets into the partnership program.”⁹²

In the 2008 session, the law was again amended: “The partnership shall begin to offer coverage no later than March 1, 2009.”⁹³ In the 2009 session, that date was stricken and language added that applications could be submitted January 1, 2011, “subject to sufficient state or federal funding being provided specifically for this purpose. . . .”⁹⁴ As the partnership floundered, legislators were moving on and harmonizing state law with the ACA.⁹⁵ Finally, the partnership law was unceremoniously repealed in 2017.⁹⁶

III. ACA IMPLEMENTATION IN WASHINGTON

After passage of the ACA, Washington worked quickly in the 2011 legislative session to harmonize its statutes with ACA requirements.⁹⁷ In some respects it did not have to go too far. For example, in Washington, dependents were already permitted to stay on their parents’ group or

Massachusetts, Washington will ease into it. Here, the Legislature set up a Massachusetts-style pilot program for small employers with low-income workers.” Richard S. Davis, *Democrats Delay Cost of Risky Legislation*, SPOKESMAN-REVIEW (Apr. 25, 2007), <http://www.spokesman.com/stories/2007/apr/25/democrats-delay-cost-of-risky-legislation/>.

⁸⁸ 2007 Wash. Sess. Laws ch. 260 § 6.

⁸⁹ Ralph Thomas, *House Narrowly OKs Health-Insurance Plan*, SEATTLE TIMES (Mar. 11, 2007), <https://www.seattletimes.com/seattle-news/house-narrowly-oks-health-insurance-plan/>.

⁹⁰ 2007 Wash. Sess. Laws ch. 260 § 4.

⁹¹ *Id.* at § 5(1)(a).

⁹² *Id.* at § 10.

⁹³ 2008 Wash. Sess. Laws ch. 143 § 2.

⁹⁴ 2009 Wash. Sess. Laws ch. 257 § 2.

⁹⁵ *See, e.g.*, 2011 Wash. Sess. Laws ch. 314.

⁹⁶ 2017 Wash. Sess. Laws ch. 25 § 23.

⁹⁷ *See* 2011 Wash. Sess. Laws ch. 314.

individual market insurance until age 25, so changing that to 26 was not a big lift.⁹⁸ Washington already had “community rating” that disallowed health insurance pricing based upon gender, for example.⁹⁹ It already disallowed insurers from charging an older consumer more than three times what a younger consumer would pay.¹⁰⁰

In 2011, the state also enacted a law to set up its own health benefit exchange through which federally-subsidized insurance in individual and small group markets could be purchased.¹⁰¹ It was set up to be a passive purchaser—it “shall approve” all plans deemed by the insurance commissioner and board to meet statutory requirements.¹⁰² This gives it no leverage over prices. California, in contrast, has an exchange that is an “active purchaser,” credited for keeping prices down due to a “rigorous vetting process for insurers that want to participate in its marketplace.”¹⁰³

The first four carriers approved by the insurance commissioner in 2013 for offering on the exchange illustrated the power one carrier, Premera Blue Cross, has exercised over Washington’s health insurance market:

Member Don Conant noted that Lifewise, one of the four approved carriers, is a subsidiary of Premera, another approved carrier.

“I’m choosing to see these as one carrier,” said Conant, general manager at Valley Nut and Bolt in Olympia and an

⁹⁸ *See id.* at § 6.

⁹⁹ *See* WASH. REV. CODE § 48.44.022 (2019).

¹⁰⁰ *See id.*

¹⁰¹ *See* 2011 Wash. Sess. Laws ch. 317.

¹⁰² WASH. REV. CODE § 43.71.065 (2019).

¹⁰³ Mattie Quinn, *How California Keeps Health Premiums Down Like No Other State*, GOVERNING (May 10, 2016), <https://www.governing.com/topics/health-human-services/gov-covered-california-health-insurance-premiums.html> (“Because the state chooses the plans, insurance companies are under pressure to offer lower rates.”). However, California’s insurance commissioner cannot reject health insurance rates—House Speaker Nancy Pelosi (D., Calif.) even urged that voters oppose a 2014 ballot measure giving the commissioner that power. *See* Editorial, *Pelosi Makes the Case Against Prop. 45*, S.F. CHRON. (Oct. 28, 2014, 8:58 AM), <https://www.sfgate.com/opinion/editorials/article/Pelosi-makes-the-case-against-Prop-45-5851347.php>. It was reported that “[i]nsurers in California—primarily Kaiser Permanente, WellPoint and Blue Shield of California—have poured more than \$55 million into defeating the measure, more than 15 times what the supporters have raised.” Ian Lovett, *California’s Proposition 45 Would Offer Public a Say on Health Insurance Rates*, N.Y. TIMES (Oct. 29, 2014), <https://www.nytimes.com/2014/10/30/us/californias-proposition-45-would-offer-public-a-say-on-health-insurance-rate-increases.html>.

assistant professor in the School of Business at St. Martin's University. "It's sort of a choice without a distinction."¹⁰⁴

Under pressure, the insurance commissioner approved more plans.¹⁰⁵

A complicating factor from the outset that made Washington different was that it "had a large population—as many as 500,000 residents—served by unregulated association health plans offered through business groups."¹⁰⁶ The insurance commissioner, Mike Kreidler,¹⁰⁷ tried to shut down this option, but was rebuffed in 2015 by his own agency's administrative law judge.¹⁰⁸ It

¹⁰⁴ Amy Snow Landa, *State Health Exchange Board Wants More Insurance Choices*, SEATTLE TIMES (Aug. 21, 2013), <https://www.seattletimes.com/seattle-news/state-health-exchange-board-wants-more-insurance-choices/>.

¹⁰⁵ Amy Snow Landa & Aaron Spencer, *Exchange Board Certifies Health Plans, At Last*, SEATTLE TIMES (Sept. 4, 2013), <https://www.seattletimes.com/seattle-news/health/exchange-board-certifies-health-plans-at-last/> ("Board members said during the previous meetings that they were concerned that the four insurers approved by Insurance Commissioner Kreidler on Aug. 1 did not provide adequate competition and choice.").

¹⁰⁶ Brendan Williams, *A Better "Exchange": Some States, Including Washington, Control Their Health Care Markets While Most Surrender Autonomy to Resist Reform*, 48 GONZ. L. REV. 595, 609 (2013). These plans date to the 1995 Republican health care reform repeal bill signed into law by Governor Lowry: "Employers purchasing health plans provided through associations or through member-governed groups formed specifically for the purpose of purchasing health care shall not be considered small employers and such plans shall not be subject to the provisions of RCW 48.44.023(5)." 1995 Wash. Sess. Laws ch. 265 § 23(2). They were further empowered through a 2004 law prime-sponsored by the Democratic chair of the House Health Care Committee that expressly allowed such plans to offer "a limited schedule of covered health care services" as opposed to benefits comparable to the BHP. 2004 Wash. Sess. Laws ch. 244 § 1. Like her, the Trump Administration has championed such plans. *See, e.g.*, Tami Luhby, *Trump Officials Roll Out New Rule for Small Business Health Insurance Plans*, CNN (June 19, 2018), <https://www.cnn.com/2018/06/19/politics/association-health-plans-ruling/index.html>.

¹⁰⁷ Washington has also had the same insurance commissioner for almost two decades. *See, e.g.*, Annie Zak, *Insurance Commissioner Kreidler Will Seek Re-Election in 2016*, PUGET SOUND BUS. J. (Sept. 18, 2015, 2:04 PM), <https://www.bizjournals.com/seattle/blog/health-care-inc/2015/09/insurance-commissioner-kreidler-will-seek-re.html> (noting that "he is the longest-serving insurance commissioner in the U.S.").

¹⁰⁸ *See* Lisa Stiffler, *Small Businesses Hail Ruling That Protects Association Health Plans*, SEATTLE TIMES (July 2, 2015), <https://www.seattletimes.com/seattle-news/small-businesses-hail-ruling-that-protects-association-health-plans/>. Kreidler has had a tempestuous tenure. In 2014, another administrative law judge resigned and obtained a \$450,000 taxpayer settlement after alleging she was subject to undue influence by Kreidler's chief deputy on an appeal. Annie Zak, *Whistleblower Judge Gets \$450,000 Settlement, Resigns After 26 Years*, PUGET SOUND BUS. J. (Nov. 17, 2014, 3:26 PM), <https://www.bizjournals.com/seattle/blog/health-care-inc/2014/11/whistleblower-judge-gets-450-000-settlement.html>. A prior Kreidler chief deputy was "questioned as part of a \$20,000 state Insurance Commissioner's Office investigation" then fired in 2009—a sexual harassment claim against him was settled for a taxpayer cost of \$50,000. Paul Gottlieb, *PDN*

was reported then that “Kreidler has accused these groups of ‘cherry-picking’ the healthiest, cheapest-to-insure workers and driving out businesses with sicker employees. He claims that some of the plans also charge much higher rates for older employees and women.”¹⁰⁹ It is unclear to what extent the existence of this option skews the individual market.

There is no doubt that past individual market rate increases for insurance offered through Washington’s exchange have been disastrous. Although proposed rates for 2020 were flat, perhaps it is because they have hit the ceiling.¹¹⁰ The average increase for 2019 was 13.8%, which followed average increases of 35% in 2018 and 14.1% in 2017.¹¹¹

Not surprisingly, the Economic Opportunity Institute reported “[o]ver 43,000 Washington residents dropped health insurance coverage in 2018.

Investigation: Sequim City Manager-Designate’s Sexual Harassment Allegation Surfaces; Cost State \$50,000, PENINSULA DAILY NEWS (Sept. 13, 2009), <http://www.peninsuladailynews.com/news/pdn-investigation-sequim-city-manager-designates-sexual-harrassment-allegation-surfaces-cost-state-50000/>. In perhaps the most exotic episode, “[a] dust-up over a gift resulted in the exodus of two employees in Kreidler’s office, including his chief deputy, Mike Watson. Kreidler said the dispute arose when Kreidler argued that ethics rules allowed him to keep a potted plant sent by a trade association.” Carol M. Ostrom, *Longtime Leader Mike Kreidler Plunges Into Political Storms*, SEATTLE TIMES (June 9, 2014), <https://www.seattletimes.com/seattle-news/longtime-leader-mike-kreidler-plunges-into-political-storms/>.

¹⁰⁹ Stiffler, *supra* note 108. Condemning Kreidler’s position, one editorial asserted that “[c]learly, the associated plans are valued by hundreds of businesses across Washington, but Kreidler has been an antagonist going back as far as 2007, when predecessor Deborah Senn—no friend to the industry she used to regulate—lined up on the side of the associations.” Editorial, *Association Health Plans are Key to Washington’s Health Insurance Market*, SPOKESMAN-REVIEW (Oct. 3, 2015), <https://www.spokesman.com/stories/2015/oct/03/editorial-association-health-plans-are-key-to/>.

¹¹⁰ See Ryan Blethen, *Washington State Health Insurers Propose Lowest Rate Increase in Affordable Care Act Era*, SEATTLE TIMES (June 4, 2019, 3:31 PM), <https://www.seattletimes.com/seattle-news/health/health-insurers-propose-lowest-rate-increase-in-affordable-care-act-era/>. While premium rates tend to be the obsession of the media and policymakers, the real action is in deductibles, which may make insurance unusable whatever one’s premiums are. As one law review article notes that rate increases might be slowed by “the explosion of high deductible health plans (“HDHPs”).” Barbara Anthony, Celia Segel & Hallie Toher, *Beyond Obamacare: Lessons from Massachusetts*, 14 J. HEALTH & BIOMEDICAL L. 285, 327 (2018). “The growth of HDHPs is a national phenomenon and presents some troubling issues. It can result in less financial protection when people need to use care, and some research shows that consumers with HDHPs are making decisions not to spend their deductibles and defer or forgo needed care.” *Id.*

¹¹¹ See Presentation to Wash. Senate Health & Long-Term Care Committee 1, Wash. Health Benefit Exchange (Jan. 16, 2019), https://www.wahbexchange.org/wp-content/uploads/2019/01/WAHBE_SHC_011619_Final_submitted.pdf.

People under 35 years old are most likely to drop coverage.”¹¹²

Although Washington expanded Medicaid under the ACA, very low reimbursement rates are a barrier to Medicaid care access. As written by one advocate: “The average cost to a medical practice in Washington for a Medicaid visit is two to three times the amount it costs to provide the service.”¹¹³

IV. THE PATH FORWARD

In looking ahead, it is unclear how bestowing more largesse upon a Washington insurer, under the guise of a “public option,” will cause insurance prices to fall.¹¹⁴ Inslee argues that “consumers in 14 counties have only one option for coverage and our ability to rein in costs has been stymied.”¹¹⁵ Yet Cowlitz County, for example, *had* competition in 2018, and still “the three insurers selling plans were approved for a combined rate increase of 38 percent. In addition, deductibles—the amount patients pay for health services before insurers start to cover costs—increased by a combined average of 43 percent.”¹¹⁶

These punishing increases have occurred even though “nonprofit insurers in Washington have amassed huge piles of surplus cash, beyond what

¹¹² Press Release, Econ. Opportunity Inst., Governor Inslee Announces EOI-Backed Cascade Care, a Public Option Health Plan (Jan. 8, 2019), <http://www.opportunityinstitute.org/blog/post/governor-inslee-announces-eoi-backed-cascade-care-a-public-option-health-plan/>.

¹¹³ Jennifer Lawrence Hanscom, *Heal the Business of Care with Fair Medicaid Compensation*, SEATTLE TIMES (Sept. 12, 2018), <https://www.seattletimes.com/opinion/heal-the-business-of-care-with-fair-medicaid-compensation/>.

¹¹⁴ As introduced, the bill requires that the state “in consultation with the health benefit exchange, must contract with one or more health carriers to offer silver and gold qualified health plans on the Washington health benefit exchange for plan years beginning in 2021.” H.B. 1523 § 3(1), 66th Leg., Reg. Sess. (Wash. 2019). A limitation upon payments may also detract from the ability to build an adequate network of providers, as the contracted “plan’s fee-for-service rates for providers and facilities may not exceed the medicare rates for the same or similar covered services in the same or similar geographic area.” *Id.* at § 3(1)(e).

¹¹⁵ Press Release, Wash. Governor’s Off., Inslee announces public option legislation to promote health care for all (Jan. 8, 2019), <https://www.governor.wa.gov/news-media/inslee-announces-public-option-legislation-promote-health-care-%C2%A0all>.

¹¹⁶ Zack Hale, *Kreidler Proposes Plan to Stabilize Rural Health Care Markets*, DAILY NEWS (Jan. 10, 2018), https://tdn.com/news/local/kreidler-proposes-plan-to-stabilize-rural-health-care-markets/article_0e6c0c92-fd3a-5828-a26f-5d8b7d3bf2c4.html. How would Inslee’s plan, with a limitation upon provider payments, fix this?

prudence—and regulation—would require.”¹¹⁷ Legislative efforts to give the insurance commissioner the authority to factor billions of dollars in insurer’s surpluses into consideration of rate increases have failed.¹¹⁸

A *true* public option “would allow middle-income, working-age adults to choose a public insurance plan—like Medicare or Medicaid—instead of a private insurance plan.”¹¹⁹

The argument for one was made by Senator Jay Rockefeller (D., W. VA), in offering a public option amendment during the Senate Finance Committee debate over the legislation that became the ACA:

[W]e need this option because our insurance companies have failed to meet their obligations in this whole matter of how do you unroll health care reform. The insurance companies in my judgment are determined to protect their profits and put their customers second. It is a harsh statement but a true statement.¹²⁰

Rockefeller saw the public option “as a counterweight to the way I would characterize health insurance companies—and I love to use the word ‘rapacious’ because I think it is precise and on the mark.”¹²¹ He stated that his constituents needed a public option “because they are helpless in the face of insurance companies.”¹²²

Supporting Rockefeller, Senator Charles Schumer (D., N.Y.) stated: “Those of us who support the public option support adding some real competition to the coagulated, ossified, and fundamentally anti-competitive insurance market.”¹²³ In opposition to that amendment, Senator Charles

¹¹⁷ Brendan Williams, *Comment: While Congress Stumbles, State Has a Health Care Fix*, EVERETT HERALD (June 25, 2017), <https://www.heraldnet.com/opinion/comment-while-congress-stumbles-state-has-a-health-care-fix/>. Indeed, in the 2018 legislative session, such a bill died in the Senate Health & Long-Term Care Committee. See Bill History for S.B. 6416, 65th Leg., Reg. Sess. (Wash. 2018), <https://app.leg.wa.gov/billsummary?BillNumber=6416&Year=2017&Initiative=False>.

¹¹⁸ *Id.*

¹¹⁹ Margot Sanger-Katz, *The Difference Between a ‘Public Option’ and ‘Medicare for All’? Let’s Define Our Terms*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/upshot/medicare-for-all-health-terms-sanders.html>.

¹²⁰ *Executive Committee Meeting to Consider Health Care Reform Before the Senate Finance Committee*, 111th Cong. 8 (Sept. 29, 2009), <https://www.finance.senate.gov/imo/media/doc/0929092.pdf> [hereinafter *Executive Committee Meeting*].

¹²¹ *Id.* at 9.

¹²² *Id.* at 31.

¹²³ *Id.* at 95.

Grassley (R., Iowa) argued that “[a] government-run plan will ultimately force private insurers out of business.”¹²⁴

Jacob Hacker, characterized as the “father of the public option,” has stated one of its appeals is it “softened the hard truth that Americans were going to be forced to buy private health insurance.”¹²⁵ Simply re-branding private health insurance as a “public option”—which the Inslee proposal would—seems unlikely to fool anyone.¹²⁶ In the 2019 legislative session, majority Democrats in Connecticut were also pursuing what was characterized in headlines as a “public option,” but turned out to be efforts to “partner with one or more private insurers under an umbrella contract to provide plans outside of the state’s risk pool.”¹²⁷ Despite these facts, the *Connecticut Mirror* reported that “Connecticut could be the first state in the nation to adopt a public option.”¹²⁸ Insurance companies opposed the effort, and a reported threat from Cigna to move its headquarters out-of-state was a key to derailing the legislation for 2019.¹²⁹

¹²⁴ *Id.* at 40.

¹²⁵ Jacob S. Hacker, *There’s a Simple Fix for Obamacare’s Current Woes: The Public Option*, VOX (Aug. 18, 2016).

¹²⁶ During Senate Finance Committee debate in 2009, Senator Rockefeller asked, “Who comes first—the insurance companies or the American people? I mean, it is—maybe that is too cliché a way to put it, but I think it is a pretty fair way to put it.” *Executive Committee Meeting, supra* note 120, at 26. In the state of Washington, the answer to that question has long been clear. *See, e.g.*, Editorial, *Premera Shrouds Transparency*, SEATTLE TIMES (Mar. 6, 2014), <https://www.seattletimes.com/opinion/editorial-premera-shrouds-transparency/> (noting that after an insurance transparency bill was gutted, “Premera Blue Cross cooed its approval of the action that denies consumers access to information to make better choices and help bring down health-care costs”).

¹²⁷ Jenna Carlesso, *Public Option Health Insurance Bills Clear Committee*, CT MIRROR (Mar. 19, 2019), <https://ctmirror.org/2019/03/19/public-option-health-insurance-bills-clear-committee/>.

¹²⁸ *Id.* Under the concept, “Connecticut small businesses would be able to join the state’s health insurance plan.” Matt Pilon, *Committee Advances Health Insurance ‘Public Option’ Bill*, HARTFORD BUS. (Mar. 15, 2019), <https://www.hartfordbusiness.com/article/committee-advances-health-insurance-public-option-bill> (describing this as “a type of ‘public option’”); *see also* Mark Paznniokas, *A New Push for a Public Option in CT*, HARTFORD BUS. (Feb. 14, 2019) (noting that to “leave no role for private insurers” would be “a political non-starter in Connecticut, the home of major health insurers like Aetna and Cigna”).

¹²⁹ *See* Stephen Singer, *Health Care Executives Ask Lamont to Halt Legislation Proposing Public Option for Health Insurance*, HARTFORD COURANT (May 28, 2019), <https://www.courant.com/business/hc-biz-connecticut-executives-public-option-20190528-wu7hzi2r7zbtbxrtwz6gqrqoe-story.html>; *see also* Jenna Carlesso, *Lamont: We’ll Revisit Public Option Health Care Issue Next Year*, CT MIRROR (June 6, 2019), <https://ctmirror.org/2019/06/06/lamont-vows-to-revive-public-option-health-care-issue-next-year/>.

In Colorado, newly elected Governor Jared Polis, a Democrat, pursued a genuine public option in 2019, described as “a state-run plan. It’s not out of the ordinary; Colorado has, for more than a century, had a state-run workers compensation insurance plan, known as Pinnacle Assurance, which is the insurer of last resort for any business that can’t get workers comp elsewhere.”¹³⁰ According to one newspaper account, this Colorado effort, which passed into law in the 2019 legislative session, would “study how to leverage existing state infrastructure to create a publicly supported insurance option, delivering affordable health insurance across the state.”¹³¹

Efforts stalled elsewhere in 2019, as *Politico* reported: “Legislative proposals in New Mexico, Nevada and other states to set up a public option to give people more choices—and insurers more competition—have been watered down or shelved as lawmakers struggle to design affordable plans building on Obamacare.”¹³² For example, “[i]n Nevada, where the legislature

¹³⁰ Marianne Goodland, *Bills on Drug Imports, Public Health Option Move Through Colorado Legislative Committees*, COLO. POL. (Jan. 29, 2019), https://www.coloradopolitics.com/news/bills-on-drug-imports-public-health-option-move-through-colorado/article_eb973068-236c-11e9-9e76-2f347ef0d143.html (noting, in an interesting similarity to Washington, that “14 counties in the state—virtually all rural and mostly on the Western Slope—have only one insurance carrier”).

¹³¹ Andre Salvail, *Committee Advances Donovan’s Health-Care Bills*, ASPEN DAILY NEWS (Mar. 15, 2019), https://www.aspendailynews.com/news/committee-advances-donovan-s-health-care-bills/article_70115604-46cf-11e9-a5b8-1b9b88feb763.html (quoting a Senate sponsor as stating: “No state in the nation has implemented a statewide public option, but Colorado has taken an innovative and responsible approach to do so that will increase competition and deliver affordable, accessible health care to Coloradans all across this state.”); see also H.B. 19-1004 (Colo. 2019). In 2019, Colorado also enacted a law that “that places a \$100 per month cap on insulin co-pays, regardless of how much insulin a patient uses. Insurance companies will pay anything more than the \$100 co-pay, according to the new law.” Christina Zdanowicz, *Colorado Is the First State to Cap Skyrocketing Insulin Co-Pays*, CNN (May 23, 2019), <https://www.cnn.com/2019/05/23/health/colorado-insulin-price-cap-trnd/index.html>. The ever-escalating price of insulin has forced U.S. diabetics to obtain it in Canada, dangerously ration their dosages, or take unproven substitutes. Emily Rauhala, *As Price of Insulin Soars, Americans Caravan to Canada for Lifesaving Medicine*, WASH. POST (June 16, 2019), https://www.washingtonpost.com/world/the_americas/as-price-of-insulin-soars-americans-caravan-to-canada-for-lifesaving-medicine/2019/06/14/0a272fb6-8217-11e9-9a67-a687ca99fb3d_story.html; Hannah Frishberg, *Diabetic Groom-To-Be Dies After Taking Cheaper Insulin to Pay for Wedding*, N.Y. POST (Aug. 6, 2019), <https://nypost.com/2019/08/06/diabetic-groom-to-be-dies-after-taking-cheaper-insulin-to-pay-for-wedding/> (“When Josh Wilkerson turned 26, he aged out of his stepfather’s private health insurance and he was unable to afford his nearly \$1,200-a-month insulin.”).

¹³² Rachana Pradhan & Dan Goldberg, *As Dems Debate Medicare for All, A Less Radical Idea Stalls in Blue States*, POLITICO (Apr. 8, 2019), <https://www.politico.com/story/2019/04/08/health-care-blue-states-1308730>.

two years ago approved a first-in-the-nation Medicaid buy-in bill that was vetoed by the Republican governor, new Democratic Governor Steve Sisolak appeared to hedge on previous support.”¹³³

Politics in Washington are highly beholden to the insurance lobby. One insurer alone showered \$241,320 upon candidates and committees in the 2016 election.¹³⁴ Insurers even come before children: Washington has not joined the 20 states that require that insurers cover hearing aids for children,¹³⁵ and it took a unanimous Washington Supreme Court decision to compel the state to finally enforce the law requiring insurance coverage for autism treatment.¹³⁶

When Inslee’s bill passed the Washington House, it was reported that “[s]ome further to the left have advocated removing private insurers from the equation entirely.”¹³⁷ At a press conference, “Inslee called the bill an achievable goal, but he did not elaborate on the role of private insurers or the government.”¹³⁸ The House health care chair rejected the idea of a government-run option as too expensive.¹³⁹ Tellingly, the state’s insurance lobby did not register formal opposition even as versions of Inslee’s proposal cleared both the House and Senate.¹⁴⁰ One critic noted that “since ‘Washington’s public option’ is based on a private-public partnership, we’d be gambling with the caprice of profit-driven companies.”¹⁴¹

Under the ACA’s medical loss ratio, individual insurance plans may divert as much as 20% of health care premiums away from care.¹⁴² Cascade Care does not require additional efficiency from insurers. It instead requires

¹³³ *Id.*

¹³⁴ See Brendan Williams, *Is Anyone Listening? The Legal Marginalization of Hearing Disabilities*, 16 IND. HEALTH L. REV. 133, 143 (2018) (citation omitted).

¹³⁵ *See id.*

¹³⁶ *See* O.S.T. ex rel. vs. BlueShield, 335 P.3rd 416 (Wash. 2014).

¹³⁷ Tom James, *State Public Health-Care Plan Clears Washington House*, SEATTLE TIMES (Mar. 9, 2019), <https://komonews.com/news/local/state-public-health-care-plan-clears-washington-house-03-09-2019>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Sara Gentzler, *Q&A: Meg Jones, Executive Director of the Association of Washington Healthcare Plans on Public Option Bills*, WASH. ST. WIRE (Mar. 15, 2019), <https://washingtonstatewire.com/%ef%bb%bfqa-meg-jones-executive-director-of-the-association-of-washington-healthcare-plans-on-public-option-bills/>.

¹⁴¹ Rich Smith, *Jay Inslee’s Health Care Plan Doesn’t Go Far Enough*, THE STRANGER (Jan. 9, 2019), <https://www.thestranger.com/slog/2019/01/09/37797796/jay-inslees-health-care-plan-doesnt-go-far-enough>.

¹⁴² *See, e.g.*, 45 C.F.R. § 158.210 (c) (2019).

them to moderately squeeze *providers*. It does not allow a contracting insurer to reimburse providers more than 160% of the Medicare rate (a cap that could be ratcheted-down in the future).¹⁴³ As Sophie Weiner wrote in *Splinter*, “Washington will avoid the obvious way of saving money on healthcare: cutting out insurance companies.”¹⁴⁴ She noted that “[t]his model inadvertently demonstrates a weakness in the hybrid health care proposals advocated by some centrist Democrats—once you cut insurance companies in, it becomes extremely difficult to cut them out.”¹⁴⁵

Health insurers are doing well, even those that are supposedly nonprofit. As *Axios* reported in March 2019: “Health Care Service Corp. didn't pay a dime in federal taxes in 2018, according to its latest financial report. Instead, the health insurance conglomerate received a \$1.7 billion tax refund, which swelled the company's net profit to \$4.1 billion.”¹⁴⁶ The conglomerate “is the parent of the Blues plans in Illinois, Montana, New Mexico, Oklahoma and Texas[.]”¹⁴⁷

In contrast, a national survey reported on in April 2019 found that “Americans borrowed a staggering \$88 billion in the past year to pay for health care. . . . Also, 65 million adults say they had a health issue but didn't seek treatment due to cost. Nearly a quarter had to cut back on spending to pay for health care or medicine.”¹⁴⁸

In August 2019, an elderly Washington couple died in an apparent murder-suicide and it was reported that “[a]uthorities said they found ‘several

¹⁴³ See ESSB 5526 § (3)(2)(g)(i), 66th Leg., Reg. Sess. (Wash. 2019). Insurance companies like to do things on the cheap, which, as more than one account has noted, helped fuel the opioid crisis: “Chronic pain had once been treated with a combination of strategies that only sometimes involved narcotics; now it was treated using opioids almost exclusively, as insurance companies cut back on reimbursing patients for long-term pain therapies that did not call on the drugs.” Sam Quinones, *Physicians Get Addicted Too*, ATLANTIC (May 2019), <https://www.theatlantic.com/magazine/archive/2019/05/opioid-epidemic-west-virginia-doctor/586036/>.

¹⁴⁴ Sophie Weiner, *Washington State Passes a Public Option, But Insurance Companies Will Still Get Their Cut*, SPLINTER (May 12, 2019), <https://splinternews.com/washington-passes-a-public-option-but-insurance-compan-1834707699>.

¹⁴⁵ *Id.*

¹⁴⁶ Bob Herman, *Large Blues Health Insurer Pockets \$1.7 Billion Tax Refund*, AXIOS (Mar. 11, 2019), <https://www.axios.com/blue-cross-blue-shield-health-care-service-corp-2018-tax-refund-f6a392be-54d7-4a25-b2e4-bb37d54cea4.html>.

¹⁴⁷ *Id.*

¹⁴⁸ Tami Luhby, *Americans Borrow \$88 Billion Annually to Pay for Health Care, Survey Finds*, CNN (Apr. 2, 2019), <https://www.cnn.com/2019/04/02/health/health-care-costs-borrowing/index.html>.

notes' citing the woman's severe, ongoing medical issues and explaining that the couple did not have enough money to afford care."¹⁴⁹ For many others, a trip to the emergency room could result in bankruptcy.¹⁵⁰ Nationally, in 2018, 27.5 million people had no health coverage at all, an 8.5% increase in the uninsured from the prior year.¹⁵¹

Those who, not incorrectly, state that climate change is an existential crisis, as did Governor Inslee in focusing on it exclusively in his presidential bid,¹⁵² often ignore—from the vantage of their own good health care—the fact that health care is *the* day-to-day existential crisis for their fellow Americans. It is hard to worry about climate change if you cannot afford your next dose of insulin. Arguments against real health care reform, based upon claims that people “love” their private health insurance, infuriate many—consider what one college student wrote in the *New York Times*:

I am alive today not *because* of insurance companies but *despite* them. My insulin refills have been delayed countless times, not because of medical reasons, but because of what seem to be arbitrary insurance limits and requirements to continuously document my condition, which is permanent. Once, my insulin refill was delayed so long that I ran out, just when the insurance office closed for a three-day weekend.¹⁵³

¹⁴⁹ Michelle Mark, *An Elderly Washington Couple Died in an Apparent Murder-Suicide. Police Said They Left Notes About Their Struggles to Afford Medical Care*, INSIDER (Aug. 9, 2019), <https://www.insider.com/washington-murder-suicide-medical-bills-2019-8>.

¹⁵⁰ See Eli Saslow, *The ‘Follow-Up Appointment’*, WASH. POST (Aug. 17, 2019), https://www.washingtonpost.com/national/the-follow-up-appointment/2019/08/17/1be5ded6-b936-11e9-a091-6a96e67d9cce_story.html (“Unpaid medical bills are the leading cause of personal debt and bankruptcy in the United States according to credit reports.”).

¹⁵¹ Amy Goldstein & Heather Long, *Uninsured Rate Rose in 2018 Despite Strong Economy, Census Says*, WASH. POST (Sept. 10, 2019), <https://www.msn.com/en-us/money/markets/uninsured-rate-rose-in-2018-despite-strong-economy-census-says/ar-AAH5wNh>.

¹⁵² It did not do him much good. See, e.g., David Guzman, *Governor Inslee Celebrates Reaching Donor Threshold, But It Looks Like a Hollow Victory*, SEATTLE TIMES (Aug. 20, 2019), <https://www.seattletimes.com/seattle-news/politics/gov-inslee-celebrates-reaching-donor-threshold-but-it-looks-like-a-hollow-victory/> (noting that despite his singular focus on climate change, Inslee never “cracked 2% in a single qualifying poll. The most recent national poll gave him 0% support”).

¹⁵³ Rachel Madley, *Does Anyone Really ‘Love’ Private Health Insurance?*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/opinion/insulin-prices-diabetics.html>.

Short of capitalizing a real public insurance option and building a provider network for it,¹⁵⁴ there are two better near-term approaches Washington could take. The first would be to take on the unchecked surpluses—money aggregated in excess of prudent reserves—of Washington’s dominant nonprofit insurers. As a 2017 article reported:

Pat Kinnaird of Kenmore was furious when she got a letter saying her longtime health insurer, Regence Blue Shield, decided not to offer coverage in King County next year, citing uncertainty in the market.

At the same time Regence is abandoning customers in Washington’s market for individual insurance, it is seeking rate increases in the state averaging 30 percent next year.

And the company is sitting on a \$1.1 billion surplus.¹⁵⁵

The article further noted that “Premera Blue Cross has proposed 28 percent increases, on average, and reported a surplus of \$1.5 billion at the end of 2016.”¹⁵⁶ Yet “Insurance Commissioner Mike Kreidler, who wanted a change in state law in 2012 allowing him to consider surpluses in annual rate

¹⁵⁴ This approach would be effectively similar to the formation of “co-ops” authorized by the ACA, and established through federal loans, under the “Consumer Operated and Oriented Plan (CO-OP) Program” that “sought to increase competition among health plans” but largely faltered due to congressional and state sabotage. See Sabrina Corlette, Sean Miskell, et al., *Why Are Many CO-OPs Failing?: How New Nonprofit Health Plans Have Responded to Market Competition* 9, COMMONWEALTH FUND (Dec. 2015), https://www.commonwealthfund.org/sites/default/files/documents/__media_files_publications_fund_report_2015_dec_1847_corlette_why_are_many_coops_failing.pdf. As the authors note: “Health insurance markets are notoriously difficult to penetrate, particularly for new companies with limited capital.” *Id.* at 12 (footnote omitted). They observed that “[p]olicymakers often talk about how important it is to encourage greater competition in health insurance markets and provide consumers with more choices. But actually delivering on that goal requires a much greater investment of financial resources and political capital than has been made to date.” *Id.* at 20. Former Senator Kent Conrad (D., N.D.), the architect of the co-op idea, blamed the failure of co-ops on insurance company lobbying. Reed Abelson & Abby Goodnough, *Health Care Co-op Closings Narrow Consumers’ Choices*, N.Y. TIMES (Oct. 25, 2015), <https://www.nytimes.com/2015/10/26/business/health-care-co-op-closings-narrow-consumers-choices.html> (reporting that “the cascading series of failures has also led to skepticism about the Obama administration’s commitment to this venture”).

¹⁵⁵ Bob Young, *Health Insurers Seek Double-Digit Rate Increases in Washington State—Despite Billion-Dollar Reserves*, SEATTLE TIMES (July 16, 2017), <https://www.seattletimes.com/seattle-news/health/health-insurers-seek-double-digit-rate-increases-despite-billion-dollar-reserves/>.

¹⁵⁶ *Id.*

reviews”¹⁵⁷ was reported to be “now more sympathetic to insurers.”¹⁵⁸ In 2012, the idea of regulating those surpluses was endorsed by the *Seattle Times*.¹⁵⁹

In neighboring Oregon, the insurance regulator may, “[i]n order to determine whether the proposed premium rates for a health benefit plan for small employers or for an individual health benefit plan are reasonable and not excessive, inadequate or unfairly discriminatory,”¹⁶⁰ consider, among other things, “[t]he insurer’s financial position, including but not limited to profitability, surplus, reserves and investment savings.”¹⁶¹ *Consumer Reports* has recommended that state regulators be given the tools to regulate surpluses and “[r]ecognize that nonprofit carriers, like for-profit health insurance carriers, benefit from a dramatically expanded customer base with government premium and cost-sharing subsidies under the ACA.”¹⁶²

A second approach would be to resurrect, as Senator Cantwell has proposed, Washington’s earliest, and most lasting, health reform approach: the Basic Health Plan. It is an idea that has had editorial support. In Clark County *The Columbian*, for example, has argued that “Washington should embrace an opportunity to revive its defunct Basic Health Plan and fill in some of the holes in coverage provided by Obamacare and an expansion of Medicaid.”¹⁶³ Responding to the 2019 health insurance rate increases in Washington, Cantwell argued again for a BHP: “The Basic Health Program . . . can also lower costs and improve quality by continuing to innovate in the

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Editorial, *Surplus Profits Should Be Factored into Insurance-Rate Decisions*, SEATTLE TIMES (Jan. 27, 2012). The idea of this reform has been around a long time. See Peter Neurath, *State Insurance Chief Weighs ‘Surplus’ Question*, PUGET SOUND BUS. J. (Sept. 24, 2006), <https://www.bizjournals.com/seattle/stories/2006/09/25/story8.html>.

¹⁶⁰ OR. REV. STAT. § 743.018 (5) (2019).

¹⁶¹ *Id.* at §§ 5(a).

¹⁶² *How Much is Too Much: Nonprofit Insurer Surplus After the ACA 9*, CONSUMER REP. (June 15, 2015), https://advocacy.consumerreports.org/wp-content/uploads/2015/06/Surplus_update.pdf.

¹⁶³ Editorial, *In Our View: Revive Basic Health Plan*, COLUMBIAN (May 19, 2016), <https://www.columbian.com/news/2016/may/19/in-our-view-revive-basic-health-plan/>; see also Editorial, *Bring Back State’s Basic Health Plan*, EVERETT HERALD (May 9, 2016), <https://www.heraldnet.com/opinion/bring-back-states-basic-health-plan/>. Many without insurance are neither eligible for ACA insurance subsidies nor eligible for Medicaid.

delivery of care.”¹⁶⁴

One editorial praising Cantwell’s position noted that “Cantwell says Minnesota and New York are now trying out the BHP-subsidized option that lets insurers bid to join the BHP pool for services.”¹⁶⁵ There is some irony in *Washington* not having such a program anymore, when Cantwell claims credit for “getting approval in the Affordable Care Act for states to test out a new version of our state’s once-popular Basic Health Plan.”¹⁶⁶ One concern may be the tenuousness of any such innovation under the Trump Administration,¹⁶⁷ but that could be said of any approach.

In conclusion, Washington still has the ability to be a trendsetter in health care reform. It shouldn’t sell itself short of real solutions.

¹⁶⁴ Press Release, Off. of Wash. Sen. Maria Cantwell, Senator Cantwell Statement on 2019 Washington State Health Insurance Rate Increases (June 4, 2018), <https://www.cantwell.senate.gov/news/press-releases/senator-cantwell-statement-on-2019-washington-state-health-insurance-rate-increases>.

¹⁶⁵ Editorial, *Cantwell is Best Fit for 4th US Senate Term*, OLYMPIAN (Oct. 16, 2018, 1:00 PM), <https://www.theolympian.com/opinion/editorials/article220071765.html>.

¹⁶⁶ *Id.* As one article notes, “Only two states—New York and Minnesota—opted to establish a BHP and enrollment has been robust, with over 800,000 enrollees across both states (most in New York). BHP coverage is typically more affordable for enrollees than marketplace coverage and can minimize churning between Medicaid and private coverage for many low-income consumers.” Katie Keith, *New York and Minnesota Sue Over Loss of Basic Health Program Funding*, HEALTH AFF. (Jan. 27, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180127.691558/full/>.

¹⁶⁷ See Michelle Andrews, *How Trump’s Funding Cuts Threaten ‘Basic Health Program’ Plans*, NPR (Feb. 6, 2018), <https://www.npr.org/sections/health-shots/2018/02/06/583475658/how-trumps-funding-cuts-threaten-basic-health-program-plans>.