ELIMINATING THE ESI TAX EXCLUSION: A SENSIBLE AND NECESSARY SOLUTION TO THE ONGOING HEALTHCARE DEBATE

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I. INTRODUCTION

The 2020 Democratic Presidential Debates and Primary Contests were, in many ways, a protracted battle over how best to approach reforming the United States healthcare system, with candidates at odds between making incremental changes to the current "private" health

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insurance system versus completely overhauling the existing healthcare landscape in favor of a single government-administered health insurance plan for all.[1] This is hardly surprising, given that healthcare was a major issue in the minds of many voters[2]—even just ten years removed from the passage of another significant healthcare reform bill, the Patient Protection and Affordable Care Act ("ACA").[3]

On the one hand, proponents of a government-run, single-payer system argue that such a change is needed to cut out profit-motivated insurers and reduce costs under a single administrative system.[4] Alternatively, proponents of retaining the mostly private system counter that moderate changes can address the current challenges facing the American healthcare system without exploding the federal budget and restricting choice of coverage, as they argue would be the case with a single-payer system.[5] Similarly, Republicans in Congress—while failing in their efforts to repeal the ACA in 2017[6]—remain steadfastly opposed to any expansion of government involvement in health insurance markets.[7]

However, this one-or-the-other debate obscures a little-mentioned aspect of American health insurance in long need of reform or outright repeal: the significant government subsidization of employer-sponsored health insurance ("ESI"). This favorable tax treatment dates back to the mid-twentieth century, beginning just after World War II when ESI's prevalence was exploding.[8] Since then, ESI subsidies have only grown, with the income tax expenditure for ESI by itself representing more than $200 billion in lost revenue to the federal government in 2018.[9] Yet, the United States is unique among industrialized nations in its reliance on and

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1. *See* Ken Thomas, *Democratic Candidates Clash Over Health Care*, WALL ST. J. (July 14, 2019), https://www.wsj.com/articles/democratic-candidates-clash-over-health-care-11563134681 [http://web.archive.org/web/20200406140909/https://www.wsj.com/articles/democratic-candidates-clash-over-health-care-11563134681].

2. Zach Hrynowski, *Several Issues Tie as Most Important in 2020 Election*, GALLUP NEWS (Jan. 13, 2020), https://news.gallup.com/poll/276932/several-issues-tie-important-2020-election.aspx [http://web.archive.org/web/20200115054439/https://news.gallup.com/poll/276932/several-issues-tie-important-2020-election.aspx].

3. Some commentators at the time referred to the ACA as "the most expansive social legislation enacted in decades." Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (Mar. 23, 2010), https://www.nytimes.com/2010/03/24/health/policy/24health.html [http://web.archive.org/web/20200302205856/https://www.nytimes.com/2010/03/24/health/policy/24health.html].

4. *See infra* Section II.E.1.

5. *See infra* Section II.E.2.

6. *See infra* Section II.E.

7. *Id.*

8. *See infra* Section II.A.

9. *See infra* Section II.D.2.ii.

support of ESI,[10] with many labeling the development and growth of the ESI-based system as an "accident of history."[11] In fact, while a number of rationales supporting ESI and its subsidization do exist, scholarly consensus has long held ESI and ESI subsidies in a mostly negative light.[12]

This Note discusses ESI and its favorable tax treatment, providing both a historical and critical analysis of the current subsidized ESI system in the United States. Furthermore, this Note shall discuss past and current efforts to reform health insurance in the United States through the lens of ESI's favorable tax treatment. Part II gives a general background into the history of ESI and its subsidization.[13] Part II also discusses the issues of high and rising healthcare costs particular to the United States' system and associated efforts, both old and new, to reform domestic health insurance markets.[14] Next, Part III provides an analysis of two prominent healthcare reform proposals generating recent debate—a single-payer overhaul versus more moderate changes like a public option—juxtaposed against the little-discussed option of repealing ESI's favorable tax treatment within the current framework established by the ACA.[15] Finally, Part IV concludes that elimination of ESI's favorable tax treatment within the current regulatory framework is a more sensible and realistic reform than those efforts currently being proposed by politicians and advocates.[16] Such action could alleviate many drawbacks of subsidized ESI while still retaining the availability of private markets for those who desire this "choice."[17]

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10. *See* D. L. Davis, *Universal Health Care Diagnosis Is on the Mark*, POLITIFACT (June 21, 2019), https://www.politifact.com/factchecks/2019/jun/21/mark-pocan/universal-health-care-diagnosis-mark/ [http://web.archive.org/web/20200406123804/https://www.politifact.com/factchecks/2019/jun/21/mark-pocan/universal-health-care-diagnosis-mark/].

11. *See infra* Section II.A.

12. *See infra* Section II.D.

13. *See infra* Section II.A.

14. *See infra* Section II.C.

15. *See infra* Section III.

16. *See infra* Section IV.

17. While debates have often revolved around this concept of consumer choice, the idea is somewhat of a misnomer considering that, for those with ESI, the employer typically selects an insurer and a limited offering of insurance options with an absence of or limited input from employees. *See* Nisarg A. Patel, *No One Actually Likes Choosing Their Own Health Plan*, VOX (DEC. 19, 2019), https://slate.com/technology/2019/12/americans-do-not-like-choosing-their-own-health-insurance.html [http://web.archive.org/web/20200405184842/https://slate.com/technology/2019/12/americans-do-not-like-choosing-their-own-health-insurance.html].

II. BACKGROUND

A. History and Background of ESI and Its Preferential Tax Treatment

The rise of ESI and its eventual subsidization by the federal government traces back to World War II, when employee benefits were not subject to wartime price controls that capped employees' regular wages.[18] This incentivized employers to compete for workers by offering generous fringe benefits, including health insurance coverage.[19] Following the war, Americans became accustomed to these benefits, even as scientific advancements began increasing medical care costs.[20] Congress thus decided to exempt ESI benefits from employees' gross income through I.R.C. § 106(a).[21] Congress further singled out ESI for favorable treatment by exempting the benefits from payroll taxes as well.[22] While these actions promoted increased health insurance coverage availability, they also effectively tied health insurance to the employment relationship.[23]

Today, ESI represents Americans' largest source of coverage, more than individual and government plans combined.[24] Despite this unique prevalence of ESI, the above origins have led many commentators to refer to ESI as an "accident of history," rather than a system based upon objective sensibilities.[25] However, not until the ESI system was effectively entrenched in American society did academics and policy-makers evaluate its true effectiveness as a healthcare policy.[26]

B. Rising Healthcare Costs Threaten ESI

Regardless of its continued prominence and government support, ESI has not been immune from the challenges of rising costs in recent

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18. Brenden S. Maher, *Unlocking Exchanges*, 24 CONN. INS. L.J. 125, 131 (2017).

19. Benjamin D. Gehlbach, Note, *The Preferential Treatment of Employer-Provided Health Care: Time for Change?*, 27 J. CONTEMP. HEALTH L. & POL'Y 398, 402–03 (2011).

20. *Id.* at 403.

21. *Id.*

22. *Id.*

23. *Id.*

24. U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2017 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-264.pdf [http://web.archive.org/web/20200129191031/https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-264.pdf].

25. Maher, *supra* note 16, at 131.

26. *Id.* at 133. This delayed scrutiny is largely attributable to low healthcare costs and a less sophisticated understanding of health insurance markets during the early years of ESI. *Id.*

decades.[27] In 2006, one author noted that ESI plans faced an ongoing crisis from continually rising healthcare costs.[28] For example, total national healthcare expenditures rose from about 7% of GDP in 1970 to more than 13% in 1995 and 17% by 2010.[29] By 2017, healthcare costs reached 17.9% of GDP[30] and are still trending above general inflation.[31] With healthcare costs growing significantly faster than the overall economy, employers and employees face burdens alike, as they must divert more funds toward healthcare and away from other activities.[32] This diversion has led employers to reevaluate the feasibility of providing healthcare for employees, with some increasing cost-sharing and others cutting benefits entirely.[33] These growing issues set the stage for various recent interventions as the federal government attempted to combat rising costs and shore up ESI markets.

C. Government Reform Efforts

Although the Federal Tax Code has already subsidized ESI for almost a century,[34] much effort in the last two decades has focused on reforming the ESI system to control costs and expand—or at least maintain—employer coverage.[35] However, public attachment to ESI has guided these reform efforts away from any attempts to abandon or undermine the ESI system.[36] Instead, the government decided to further incentivize certain

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27. *See* Rabah Kamal & Cynthia Cox, *How has U.S. Spending on Healthcare Changed Over Time?*, KAISER FAM. FOUND., Dec. 10, 2018, https://www.healthsystemtracker.org/chart-collection/u-s-spending-healthcare-changed-time/#item-total-health-expenditures-have-increased-substantially-over-the-past-several-decades_2017 [http://web.archive.org/web/20191212205026/https://www.healthsystemtracker.org/chart-collection/u-s-spending-healthcare-changed-time/].

28. Larry Grudzien, *Can Consumer-Driven Health Care, Health Reimbursement Arrangements and Health Savings Accounts Save Employer Sponsored Health Care from Ruin?*, 19 ST. THOMAS L. REV. 39, 40 (2006).

29. Kamal & Cox, *supra* note 25.

30. CMS, NATIONAL HEALTH EXPENDITURES 2017 HIGHLIGHTS, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/highlights.pdf [http://web.archive.org/web/20200130224622/https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/highlights.pdf].

31. PWC, MEDICAL COST TREND: BEHIND THE NUMBERS 2020 1 (June 2019), https://www.pwc.com/us/en/industries/health-industries/assets/pwc-hri-behind-the-numbers-2020.pdf [http://web.archive.org/web/20210202215532/https://www.pwc.com/us/en/industries/health-industries/assets/pwc-hri-behind-the-numbers-2020.pdf].

32. Grudzien, *supra* note 26, at 43–44, 46.

33. *Id.* at 45.

34. *See* discussion *supra* Section II.A.

35. *See* discussion *infra* Section II.C.

36. Maher, *supra* note 16, at 133–134.

types of ESI with increased subsidies, as seen in the two following reform efforts.

1. The MMA

The first major changes came with the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA"),[37] which specifically targeted retiree health benefits.[38] While the major change of the MMA involved expanding Medicare with new prescription drug coverage,[39] it also attempted to maintain existing ESI by providing a direct subsidy to employers who maintain retiree drug coverage meeting certain minimum requirements.[40]

2. The ACA

More recently, the government instituted the ACA, a wide-ranging piece of reform legislation aimed at increasing coverage, reducing costs, and protecting those with pre-existing conditions.[41] For private insurance, the ACA undertook various reforms to increase accessibility to individual markets—that is, insurance outside of ESI and government programs.[42] Simultaneously, the ACA took steps to preserve the existing ESI system by retaining its favorable tax treatment and mandating large employers to provide coverage or pay a penalty.[43] The ACA further incentivized ESI by expanding subsidies for smaller employers.[44] The ACA did, however, attempt to curb the subsidization of excess insurance with a forty percent excise tax on high-cost employer plans.[45] Though revolutionary in its attempts to fix individual markets, the ACA was thus conservative in preserving the historical government-subsidized ESI system of health

37. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108–173, 117 Stat. 2066 (codified in scattered sections of 26, 42 U.S.C.) [hereinafter MMA].

38. *See id.*

39. *See id.*

40. 42 U.S.C. § 1395w–132.

41. Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001–18122.

42. Maher, *supra* note 16, at 144.

43. *Id.* at 147–48.

44. Nicholas Drew, *Two Federally Subsidized Heath Insurance Programs are One Too Many: Reconsidering the Federal Income Tax Exclusion for Employer-Provided Health Insurance in Light of the Patient Protection and Affordable Care Act*, 54 B.C. L. REV. 2047, 2064 (2013).

45. Blaine G. Saito, *The Value of Health and Wealth: Economic Theory, Administration, and Valuation Methods for Capping the Employer Sponsored Insurance Tax Exemption*, 48 HARV. J. ON LEGIS. 235, 251 (2011).

insurance.[46] In sum, the government's reform efforts to date have looked to control costs and expand coverage without any extensive overhaul of the current system of ESI subsidization, all while increasing subsidies for certain benefits by significant margins.[47]

D. The Cases for and against ESI Subsidization

In contrast to the public and government attachment to ESI, consensus among academics and researchers has long held the ESI system in a mostly negative light.[48] However, for the purposes of this Note—and when looking at reformation in general—it will be helpful to dive deeper into the academic arguments, viewing the theoretical rationales both for and against ESI and its subsidization. While some factors relate to ESI generally—as opposed to the specific taxation or subsidization of ESI—it should be noted that any reason for or against ESI generally will implicitly either support or oppose the government subsidizing such a system.

1. Rationales for Supporting ESI

The central benefit of ESI, at least when compared with an unregulated market, is to provide a convenient method to facilitate group purchasing.[49] This is especially valuable in insurance purchases, where larger group plans reduce risk and better alleviate problems of adverse selection that can drive up costs in insurance markets.[50] Larger groups may also be better suited to negotiate favorable terms with an insurer, with this group power often translating into favorable policies and more generous coverage.[51]

Other, less prominent rationales focus on the complexity of purchasing insurance.[52] According to these arguments, tying the purchase of a complicated good, such as health insurance, to the labor deal increases the likelihood that individuals will purchase insurance and put forth sufficient attention to that purchase decision.[53] ESI also leverages the heightened sophistication and resources of employers, who can generally make more optimal purchasing decisions than workers researching and purchasing insurance individually.[54]

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46. Maher, *supra* note 16, at 149.
47. *See supra* Sections II.C.1–2.
48. Maher, *supra* note 16, at 133.
49. *Id.* at 136.
50. *Id.*
51. *Id.*
52. *Id.* at 137.
53. *Id.* at 137–38.
54. *Id.* at 137.

Finally, connecting health insurance with the labor deal provides a convenient regulatory nexus through which the government can impose its desired scheme.[55] Not only are workers unlikely to abandon the labor deal in efforts to avoid regulation, but employers' prior experience as compliance actors also provides a pre-existing structure for the government to impose its regulatory will.[56]

2. Rationales against Supporting ESI

Alternatively, several disadvantages have arisen in both the ESI system generally, as well as with how the government subsidizes ESI through the Tax Code.

i. General Disadvantages of the ESI System

Looking at the ESI system generally, a self-evident downside is that it only reaches employed workers and their dependents. Even then, most employers are not required to provide coverage.[57] Most employers' freedom to simply decide not to offer their employees health benefits also makes ESI a relatively frail regulatory mechanism.[58] Employers faced with higher regulatory burdens may structure operations to avoid such costs, with employees bearing the brunt of damage through higher costs or discontinued coverage.[59] This power gives employers substantial leverage with regulators, and in turn, enforces an inherent legal bias in favor of employers and against employees and regulators.[60]

Tying health benefits to employment also has the negative effect of increasing job lock, a phenomenon where employees who otherwise would leave their current employer for a new job instead stay out of fear of losing employer-provided health benefits.[61] This concern may be especially acute for those wishing to start a business or move to a small employer, where subsidized insurance may not be available.[62] Not only could this lack of mobility have impacts on the larger economy, but evidence shows that those experiencing job lock suffer in terms of happiness, security, and productivity.[63]

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55. *Id.* at 139.
56. *Id.*
57. *Id.* at 140.
58. *Id.* at 142.
59. *Id.*
60. *Id.*
61. Gehlbach, *supra* note 17, at 408.
62. *Id.* at 408–09.
63. *Id.* at 408.

ESI may also suffer from the existence of myopic actors.[64] Despite the higher sophistication of employers to make the complex decisions required in purchasing health insurance, most employers are not particularly sophisticated on health insurance.[65] This can allow for exploitation of employer purchasers by providers absent certain protectionist regulations, with workers ultimately bearing the costs by receiving suboptimal coverage.[66]

Finally, some have argued that providing insurance through employers may perpetuate a mistaken belief that only those employed deserve healthcare coverage.[67] This also encourages the stratification of healthcare in the United States where—at least in the eyes of consumers—ESI benefits are perceived as "earned" and are thus superior to other forms of health coverage.[68]

ii. Specific Disadvantages of ESI Tax Subsidies

In addition to these general criticisms of ESI, its favorable tax treatment, in particular, has also garnered many significant critiques. The greatest criticism of ESI subsidization is the massive loss of revenue affected by excluding ESI benefits from employees' gross income.[69] This exclusion represents the government's most significant annual tax expenditure,[70] estimated at approximately $205 billion in 2018 (and expected to grow to over $391 billion by 2028).[71] And this figure does not even include other mechanisms in place in support of ESI, such as the exclusion for payroll taxes.[72]

Furthermore, the exclusion for ESI income is criticized as an inequitable tax policy in numerous respects.[73] First, because the exclusion

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64. Maher, *supra* note 16, at 140.

65. *Id.*

66. *Id.*

67. *Id.* at 143.

68. Lauren Roth, *Overvaluing Employer-Sponsored Health Insurance*, 63 U. KAN. L. REV. 633, 639–40 (2015).

69. Gehlbach, *supra* note 17, at 407.

70. A tax expenditure is defined as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." OFF. OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES 1 (Oct. 19, 2018), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf [http://web.archive.org/web/20200114125024/https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf].

71. *Id*. at 25.

72. *Id.*

73. Gehlbach, *supra* note 17, at 409–11.

applies to benefits provided by an employer, but not those purchased on insurance exchanges or by self-employed workers, the current system treats those with the same theoretical tax liability differently depending on how they receive health benefits.[74] Second, the exclusion's benefits do not depend on taxpayers' ability to pay, but rather are disproportionately received by high-income taxpayers.[75] This is due to the increased value of an exclusion for those with higher marginal tax rates and the fact that high-income workers are more likely to receive ESI benefits in the first place.[76] Equity in each of the above senses, which are lacking from the tax treatment of ESI, are generally viewed as desirable norms for policy-makers in constructing tax policy.[77]

The favorable taxation of ESI benefits is also criticized for contributing to rising healthcare costs by incentivizing the purchase of excess insurance.[78] This occurs because there is no upper limit for the amount of the exclusion, while at the same time, the actual consumers of healthcare—the employees—are shielded from the true cost of their health expenses.[79] Employees, therefore, have little incentive to curb their spending and will tend to over-use coverage, which in turn forces insurers to raise prices.[80] Such critical reviews of ESI and its favorable tax treatment make further reform a topic ripe for evaluation, even in light of the recent overhaul of the ACA.

E. Healthcare Reform Revisited: Current Proposals for Change

More than a decade removed from the ACA's dramatic overhaul of healthcare in the United States, the topic remains a prominent, if not the number one, issue of importance in the minds of American voters.[81] Accordingly, politicians from both parties are still advocating for significant healthcare reforms, though with differing opinions on how and in which ways to change the current ESI-based system.[82] Most prominently and recently, the 2020 Democratic debates for the presidential nomination featured extensive discussion over the best way forward

74. *Id.* at 409–10.
75. Drew, *supra* note 42, at 2072–73.
76. *Id.* at 2073.
77. *Id.* at 2071.
78. Gehlbach, *supra* note 17, at 412.
79. Drew, *supra* note 42, at 2069.
80. *Id.*
81. Hrynowski, *supra* note 2. Thirty-five percent of Americans rated healthcare as an "extremely important" issue ahead of the 2020 election, more than for any other issue. *Id*. This survey found healthcare to be the most important issue for both Democrats and Independents, but it fell roughly in the middle for Republicans. *Id*.
82. *See* discussion *infra* Section II.E.

regarding healthcare reform,[83] with the party divided over whether to moderately adjust provisions of the ACA—by providing a public option, for example—or to institute a single-payer system to replace private insurance altogether.[84] On the other side of the political aisle, Republicans—despite the Senate's failed effort to repeal and replace the ACA in 2017[85]—continue to fight for repeal of the ACA, albeit without a clear plan for its eventual replacement.[86]

Given the Republican failure to repeal and replace the ACA[87] and the general upward trends in public support for that law,[88] this Note will focus only on the debate between keeping and possibly expanding the ACA versus replacing the ACA with a universal, single-payer system.[89]

1. Single-Payer or Medicare-for-All

The more "progressive" plan being championed by various Democrats, among others, is a single-payer system which is commonly

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83. *See* Emmarie Huetteman, *Health Care Stayed Front and Center at Democratic Debate*, KAISER HEALTH NEWS (Oct. 26, 2019), https://khn.org/news/health-care-stayed-front-and-center-at-democratic-debate/ [http://web.archive.org/web/20200101130919/https://khn.org/news/health-care-stayed-front-and-center-at-democratic-debate/].

84. *See* Emmarie Huetteman, *Democrats Favor Building on ACA Over 'Medicare for All'*, KAISER HEALTH NEWS (Jul. 30, 2019), https://khn.org/news/democrats-favor-building-on-aca-over-medicare-for-all/ [http://web.archive.org/web/20191105024924/https://khn.org/news/democrats-favor-building-on-aca-over-medicare-for-all/].

85. Robert Pear & Thomas Kaplan, *Senate Rejects Slimmed-Down Obamacare Repeal as McCain Votes No*, N.Y. TIMES (Jul. 27, 2017), https://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html [http://web.archive.org/web/20200131020119/https://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html].

86. *See* Kristina Peterson & Stephanie Armour, *Democrats, Trump Try to Keep Spotlight on Health Care*, WALL ST. J. (Apr. 3, 2019), https://www.wsj.com/articles/democrats-trump-try-to-keep-spotlight-on-health-care-11554312667 [http://web.archive.org/web/20190810000006/https://www.wsj.com/articles/democrats-trump-try-to-keep-spotlight-on-health-care-11554312667].

87. Pear & Kaplan, *supra* note 83.

88. While a majority of Americans held an unfavorable view of the ACA for much of its history, the law has showed steady gains in support dating back to 2014. *See KFF Health Tracking Poll: The Public's Views on the ACA*, KAISER FAM. FOUND. (Jan. 30, 2020), https://www.kff.org/interactive/kff-health-tracking-poll-the-publics-views-on-the-aca/#?response=Favorable--Unfavorable [http://web.archive.org/web/20200130195313/https://www.kff.org/interactive/kff-health-tracking-poll-the-publics-views-on-the-aca/#?response=Favorable--Unfavorable&aRange=all]. The law was ultimately viewed as more favorable than unfavorable beginning in May 2017, and the gap has only widened since. *See id*. Recent polling for January 2020 shows 53% of Americans with a favorable view of the ACA and only 37% with an unfavorable view. *See id*.

89. *See infra* Sections II.E.1–2.

dubbed "Medicare-for-All."[90] Although not the first proposal for a single-payer system in the United States,[91] Medicare-for-All would effectively outlaw private insurance by replacing ESI altogether in favor of a single, government-run program covering all United States residents.[92] The proposal calls for the provision of "comprehensive" coverage, including hospital services, prescription drugs, mental health services, long-term care, and a plethora of other ancillary health-driven services.[93]

Proponents of Medicare-for-All principally argue that the healthcare system would be more effective by removing profit-motivated insurers and providing coverage under a single administrative system.[94] Alternatively, critics have called the plan unrealistic and too costly.[95] While the true cost of such a plan is not precisely known, estimates from different entities and economists range from $13.8 trillion up to $36 trillion over a ten year period.[96] Additionally, the Congressional Budget Office has acknowledged, without going into specifics on cost, that

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90. Joseph Ax, *Where Democratic Presidential Candidates Stand on 'Medicare for All'*, REUTERS (Jan. 31, 2020), https://www.reuters.com/article/us-usa-election-healthcare-factbox/where-democratic-presidential-candidates-stand-on-medicare-for-all-idUSKBN1ZU1DY [http://web.archive.org/web/20210323181542/https://www.reuters.com/article/us-usa-election-healthcare-factbox/where-democratic-presidential-candidates-stand-on-medicare-for-all-idUSKBN1ZU1DY].

91. Efforts to replace private health insurance with a universal, single-payer system date back almost a century, with Presidents Roosevelt (Franklin) and Truman both trying and failing to pass single-payer legislation through Congress. Robert Coleman, *The Independent Medicare Advisory Committee: Death Panel or Smart Governing?*, 30 J. NAT'L ASS'N L. JUD. 235, 247–50 (2010). A single-payer plan was once again before Congress in 1992, but President Clinton ultimately advanced a more moderate reform (which also did not become law) upon taking office. *Id*. at 261.

92. *See* Medicare for All Act of 2019, S. 1129, 116th Cong. §§ 101, 102 (2019).

93. *Id.* at §§ 201(a)(1)–(13).

94. *See* Emmarie Huetteman, *Democrats Debate Whether 'Medicare for All' is 'Realistic'*, KAISER HEALTH NEWS (Dec. 20, 2019), https://khn.org/news/democrats-debate-whether-medicare-for-all-is-realistic/ [http://web.archive.org/web/20200203024438/https://khn.org/news/democrats-debate-whether-medicare-for-all-is-realistic/].

95. *See id.*

96. *How Much Will Medicare for All Cost?*, COMM. FOR A RESPONSIBLE FED. BUDGET (Feb. 27, 2019), https://www.crfb.org/blogs/how-much-will-medicare-all-cost [http://web.archive.org/web/20200203201345/https://www.crfb.org/blogs/how-much-will-medicare-all-cost]. To put these numbers in perspective, President Trump's proposed budget in 2019 called for total federal spending of $4.4 trillion. OFF. OF MGMT. AND BUDGET, BUDGET OF THE U.S. GOVERNMENT—FISCAL YEAR 2019 117 (2019), https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf [http://web.archive.org/web/20200204013606/https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf].

adopting any potential single-payer plan would place a massive new administrative burden on the federal government.[97]

2. Building on the ACA

On the other hand, some believe the better path forward is to build upon our existing system through adjustments or additions to the ACA.[98] Supporters of this approach argue that more moderate expansions of the ACA—such as a public option—would adequately expand coverage and lower costs without forcing individuals off of the private health plans they may wish to keep,[99] while critics often claim these proposals do not go far enough to fix what they consider a broken system.[100] The public option proposal—which was initially debated as a possible inclusion in the original ACA—is similar in some respects to Medicare-for-All, but differs significantly by retaining private markets and giving consumers the option to switch onto a government-run plan.[101] As this Note shall discuss, however, this fight between so-called private insurance and a single-payer system is largely misguided; rather, a better approach to healthcare reform requires looking at ESI subsidization specifically and how its elimination may alleviate the concerns of those on either side of the current debate.[102]

III. ANALYSIS

While it remains to be seen what, if any, tangible healthcare reforms will come from 2020's election results, history indicates that the debate between private, employment-based insurance and a single-payer system is unlikely to lessen in the near future.[103] Yet, few participants in this debate give adequate attention to ESI's long-standing tax treatment and its

97. *See* CONG. BUDGET OFFICE, KEY DESIGN COMPONENTS AND CONSIDERATIONS FOR ESTABLISHING A SINGLE-PAYER HEALTH CARE SYSTEM 7–8 (May 2019), https://www.cbo.gov/system/files/2019-05/55150-singlepayer.pdf [http://web.archive.org/web/20200203194936/https://www.cbo.gov/system/files/2019-05/55150-singlepayer.pdf].

98. *See, e.g.*, Matthew Yglesias, *Joe Biden's Health Care Plan, Explained*, VOX (Jul. 16, 2019), https://www.vox.com/2019/7/16/20694598/joe-biden-health-care-plan-public-option [httphttps://web.archive.org/web/20210324194718202103181318 53/https://www.vox.com/2019/7/16/20694598/joe-biden-health-care-plan-public-option].

99. *See id.*

100. *Id.*

101. Selena Simmons-Duffin, *Medicare for All? A Public Option? Health Care Terms, Explained*, NPR (Jan. 14, 2020), https://www.npr.org/sections/health-shots/2020/01/14/796246568/medicare-for-all-a-public-option-health-care-terms-explained [http://web.archive.org/web/20200204022255/https://www.npr.org/sections/health-shots/2020/01/14/796246568/medicare-for-all-a-public-option-health-care-terms-explained].

102. *See infra* Part III.

103. *See supra* note 89 and accompanying text.

effect on costs and coverage.[104] Given the particular challenges surrounding reformation to a single-payer healthcare system and the recurring failures of subsidized ESI, this Note asserts that the current healthcare debate between private insurance and a single-payer system is misguided. The Note further argues that the government should repeal the favorable tax treatment of ESI within the framework of the ACA. Such action would preserve "choice" for employers and individuals wishing to stay in the private market while also addressing some of the most pressing challenges facing healthcare coverage in the United States today.

A. Challenges of Single-Payer

While proponents of single-payer or Medicare-for-All may be warranted in some of their criticisms of private insurance, such supporters nonetheless face the nearly impossible task of actually getting the legislation passed through Congress[105]—regardless of what the actual costs might turn out to be.[106] Most importantly, even though support for single-payer has increased in recent years, much of the country still opposes it.[107] In fact, even a majority of Democrats—who would be most inclined to favor more progressive proposals—currently support expanding upon the ACA in favor of Medicare-for-All.[108] This is likely

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104. Out of more than twenty initial contenders for the 2020 Democratic presidential nomination, only one had a healthcare proposal addressing repeal of ESI subsidies (not counting those who would abolish ESI completely with Medicare-for-All), and that candidate dropped out of the race before the first primary contest. *See, e.g.*, Dylan Scott, *John Delaney Has a Plan for Universal Health Care—But Don't Call it "Medicare-for-All"*, VOX (Feb. 11, 2019), https://www.vox.com/2019/2/11/18220118/2020-presidential-campaign-medicare-for-all-john-delaney [http://web.archive.org/web/20190831055230/https://www.vox.com/2019/2/11/18220118/2020-presidential-campaign-medicare-for-all-john-delaney]; *see also* Geoffrey Skelley, *John Delaney Is 2020's Latest Also-Ran*, FIVE THIRTY EIGHT (Jan. 31, 2020), https://fivethirtyeight.com/features/john-delaney-is-2020s-latest-also-ran/ [http://web.archive.org/web/20200203030203/https://fivethirtyeight.com/features/john-delaney-is-2020s-latest-also-ran/].

105. *See* Alice Miranda Ollstein, *5 Things the 2020 Democrats Aren't Telling You About Medicare for All*, POLITICO (Nov. 25, 2019), https://www.politico.com/news/agenda/2019/11/25/medicare-for-all-sanders-warren-072161 [http://web.archive.org/web/20200302162235/https://www.politico.com/news/agenda/2019/11/25/medicare-for-all-sanders-warren-072161].

106. *See supra* Section II.E.1.

107. *Public Opinion on Single-Payer, National Health Plans, and Expanding Access to Medicare Coverage*, KAISER FAM. FOUND. (Jan. 20, 2020), https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage/ [http://web.archive.org/web/20200204024654/https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage/].

108. Huetteman, *supra* note 82.

why even the prominent Democrat and House Speaker Nancy Pelosi, and many others in Congress, have refused to endorse any single-payer plan.[109]

In addition to this significant public and political opposition, industry groups also largely disapprove of single-payer health reform—or any significant government intrusion into the health care markets, for that matter.[110] Part of this opposition may stem from job loss estimates that reach as high as two million workers losing employment as a result of a single-payer overhaul,[111] since such displacement is no small concern for those potentially affected individuals and companies. Importantly, even states trying to enact much less sweeping reform efforts have been stymied by industry opposition.[112] In turn, such challenges facing even small efforts at health reform make the idea of something as revolutionary as Congress passing a single-payer system into law almost laughable.

Furthermore, the support a single-payer system does have is heavily partisan, with many Republicans opposed to such dramatic government intervention.[113] Such a divisive proposal clearly would face bitter opposition, making it difficult to foresee any single-payer plan actually passing through Congress in the near future.

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109. *See, e.g.*, Peter Sullivan, *Pelosi: 'I'm Not a Big Fan of Medicare for All,'* THE HILL (Nov. 1, 2019), https://thehill.com/policy/healthcare/468553-pelosi-im-not-a-big-fan-of-medicare-for-all [http://web.archive.org/web/20200302163557/https://thehill.com/policy/healthcare/468553-pelosi-im-not-a-big-fan-of-medicare-for-all]; *see also* Alice Miranda Ollstein & James Arkin, *Senate Battleground Dems Shun 'Medicare for All',* POLITICO (Aug. 25, 2019), https://www.politico.com/story/2019/08/25/democrats-health-care-senate-1678301 [http://web.archive.org/web/20200302164151/https://www.politico.com/story/2019/08/25/democrats-health-care-senate-1678301].

110. Ollstein, *supra* note 103.

111. *See* Elisabeth Rosenthal, *Analysis: A Health Care Overhaul Could Kill 2 Million Jobs, And That's OK*, (May 24, 2019), https://khn.org/news/analysis-a-health-care-overhaul-could-kill-2-million-jobs-and-thats-ok/ [http://web.archive.org/web/20200302193507/https://khn.org/news/analysis-a-health-care-overhaul-could-kill-2-million-jobs-and-thats-ok/].

112. *See, e.g.*, Shefali Luthra, *Insurers Sank Connecticut's 'Public Option.' Would a National Version Survive?*, NPR (Feb. 26, 2020), https://www.npr.org/sections/health-shots/2020/02/26/809256960/insurers-sank-connecticut-s-public-option-whats-that-mean-for-the-u-s [http://web.archive.org/web/20200302194318/https://www.npr.org/sections/health-shots/2020/02/26/809256960/insurers-sank-connecticut-s-public-option-whats-that-mean-for-the-u-s]. While Connecticut's public option failed to win support, Colorado very recently was successful in passing significant state-level health reforms, including a public option. *See* Markian Hawryluk, *A Health Policy Laboratory: Dems Reshape Health Care in Colorado—and Possibly the USA*, USA TODAY (Feb. 26, 2020), https://www.usatoday.com/story/news/health/2020/02/26/health-care-plans-policy-colorado-could-spread-2020-election/4867108002/ [http://web.archive.org/web/20200302195122/https://www.usatoday.com/story/news/health/2020/02/26/health-care-plans-policy-colorado-could-spread-2020-election/4867108002/].

113. *See* Thomas, *supra* note 1.

B. Failures of Subsidized ESI

Despite these challenges of a single-payer option, retaining subsidized ESI under the current status quo is also unsustainable given the many associated drawbacks already discussed.[114] Even adding a public option may not provide the desired fix, as such a program could easily fall victim to those same pitfalls that have largely kept the ACA exchanges from reaching their promised potential.[115]

Additionally, the principal advantage of ESI in general—that it facilitates group purchasing[116]—seems much less relevant with the establishment of ACA exchanges (and possibility of a public option) that give an alternate mechanism for pooling risk. Consequently, the only rationales remaining to support the current system of subsidized ESI would be that employers are better equipped to purchase complex insurance products, and that regulating health insurance markets via the employment relationship provides a convenient regulatory nexus for lawmakers.[117] Yet, even the regulatory nexus argument is now less solid, since provisions of the ACA (specifically those regarding the exchanges) already provide a significant framework for insurance regulation outside the employer context.[118]

C. A Realistic Solution—Abolishing ESI's Favorable Tax Treatment

Given these realities, lawmakers must move on from the tired arguments between private ESI and single-payer; rather, Congress should look at fixing the subsidization of ESI as a responsible and realistic solution to the current healthcare debate. Such action would provide for a transition away from ESI and its many disadvantages—but in a less sudden and divisive manner than Medicare-for-All—while also providing a source of much needed revenue for the federal government.

1. Natural Transition Away from ESI

While the current problems with healthcare and insurance in this country surely cannot be traced back to one single contributory factor, abolishing the favorable tax treatment of ESI would, at the very least, facilitate a transition away from ESI and its various disadvantages,

114. *See supra* Section II.D.2.
115. *See supra* Section II.C.2; *see generally*, Roth, *supra* note 66.
116. *See supra* Section II.D.1.
117. *Id.*
118. *See, e.g.*, 42 U.S.C. § 18031.

hopefully resulting in reducing waste and curbing healthcare costs for everyday Americans.

In fact, at least one author has argued that the ACA in its current form actually establishes a framework to allow a natural transition away from ESI, if only the ACA exchanges could be "unlocked."[119] Since ESI's favorable tax treatment ensures a generous tax break compared to other health insurance, Congress could "unlock" the ACA exchanges by eliminating ESI subsidies, thus leveling the playing field and facilitating a migration from ESI markets to the individual exchanges.[120] This would allow for more robust exchanges that could provide more affordable coverage for all, not just the employed.[121] At the same time, eliminating these subsidies and facilitating this migration away from ESI would hopefully address some of the other aforementioned issues as well, such as the excess insurance and job lock associated with ESI and its subsidization.[122]

Furthermore, the ACA itself contains major provisions that render the rationale behind ESI subsidization moot.[123] Specifically, protections for pre-existing conditions and establishment of the ACA exchanges ensure that those benefits of the large employer group market are made more widely accessible to the public.[124] With these provisions in place, repeal of ESI's favorable tax treatment has the power to increase overall affordability for consumers in United States health insurance markets.[125]

2. Budgetary Necessity

Another vital consideration is that the repeal of ESI subsidies would greatly improve the increasingly dire situation facing the federal budget today. As noted, the tax exclusion for ESI constitutes the federal government's largest tax expenditure, representing an annual $205 billion in lost revenue.[126] The federal government also is not currently in a position to continue such generous subsidization, since, even before considering the impact of COVID-related spending, the federal budget was projected to reach an astonishing $1 trillion deficit in 2020, with deficit spending projected to reach the highest levels since World War II

119. Maher, *supra* note 16, at 149.
120. *Id.*
121. *See id.* at 152.
122. *See supra* Section II.D.2.
123. Daniela De La Torre, *The Affordable Care Act: The Replacement for the Employer Sponsored Health Insurance Tax Exclusion*, 18 DUQ. BUS. L.J. 1, 5 (2016).
124. *Id*. at 11.
125. *Id*. at 12–13.
126. OFF. OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, *supra* note 68.

in the coming decade.[127] Eliminating ESI subsidies is thus a responsible, if not necessary, move, especially considering the previously-mentioned advantages of abolishing ESI's favorable tax treatment.[128] Although additional steps would ultimately be necessary to fully address the country's budget issues, reducing the current annual deficit by more than twenty percent in one fell swoop is no small measure. This additional revenue could also fund a possible public option or other measures aimed at expanding and improving coverage within the framework of the ACA.

3. Addressing Potential Challenges

One concern of making such changes is public fear that many employers will cancel their healthcare coverage and thus "dump" employees onto the government exchanges—a key focus of the media and certain scholars during passage and implementation of the ACA.[129] Yet, such fears are likely perpetuated by ESI's favorable tax treatment in the first place, as obscuring ESI's true cost results in consumers overvaluing their employer-provided healthcare coverage.[130] Removal of ESI subsidies would merely reflect, for the first time, the true cost of ESI benefits, which could be an important step for the public to overcome the attachment to ESI that at least one commentator has deemed irrational.[131]

Furthermore, while repeal of ESI subsidization would require congressional approval just like any single-payer plan, proposals to reform the tax treatment of ESI have actually come from politicians on both sides of the aisle in years past.[132] That is not to say repealing ESI subsidies would be easy by any means, but surely such efforts would be less divisive than trying to pass a bill that Senate Majority Leader, Mitch McConnell, dubbed "full socialism."[133]

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127. *See* CONGRESSIONAL BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2020 TO 2030 1 (Jan. 2020), https://www.cbo.gov/file-download/download/private/159209 [http://web.archive.org/web/20200129032527/https://www.cbo.gov/file-download/download/private/159209].

128. *See supra* Part II.

129. Roth, *supra* note 66, at 633, 639.

130. *Id*. at 639–42.

131. *Id.* at 636.

132. *See, e.g.*, THE WHITE HOUSE NAT'L ECON. COUNCIL, REFORMING HEALTH CARE FOR THE 21ST CENTURY 6–7 (Feb. 2006), https://georgewbush-whitehouse.archives.gov/stateoftheunion/2006/healthcare/healthcare_booklet.pdf [http://web.archive.org/web/20170504030803/https://georgewbush-whitehouse.archives.gov/stateoftheunion/2006/healthcare/healthcare_booklet.pdf]; *See also* Scott, *supra* note 102.

133. This was a reference then-Senate Majority Leader Mitch McConnell made to Medicare-for-All and similar Democratic proposals. Jordan Carney, *McConnell Dismisses Medicare for All: Not While GOP Controls Senate*, THE HILL (Apr. 10, 2019),

IV. CONCLUSION

Considering the more than century-long history of robust healthcare debate in the United States, arguments between "private" insurance and a single-payer system will likely persist well into the future—even if such debate does come in cycles. However, lawmakers would be wise to set these longstanding arguments aside and look to ESI tax reform as the best starting point for effective and attainable changes to healthcare in America. Not only is such action potentially necessary, given the increasingly dire state of the federal budget and the country's growing deficits, but eliminating the tax preference for ESI is also the most sensible approach to control costs and address the plethora of issues that have plagued subsidized ESI. Furthermore, reform of ESI subsidization does not appear as politically fraught as other options, such as single-payer insurance. Congress should therefore take this current opportunity of public interest in further healthcare reform to repeal the twisted system of subsidized ESI. The academic consensus has long been settled on this issue; now it is time for lawmakers to finally act.

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